

SOUTH AFRICA / JUDGMENT

Singh v Minister of Justice and Constitutional Development and Another (5072/05) [2006] ZAKZHC 20 (5 May 2006) [2006] ZAKZHC 20

COURT

High Courts - Kwazulu Natal

BEFORE

Hollis

CASE / FILE NUMBER

5072/05

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

NATAL

PROVINCIAL DIVISION

CASE

NO: 5072/05

In the

matter between :

ASHIN

ASHOK KUMAR SINGH Applicant

and

THE

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT FOR THE
REPUBLIC

OF SOUTH AFRICA First Respondent

THE

NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS Second

Respondent

JUDGMENT

HOLLIS A.J.

When the application was launched on 18 August 2005 the applicant sought an order, inter alia, in the following terms :

" 1.. That second respondent is ordered :

1.1. forthwith to consider the statements and documents contained in Pietermaritzburg Police Docket CAS 779/11/2003 and to make a decision

in regard thereto as to whether any persons will be prosecuted in respect of the allegations contained therein, and if" so, whom, and on what charges and in what Court such persons will be arraigned;

Immediately thereafter to inform Applicant's attorneys of what second respondent's decision is; and

in the event of second respondent's decision being to decline to prosecute any persons in respect of the allegations contained in the said police docket, forthwith to issue to applicant a certificate nolle prosequi in terms of Section 7(1) of the Criminal Procedure Act, 51 of 1977."

On 17 October 2005 the respondents' attorneys advised the applicant's attorneys that they had received a letter from one J S M Henning SC who had signed it in his capacity as Deputy National Director of Public Prosecutions Head: National Prosecuting Service which was in the following terms :

"In my capacity as the Head of the National Prosecuting Service, I perused all the statements, exhibits and related documents contained in South African Police Service docket, Pietermaritzburg (sic) CAS 779/11/2003. In the light thereof, I have decided not to prosecute B T Ngcuka, P Sonn, W J Downer, R C MacAdam and C R C Marion on any of the charges alleged in the said police docket.

The issue of granting a nolle prosequi certificate is under consideration."

In consequence of the foregoing the applicant no longer seeks the relief set out in paragraphs 1.1 and 1.2 of the prayer and limits the relief to paragraph 1.3 thereof.

The applicant contends that upon a proper construction of Section 7(1) of the Criminal Procedure Act, 51 of 1977 (hereinafter referred to as "the Act") he is entitled as a result of the second respondent's decision not to prosecute any of the said persons to receive from the second respondent a certificate nolle prosequi. He requires this certificate to institute a private prosecution in terms of the said Section 7.

The applicant is an additional Magistrate for the District of Pietermaritzburg. He was the complainant in respect of various criminal charges that he laid in November 2003 and which were the subject of the police investigation in Police Docket Pietermaritzburg CAS 779/11/03. During 1999 he was seconded by the then Minister of Justice to the Investigating Directorate for Organised Crime and Public Safety in KwaZulu-Natal referred to as IDOC in the founding affidavit. This unit later formed a part of the Directorate of Special Operations which is now commonly known as the Scorpions. IDOC was requested to assist in the Richmond area where there had been a considerable amount of violence and unrest due to friction between various political factions. The unit of which the applicant was a member was headed by one Chris. MacAdam. The applicant was later expelled from the unit allegedly on the orders of the National Director of Public Prosecutions, one Buleiani Ncguka on the ground that he had involved himself in a case that was not his concern. He was also expelled from IDOC. He was arrested and later charged with 12 counts including 4 counts of defeating or obstructing the course of justice, 3 counts of unauthorised disclosure of information, one count of making a false statement under oath and the remaining counts related to alleged contraventions of certain sections of the Protection of Information Act, No.84 of 1982 and of the Interception and Monitoring Prohibition Act, No, 127 of 1992. The prosecution proceeded but failed when the trial court granted a permanent stay of the proceedings as the evidence against the applicant had been obtained illegally. Thereafter the applicant returned to his former position as a Magistrate in the Pietermaritzburg Court. The applicant has instituted a civil action claiming damages but felt sufficiently aggrieved at the treatment that he had received that he wants a criminal prosecution of those persons who knowingly instigated and/or persisted with his prosecution. The applicant contends that the true state of affairs was known at the time by, inter alia, "Ncguka, MacAdam, "Billy" Downer (the prosecutor), Clifford Marion, a member of the unit, and also by the then head of the Scorpions, Percy Sonn". The applicant laid criminal charges against these persons. The applicant claimed in his founding affidavit that there has been a considerable delay by the second respondent in deciding whether or not to prosecute having regard to the fact that the criminal charges were laid during November 2003.

