IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

24/6/2016

Case Number: 19577/09

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. yes

24 June 2016
DATE

SIGNATURE

In the matter between:

THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTION	**1ST APPLICANT**
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	**2ND APPLICANT**
JACOB GEDLEYIHLEKISA ZUMA	**3RD APPLICANT**
AND	
DEMOCRATIC ALLIANCE	**RESPONDENT**

IN RE:

DEMOCRATIC ALLIANCE	**APPLICANT**
AND	
THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTION	**1ST RESPONDENT**
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	**2ND RESPONDENT**
JACOB GEDLEYIHLEKISA ZUMA	**3RD RESPONDENT**
SOCIETY FOR THE PROTECTION OF OUR CONSTITUTION	**AMICUS CURIAE**

JUDGMENT:
APPLICATION FOR LEAVE TO APPEAL

THE COURT

1.

INTRODUCTION

On 29 April 2016 the Court delivered a judgment in a review application ("the main judgment") launched by the Democratic Alliance ("the DA"), against the Acting National Director of Public Prosecutions ("ANDPP"), the Director of Special Operations ("the DSO") and Mr Jacob Gedleyihlekisa Zuma ("Mr Zuma"), the current President of the Republic of South Africa.

2.

The DA in that application sought to have reviewed and set aside the decision by Adv Mpshe SC, the then ANDPP, to discontinue the prosecution of the charges against Mr Zuma. The Court in the main judgment ordered that the decision of the first respondent dated 1 April 2009 to discontinue the prosecution of the case against the third respondent, in accordance with the indictment served on him on 28 December 2007, is reviewed and set aside.

3.

The ANDPP and the DSO, the first and second applicants on the one side, and Mr Zuma, the third applicant on the other side, lodged separate applications for leave to appeal the main judgment. The applicants further seek leave to appeal against the findings of facts and/or rulings and/or interpretation of law relating to rationality. The DA, the respondent, is opposing both applications for leave to appeal.

4.

The ANDPP and DSO based their applications on six grounds. Some of the grounds raised in their application and the grounds raised in Mr Zuma's application overlap. Mr Zuma, in addition, contends that there are *"some other compelling reasons why the appeal should be heard"*.

5.

THE SUPERIOR COURTS ACT

1. Section 17(1) of the Superior Courts Act 10 of 2013, provides as follows:

> *"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
>
> *(a) (i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
>
> *(b) ..."*

2. We shall not deal with the grounds of appeal raised by the applicants ***ad seriatum*** and we shall briefly deal with the said grounds as set out hereunder.

REFERRAL OF THE ABUSE OF PROCESS

It was submitted and argued by the applicants' counsel that the Court erred in finding that Adv. Mpshe acted irrationally by not referring the complaint or abuse of process and the related allegations against Mr McCarthy to Court, thus rendering his decision irrational. The ANDPP and DSO in the application further stated that the effect of the finding of the Court is that Adv. Mpshe acted ***ultra vires*** his powers.

7.

The ANDPP and DSO submitted that the National Director of Public Prosection (NDPP) has a duty to protect the institutional integrity of the institution and it is the NDPP who is **best positioned** to weigh the seriousness of abuse within his own hierarchy.

8.

We record that the background facts in this case are common cause. The applicants in their applications and during argument did not challenge the Court's presentation of the background facts. It is important to clarify that the respondent (the DA) in the main application, did not seek an order that the determination of the principle of abuse of process was an exercise for a court of law and not that of the NPA. Furthermore the court did not make such a finding or such an order that in all instances the determination of the principle of abuse of process should be determined by a Court of law.

9.

The applicants are notably silent about what the court said in paragraphs 70 and 71 of the main judgment. They were selective as they focused on certain portions in the judgment thus totally disregarding the essence and the order thereof.

10.

When the main judgment is read as a whole, it is clear that on the circumstances and/or facts of this case, the Court is the appropriate forum to deal with the abuse of process doctrine. It is therefore not correct for the applicants to select certain portions of the judgment and deduce a wrong conclusion about the judgment. The Court did not find that Adv. Mpshe acted ***ultra vires*** his powers as submitted by the applicants.

11.

