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IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG **CASE NO**: 35697/08

DATE: 18/08/2009

(1) NOT REPORTABLE.
(2) NOT OF INTEREST TO OTHER JUDGES.
(3) REVISED.

FHD VAN OOSTEN
SIGNATURE
27 August 2009

In the matter between

ROOSHDEEN RUDOLPH **FIRST APPLICANT**

SHAHEED RUDOLPH **SECOND APPLICANT**

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **FIRST RESPONDENT**

DIRECTOR OF PUBLIC PROSECUTIONS **SECOND RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This is an application in which the applicants seek the review and setting aside of two decisions taken by the Director of Public Prosecutions (the second respondent in this

application) to institute criminal proceedings against the applicants.

[2] The application is premised in the main on the provisions of s 179(5)(d) of the Constitution and secondary on a lack of compliance by the DPP of certain of the directions contained in the Policy Manual of The National Prosecuting Authority of South Africa. A further challenge to the decisions of the DPP premised on alleged unfair administrative action pursuant to s 33 of the Constitution, although raised in the papers, was abandoned at the commencement of the hearing before me.

[3] The background facts to this matter insofar as they are relevant for purposes of this judgment, are briefly stated these. The arrests and prosecution of the applicants stemmed from a criminal investigation into what has become known as the Johannesburg International Airport robbery, which occurred in March 2006. Altogether 20 suspects were arrested. Two of the suspects were the applicants who were joined as accused 11 and 12 respectively in the criminal trial. The first applicant was arrested after handing himself over at the South African Police Services in Bellville, on 29 April 2006. The second applicant was arrested on 26 April 2006 at Club Mykonos, in the Western Cape Province. Subsequent to their arrest both applicants appeared in the Kempton Park Magistrate's Court where they were granted bail after having spent 90 days in prison. On 27 July 2006 the DPP withdrew the charges (one of robbery with aggravating circumstances and two charges in contravention of

Section 60 of Act 60 of 2000) against the applicants and decided to proceed against 15 remaining accused in this court on the said charges.

[4] The reason for the withdrawal of the charges against the applicants was stated as the only evidence incriminating them available was contained in confessions of their co-accused which would have been inadmissible in evidence against them. During August 2008 the applicants were re-arrested and incarcerated for 21 days before they were released on bail. Altogether 16 “provisional charges” were proffered against them of which five relate to the Johannesburg International Airport robbery.

[5] Against this background the applicants seek the following relief:

1. That it is declared that the decisions taken by the Director of Public Prosecutions during or about April 2006 to prosecute the applicants were invalid and set aside.
2. That it is declared that the decisions taken by the Director of Public Prosecutions during or about 2008 to prosecute the applicants afresh on apparently similar charges which were implemented by their re-arrest, re-incarceration and prosecution on the charges as set out in the annexure to the charge sheet, a copy whereof is annexed to the first applicant’s founding affidavit as annexure “A” is invalid and set aside.
3. That the charge sheet is invalid and is set aside.
4. That the respondents are ordered to pay the cost of this application on an attorney and client scale.

[6] A full set of affidavits has been filed in this application. The respondents have annexed to the answering affidavit all the available affidavits of potential witnesses in the prosecution against the

applicants. This prompted the applicants to apply for the striking out of the evidence concerning the merits of the criminal proceedings against them. The application for striking out was heard separately at the commencement of the hearing before me. Counsel for the second applicant however did not persist with the application. Having heard argument on behalf of the first applicant and the respondent I dismissed the application for striking out and ordered the first applicant to pay the costs of that application (for the sake of clarity the orders are repeated below). These are my reasons:

[7] The application for striking out was premised on the contention that the evidence on the merits of the criminal matter was irrelevant to the disputes raised by the applicants in this application. Counsel for the first applicant submitted that the applicants had restricted the issues in the founding papers and that the respondents therefore were not entitled to venture beyond those issues. The argument is simply untenable. The merits of the criminal matter in the face of a constitutional challenge, for obvious reasons, are not only relevant to the issues in this matter, but also useful in understanding the background facts to this matter. I am in any event not persuaded that the applicants suffered any prejudice whatsoever resulting from the evidence forming part of the papers before me, nor has anything been put before me to justify any inference of prejudice (see *Beinach v Wixley* 1997 (3) SA 721 (SCA) 732-734).

[8] I turn now to the constitutional challenge premised on Section 179(5)(d) of the Constitution. The section in summary provides

that the NDPP may "review" a decision to prosecute or not to prosecute after consulting the relevant DPP and after taking representations from the accused, the complainant and any other relevant person. The applicants' complaint is that they were not afforded the opportunity to make representations prior to the second decision was taken in August 2008 to re-prosecute them. This application was launched in October 2008 and therefore before the Supreme Court of Appeal pronounced on a similar constitutional challenge in *National Director v Public Prosecution v Zuma* 2009 (1) SACR 361 (SCA). In the light of this judgment the applicants' constitutional challenge is short-lived. It is common cause that the National Director of Public Prosecutions was not involved at all in either of the decisions to prosecute the applicants. It therefore was not the NDPP "reviewing a decision to prosecute or not to prosecute" as contemplated in Section 179 (5) (d) of the Constitution.