The respondents oppose the application on the basis of questions of law and aver that the applicant's founding affidavit read with the annexures thereto, lack the necessary averments to bring it within the ambit of Section 7(1)(a) of the Criminal Procedure Act, No.51 of 1977 in that he has failed to prove that :

that he has an interest in the issue of the trial;

that the interest is substantial and peculiar to him;

that the interest arises from some injury which he individually suffered;

that the injury was suffered as a consequence of the commission of the alleged offence.

Mr Blomkamp who appeared on behalf of the applicant submitted that upon a proper construction of Section 7 of the Criminal Procedure Act the second respondent was obliged to issue to the applicant a certificate nolle prosequi once there had been a decision that the second respondent had declined to prosecute. In the alternative he submitted that even if it was held that the applicant had to prove the requirements set out in Section 7(1)(a) of the Act, these requirements had been met.

I quote the relevant parts of Section 7 of the Act :

"7. Private prosecution on certificate nolle prosequi -(1) In any case in which an attorney-general declines to prosecute for an alleged offence -

- (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;

may, subject to the provisions of Section 9, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

(2)(a) No private prosecutor under this section shall obtain the process of any Court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorised by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.

- (b) The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).

(c)

(d) "

The provisions of Section 9 are not relevant for present purposes and deal with the question of security by a private prosecutor.

Mr Blomkamp submitted that the provisions of Section 7(2)(b) are pre-emptory and highlighted the use of the words "shall"

and "any" in the subsection. He referred also to the provisions of Section 7(2)(a) of the Act where no qualification has been placed upon the meaning of "private prosecutor". He contended that if the legislature had intended that a private

prosecutor had to prove some substantial and peculiar interest in the issue of the trial then the wording which relates to a private

prosecutor would have been amplified to include reference to Section 7(1)(a) of the Act. Secondly, if the meaning of a private prosecutor had to be so qualified, then there would be no need for Section 106(l)(h) of the Criminal Procedure Act which provides that when an accused pleads to a charge, he may plead that the prosecutor has no title to prosecute.

Mr Wall is who appeared on behalf of the respondents, on the other hand, contended that upon a proper interpretation of Section 7 of the Act a would-be private prosecutor had to meet the requirements of Section 7(1)(a) of the Act and that Section 7(2)(b) should not be read in isolation but in the context of the section as a whole. I agree with Mr Wallis.

Section 7(1)(a)-(d) defines those persons who are entitled to institute a prosecution. Section 7(2)(a) refers to such a person as a "private prosecutor under this section". This is clearly a reference to the category of persons defined in Section 7(1)(a)-(d). Section 7(2)(b) refers to such a person as "the person intending to prosecute". This must be a reference to a private prosecutor referred to in Section 7(2)(a) of the Act. There was no need to amplify the wording relating to private prosecutor in Section 7(2) as the meaning thereof is clear by the use of the words "under this section" in Section 7(2)(a).

The unrestricted meaning contended for by Mr. Blomkamp is also inconsistent, with the recognition that private prosecutions are unusual and a departure from the basic law that criminal prosecutions must be conducted by a public prosecutor. (*Fourie v Resident Magistrate of Worcester* (1897) 14 SC 54 at 57).

Mr Wallis submitted that although there has been statutory provision for private prosecutions in place for over 100 years, this has always been subject to limitation. Such primary limitation is the requirement that the private prosecutor has "some substantial

and peculiar interest" in the issue of the criminal trial and made reference to *Attorney-General v Van der Merwe and Bornmann* 1946 OPD 197 at 201 where the following was said :

"The object of (this) phrase was clearly to prevent private persons from arrogating to themselves the function of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public; to curb, in other words, the activities of those who would otherwise constitute themselves public busy bodies".

The provisions of Section 106(1)(h) of the Act do not in my view help Mr Blomkamp's contention as Section 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."

By reason of the foregoing I find against Mr Blomkamp's main contention that the second respondent was obliged to issue to the applicant a certificate *nolle prosequi* once there had been a decision that the second respondent had declined to prosecute. I turn now to consider his alternative submission that even if I came to that conclusion, I should nevertheless order the second respondent to issue such a certificate as the allegations contained in the applicant's founding affidavit proved that, there has been compliance with the requirements set out in Section 7(l)(a) of the

Act. It is accordingly necessary to analyse the allegations made in the founding affidavit.