TAINTING OF THE PROSECUTION

The ANDPP and the DSO submitted in paragraph 2.1 of their heads of argument that the finding of the Court that the envisaged prosecution was not tainted is wrong. They further submitted that the Court should have found that the prosecutorial process was tainted and it was not irrational for Adv. Mpshe to discontinue the prosecution under the circumstances.

12.

It is clear in the main judgment that on the facts of this case, a Court was an appropriate forum to deal with the issue of whether the prosecution was tainted or not. It is interesting to note that the applicants impliedly state that it is the Court that should make such a finding whilst at the same time, they also argue that it is the NDPP only who can make such a finding.

13.

The main judgment clearly explains why the Court is better placed to deal with the issue when a proper application is before it and all the interested parties shall have put forward their versions. It is further explained in the judgment that Adv. Mpshe irrationally and hastily made a decision not having all the information before him and not waiting for the requested information.

14.

BALANCING OF TWO IMPERATIVES

14.1 The Court in its judgment under the heading "***RATIONALITY OF THE DECISION AND ABUSE OF PROCESS DOCTRINE"*** clearly dealt with the issues raised in the third, fourth and fifth grounds in the applicants' application. It is not necessary to regurgitate what is said in the judgment it been clear on these aspects.

14.2 It is not correct, as submitted by the ANDPP and the DSO that the Court in paragraph 88 of the judgment found that once Adv. Mpshe had said that the alleged conduct of Mr McCarthy had not affected the merits of the charges against Mr Zuma, ***cadit quaestio***. The Court in the said paragraph stated that there was no rational connection between the need to protect the integrity of the NPA and the decision to discontinue the prosecution against Mr Zuma.

15.

The Court clearly understood the argument of the applicants, the ANDPP and the DSO, when the main application was heard. In paragraph 52 of the judgment it is stated that the conduct of Mr McCarthy, **if proven**, constitutes a serious breach of the law and prosecutorial policy. Importantly, Adv. Mpshe, made a decision without having the version of Mr McCarthy, see paragraphs 53 and 54 of the judgment. The Court further dealt with the contradictions regarding the timing of the service of the indictment as set out in paragraph 73 of the judgment.

16.

The opinion of Mr Hofmeyer is just that and not a fact as the applicants seek to elevate it as such. The test mentioned in the ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 634-635*** was properly

considered and applied with in the main judgment. Mr Hofmeyer's statement that Mr McCarthy and Ngcuka had actively abused the NPA to discredit Mr Zuma and that the motive was political cannot be regarded as a fact and binding.

17.

OTHER COMPELLING REASONS

The other ground to support the application raised by Mr Zuma is that the formal withdrawal of the charges on 8 APRIL 2007 before the Kwa-Zulu Natal High Court was a vital factor and that the Court in its judgment should not have stated that Mr Zuma should face the charges. In our view, the withdrawal of the charges against Mr Zuma was not an acquittal. Such withdrawal does not nullify the decision to prosecute should Adv. Mpshe's decision be set aside. The said withdrawal cannot be regarded as a factor to stop Mr Zuma to face the charges. The Court had no obligation to make an order that the matter should be referred back to the NDPP for reconsideration as submitted by the applicants. **In NDPP v Freedom Under Law ("FUL") 2014 (4) SA 298 (SCA), p 316, par [51] Brand, JA** said the following:

> *"....The setting-aside of the withdrawal of criminal charges and the disciplinary proceedings has the effect that the charges and the proceedings are automatically reinstated, and it is for the executive authorities to deal with them..."*

18.

The ground raised by the applicants that the Court has breached the separation of powers is without merit. The Supreme Court of Appeal (SCA) in the **FUL** case has clearly and correctly pronounced that Courts should refrain from handing down orders directing the prosecution as to the execution of their functions. Such measures would encroach on the terrain of the executive branch of the State. This Court has cited the SCA's decision in its main judgment and has throughout been mindful of what has been decided by the SCA. Mr Zuma's counsel further contends that the Court should have considered referring the matter back to the prosecution. That would have resulted in the breach of the separation of powers doctrine. There was thus no need to make any order regarding what the NDPP should do.

19.

In our view the issues of law concerning the grounds of review and the separation of powers doctrine have been considered and settled by the SCA in their judgments, which are referred to in the main judgment. There is thus no legal issue arising out of the main judgment which requires consideration by the SCA.

20.