In *Zuma* Harms DP touched on this aspect and held as follows:

> [64] …Section 179(2) is the empowering provision. It empowers the NPA to institute criminal proceedings, and to carry out 'any necessary functions incidental to instituting criminal proceedings'. The power to make prosecutorial decisions and to review them flows from.[59] If it were necessary specially to empower any member of the NPA to make such decisions and to revisit them, one would have expected the Constitution to have said so. It would be incongruous to require a special provision to empower the head of the NPA to review matters but to assume that other members of the NPA of a lower rank have the power of review by implication. One would have expected that at the lower level there is greater need for these requirements but, significantly, the drafters of the Constitution, conscious of the existing practice, and for good reason, did not think it necessary to include such safeguards.

Footnote 59 reads as follows:

> [59] It will be recalled that prosecutorial decisions and their internal reconsideration were, except in the limited sense set out earlier, not subject to procedural limitations or judicial overview. Mr Kemp accepts that the review of prosecutorial decisions by prosecutors and DPPs is not subject to any consultation or representation requirement.

[9] Assuming at best for the applicants that the first decision was re-considered, such reconsideration was clearly not subject to the provisions of s 179(5)(d) of the Constitution, and the applicants therefore were not entitled to be afforded an opportunity to make representations. The constitutional challenge therefore must fail.

[10] Next, the applicants' secondary challenge premised on an alleged "flagrant" disregard by the DPP of its Policy Manual. The allegations in support of this challenge are terse, vague and lack any substance. All that the applicants have stated in their founding papers, is the following:

> 29. We contend that the decision taken during August 2008 was deliberate as it occurred in defiance of the NDPP and DPP's own Policy Manual in regard to decisions to reinstitute prosecutions afresh on substantially similar charges.
> 30. We contend that the NDPP and DPP's Policy Manual makes ample provision for the careful or circumspect decision to arraign accused persons afresh before a court either by means of a summons or notice to appear in court.
> 31. We contend that our re-arrest and re-incarceration occurred in flagrant disregard of the respondents' own policy.

It is significantly only in the heads of argument filed by counsel for the first applicant that particulars of the alleged "flagrant disregard" are furnished. As correctly submitted by counsel for the respondents the applicants have failed to make out any case on this challenge in their founding papers.

[11] Counsel for the first applicant sought to seek some redress in the fact that the applicants were not in possession of the policy document at

the time the application was launched. There is no merit in the argument. The document is in the public domain and it was for the applicants, had they wished to do so, to make out a case on this challenge which they have clearly failed to do.

[12] But it does not end there. Having considered the arguments raised by counsel for the first applicant I am not persuaded that there is any merit in the challenge. The Policy Manual, it must be remembered, albeit binding, contains *directives* to the prosecutorial staff. A mere non-compliance by the DPP with any of its directives or provisions will not result in an irregularity of such a nature as would justify a review of the subsequent prosecution. The applicants must go further and *inter alia* show that their rights were infringed by the non-compliance and more importantly that they suffered prejudice as a result. Nothing of this nature has either been alleged or proved in the papers before me. Counsel for the first applicant readily and in my view correctly conceded that no prejudice of any kind has been shown to exist. It follows that this challenge must suffer the same fate than the main constitutional challenge.

[13] Counsel for the second applicant, somewhat surprisingly disavowed any reliance on the two challenges. He sought to direct the second applicants' objection to his re-arrest which counsel submitted was unlawful. The re-arrest counsel argued was unlawful as there were other softer non-custodial options, such as a summons to appear in court or a warning of that nature, available to bring the applicants before

court. The objection is ill-conceived and much of an afterthought. The application is certainly not premised on an unlawful arrest, but even if it had been, no case for unlawful arrest has been made out.

[14] Finally, something needs to be said concerning the evidence on the merits that has been disclosed by the respondents. Counsel for the first applicant submitted that the affidavits lack *prima facie* evidence to justify the re-institution of criminal proceedings against the applicants. The argument is flawed in its premise. This is neither the opportune moment nor the appropriate forum to raise this aspect and this moreover in any event is not the basis upon which this application was launched.

[15] In my view the application was misconceived right from the outset. The basis for seeking an invalidation of the first decision to prosecute the applicants (prayer 1 of the Notice of Motion) has neither been alleged, nor been touched upon in argument before me. The first decision in any event in view of the withdrawal I have referred to, if anything, is nothing more but of academic interest. Prayers 2 and 3 for another reason to which I have not yet referred to cannot succeed as all the charges in the charge sheet do not relate to the Johannesburg International robbery incident - charges 6 to 16 relate to a different incident and the prosecution on those charges has not been challenged and will no doubt proceed.

[16] In the result I make the following order:

1. The application for striking out is dismissed.
2. The first applicant is ordered to pay the cost of the application for striking out.

3. The main application is dismissed.
4. The first and second applicants jointly and severally, the one paying the other to be absolved, are ordered to pay the cost of this application.

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COUNSEL FOR FIRST APPLICANT	*ADV J BAUER*
COUNSEL FOR SECOND RESPONDENT	*ADV AB BURGER*
COUNSEL FOR RESPONDENTS	*ADV (MS) K PILLAY*

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