The application was launched about two months prior to the second respondent deciding that he had declined to prosecute the individuals

against whom the applicant had laid criminal charges. The thrust of the application was directed towards directing the respondent to make a decision in regard to whether or not the said individuals were to be prosecuted. Paragraph 1.3 of the relief, however, does make provision for an order that the second respondent should issue the applicant with a certificate *nolle prosequi* in the event of the second respondent declining to prosecute the said individuals. The only reference in the founding affidavit to a possible private prosecution is contained in paragraph 21 thereof which reads as follows :

"I respectfully submit that for the present relief which I claim in this application, which is a mandamus, it is not necessary for me to establish either on the criminal standard or even on the civil standard of proof in these papers that Ngcuka, MacAdam, Downer, Marion and/or Sonn have actually committed the criminal offences I have accused them of. The proper forum in which to do that will be a criminal court and the proper occasion will be when those persons are arraigned on appropriate charges based on my allegations (either in the normal course by the prosecuting authority itself, or, should the prosecuting authority decline to prosecute, as a result of a private

prosecution instituted by me in terms of Section 7 of the Criminal Procedure Act, 51 of 1977 once I have obtained the necessary certificate nolle prosequi). For present purposes, I respectfully submit, all that I need to show is that I have laid a complaint which has been investigated by the police, and that Second Respondent fails to perform his statutory duty of making a decision as to whether or not a prosecution will follow at the instance of the State based on my complaint and the evidential material which emerged during the said police investigation."

There is no express mention made by the applicant that he is a private person who falls within the ambit of Section 7(1)(a) of the Act and brings the application on this basis. It seems that this was intentionally done as it was always the applicant's main contention

that it was not necessary for these requirements to be complied with as he had an absolute right to the issue of a certificate nolle prosequi once the second respondent had declined to prosecute. Mr Blomkamp, however, submitted that the allegations contained in a sworn statement by the applicant and put up as an annexure "C" to the founding affidavit overcame this difficulty.

The applicant's sworn statement is not a complete document as none of the annexures referred to therein have been attached to such statement. In these circumstances it is quite impossible to assess the veracity of the allegations contained therein. An example of this omission is contained in part of paragraph 7 of the sworn statement which reads as follows :

"7. In the course of the proceedings against me, I made an affidavit in a bail application dated 23/02/2000. This sets out the information given to me. (This affidavit also gave rise to further charges against me.) The affidavits attached hereto as annexure "A2".

No annexure "A2" was attached. For a proper assessment of evidence it is necessary to place the entire document before a Court. It seems that the purpose of putting up annexure "C" was to prove that the applicant had made a complaint to the police and not to prove that the requirements of Section 7(1)(a) of the Act had been complied with.

In my view it was necessary for the applicant to deal pertinently with the requirements of Section 7(I)(a) in respect of each offence in respect of which he wished to institute a private prosecution. Leaving open the question of whether or not the individuals concerned should have been joined in these proceedings as having an interest in the outcome of the matter, I consider that the applicant's allegations fall far short in this regard. To support his submission that it was necessary for a party to make out his case clearly in his founding affidavit, Mr Wall is relied upon the judgment of Nienaber JA in *Cooper & Others NNO v Syfrets Trust Ltd* [2000] ZASCA 128; 2001 (1) SA 122 (SCA) at 133C-E where the following was stated :

"A party whose case had unravelled before a trial court cannot stitch together a new one on appeal if it is not properly covered by the pleadings or was not properly covered in evidence. He cannot in fairness be allowed to advance a case different from the one he presented on paper - be it in the affidavits on motion (cf *Administrator, Transvaal & Others v Theletsane & Others*

[1990] ZASCA 156; 1991

- (2) SA 192 (A) at 195J-197D; Naude & Another v Fraser [1998] ZASCA 56; 1998 (4) SA 539 (SCA) at 563H-564A) or in the pleadings on trial (Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 107TH). On that ground too the plaintiff must in my opinion fail."

I find that these remarks of Nienabar JA are apposite to this matter. It was necessary for the applicant to produce evidence of the offences which the said individuals allegedly committed. Thereafter it was necessary for the applicant to provide a factual basis proving :

he had some substantial and peculiar interest in the issue of the trial;

such interest arises out of some injury which he individually suffered;

the injury was suffered in consequence of the commission of the alleged offence.

I find that the applicant has failed in the founding papers to discharge the onus of proving that he is a private person falling within the ambit of Section 7(l)(a) of the Act.

Having come to this conclusion the application must fail and it is dismissed with costs.

Applicant's Counsel: Mr. P Blomkamp

Instructed by: Sangham Incorporated

Respondents' Counsel: Mr M J D Wallis S.C.

Instructed by: Mason Incorporated

Date of Hearing: 5 May 2006.

Date of

Judgment:

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAKZHC/2006/20.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/singh-v-minister-of-justice-and-constitutional-development-and-others-unknown-topic-akzhc-2006--6a3ea5133b1caa912980b42a>

Prepared on 14 October 2026 · Esheria