The applicants further criticised the main judgment by submitting that the

Court did not consider the affidavit of Mr McCarthy to the High Court that the prosecution process was of the highest integrity whilst he, Mr McCarthy, had been engaged in an illegal investigation in the conduct of Mr Zuma at the time. The submission disregards the fact that when Adv Mpshe made the decision to discontinue the prosecution did not mention it. The submission was made when the main application was argued and we did consider it.

21.

The Court in adjudicating the matter, did take into consideration what the SCA found in **Pharmaceutical Manufacturer Ass of South Africa & Another: In Re. Ex Parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) at 709 E – H**. The Court clearly stated in the main judgment that Adv. Mpshe's decision to terminate the process due to the alleged abuse or manipulation of the prosecution process was irrational.

22.

It was submitted on behalf of Mr Zuma in the heads of argument in par 7.5 that the decision to charge Mr Shaik only, should be regarded as irrational. We fail to understand the relevance of this submission because Mr Shaik's conviction was confirmed by the highest Court. Furthermore Mr Shaik's issue was not mentioned by Adv. Mpshe when he took his decision and same

cannot therefor be a reason for his decision not to prosecute. There is no merit on this ground.

23.

Mr Zuma in par 7.6 of his heads of argument submitted as follows:

> *"On the evidence, Mr Msphe did not act overcome (sic) emotional nor was he pressured."*

Crucially the third respondent further alleged that emotional people often take impeccable decisions. Mr Hofmeyr clearly stated in his affidavit that Adv. Mpshe was angry at the time when he took the decision to discontinue the prosecution.

24.

We are of the view that the applicants have also raised irrelevant and non-meritorious factors to try and support their contention and arguments that there are other factors that should be considered.

25.

CONCLUSION

The Superior Courts Act has raised the bar for granting leave to appeal in **The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others**, Bertelsmann J held as follow:

> *"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see* ***Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H****. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."*

26.

The applicants are not challenging the orders granted by the Court but they extracted and misinterpreted the following under mentioned sentences in the main judgment to formulate the grounds of appeal.

(i) *"the Court of law is the appropriate forum to deal with the abuse of process doctrine, not extra-judicial process"* and

(ii) *"Mr Zuma should face the charges as outlined in the indictment".*

27.

In reading the judgment holistically it is clear that the Court never created a principle that the NDPP has no power to discontinue the prosecution. Furthermore the court did not interfere with the separation of powers principle and did not order or direct that the NDPP must continue with the prosecution. The attack by the applicants based on the above sentences is ill founded. The said sentences should be read in the context within which they were made in the judgment and not read in isolation to create a different context.

28.

The authorities relied upon by Adv. Mpshe do not support an extra judicial termination of the prosecution. Adv. Mpshe relied on English case law and Hong Kong case law which did not support his decision not to prosecute. Importantly the said authorities, the circumstances of the case, and the advice that the NPA received from their senior counsel supported that the abuse of process should be dealt with by the Court. Adv. Mpshe's decision was carefully considered by this Court. The alleged conduct of Mr McCarthy was not brushed off by the Court hence it is stated in the main judgment that should the allegations be proved that the conduct of Mr McCarthy stands to be censured.

29.

When the Court deals with an application for leave to appeal, leave may only be given if we are of the opinion that the appeal would have reasonable prospects of success or if there are some other compelling reasons. In our view there are no novel legal issues raised in the matter. The applicants invented novel legal grounds by misinterpreting sections of the judgment or some selective sentences of the judgment. The fact that the public has an interest in the matter is not a justification to grant leave to appeal. The matter is of course important for Mr Zuma. However, if the appeal does not have reasonable prospects of success leave to appeal should not be granted.

30.

There will in most instances, be different interpretations, however, we have carefully considered the authorities referred to and we are of the view that the Court interpreted and applied the authorities correctly.

31.

We seriously considered whether the appeal would have reasonable prospects of success and we came to the conclusion that there are no merits in the arguments raised by the applicants. We have carefully reconsidered

our judgment and conclude that the appeal does not have reasonable prospects of success.

32.

We therefore make the following order:

32.1 The applications for leave to appeal by the first, second and third applicants are dismissed.

32.2 The first, second and third applicants are jointly and severally ordered to pay the costs of the respondent, including costs of two counsel.

JUDGE A P LEDWABA
DEPUTY JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

JUDGE C PRETORIUS
JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

JUDGE S P MOTHLE
JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA