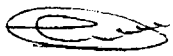




IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1)	REPORTABLE: YES / <input checked="" type="checkbox"/>
(2)	OF INTEREST TO OTHER JUDGES: YES / <input checked="" type="checkbox"/>
(3)	REVISED.
10/5/2016	
	

24/5/2016

CASE NO: 65493/15

In the matter between:

ZUNAID ABBAS MOTI

Applicant

and

THE NATIONAL DIRECTORS OF
PUBLIC PROSECUTIONS

First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG DIVISION

Second Respondent

JUDGMENT

MOSEAMO AJ

INTRODUCTION

[1] This is an application where applicant seeks an order:

1. Declaring that the decision of the first respondent not to institute a prosecution against the applicant flowing from the incident in respect of which the

applicant had made representations to it on 6 November 2011, and communicated by way of the letter, dated 22 August 2013, ...stands;

2. declaring that the decision cannot be revisited by the first respondent, the first respondent being functus officio;
3. interdicting both respondents from reconsidering the decision referred to;
4. alternatively to paragraph 1, 2 and 3 above, an order that the first respondent must produce to the applicant, within 7 (seven) days of this order:
 - 4.1 a charge sheet, setting out detailed, circumscribed and understandable offence(s), alternatively, a summary of substantial facts, in respect of the events in respect of which the first respondent is considering to reinstitute a prosecution against the applicant; and
 - 4.2 a copy of the Police Docket under Brits CAS 219/04/2011;
5. cumulative to paragraph 4 above, an order granting the applicant 14 (fourteen) days from the date of production of the documents referred to in paragraph 4 above within which to make representations to the consideration of criminal proceedings against the applicant;
6. costs of the application as against the respondent who may oppose; and
7. further and or alternative relief.'

[2] At the hearing of this application applicant's counsel indicated that the applicant is abandoning the alternative prayer contained in paragraph 4 and 5 of the notice of motion.

[3] First respondent did not oppose the application while the second respondent indicated that they will abide by the decision of the court. I therefore do not have the benefit of the respondents' heads of argument.

The power of the court to hear this application

[4] It is correctly submitted on behalf of the applicant that the prosecutorial decisions are not reviewable under PAJA further that where the decision to prosecute or not to prosecute is in breach of principle of legality, the court has the power to review such a decision. In my view the court has jurisdiction to hear this application.

BACKGROUND

[5] The applicant and 18 others were charged in the Britz Regional Court on a number of counts linked to two separate incidents during April and November 2011. The matter was struck from the roll on the 1st November 2012 in terms of S342A(3)(c) of the Criminal Procedure Act 51 of 1977 (CPA).

[6] On the 6th November 2011 the applicant's attorneys made representations to the first respondent. The letter containing representations was also copied to the DPP's office. Andrea Johnson (Johnson) from the office of the second respondent was tasked to deal with the matter. The applicant's attorneys made further representations to Johnson on the 13th December 2012. Johnson notified the applicant's attorneys of her decision not to prosecute the applicant on the 22 August 2013.

[7] On the 14th November 2014 the applicant's attorneys received a letter from the second respondent's office dated 10 September 2014 indicating that they have decided to prosecute the applicant. I will refer to this decision as Baloyi's decision. The applicant brought a review application under case number 83142/2014 against that decision. The Baloyi's decision was successfully reviewed and set aside by the court on the 4th February 2015.

[8] On the 17th June 2015 the applicant's attorneys received a letter from the Deputy National Director of the Public Prosecutions (Deputy NDPP) inviting the applicant to make representations in respect of CAS 219/04/2011 to enable acting NDPP to consider them before making a final decision in the matter. I will refer to this decision to revisit Johnson's decision by the first respondent's office as Ramaite's decision.

THE ISSUE

[9] The main issue before me is whether the first respondent can reconsider the decision taken by Johnson.

WHETHER THE FIRST RESPONDENT HAS THE POWER TO REVISIT JOHNSON'S DECISION.

[10] It is submitted on behalf of the applicant that the decision made by Johnson is the decision of the first respondent and that the attempt by the first respondent to revisit that decision is ultra vires and in breach of the principle of legality and thus reviewable.

[11] The reason for this application is the letter written by the Deputy NDPP which states as follows:

'RIGHT TO MAKE REPRESENTATIONS TO THE NDPP IN RESPECT OF STATE versus HOOSEIN MOHAMMED AND 18 OTHERS

Brits Cas 272/04/2011 and Others

This Office previous communication in the above regard refers.

Kindly be advised that the Director of Public Prosecution, North Gauteng has since advised this office that he has decided not to institute prosecutions in respect of all matters that formed part of your initial representations, with the exception of Brits CAS219/04/2011. You are therefore in terms of section 179(5)(d) of the Constitution, Act 108 Of 1996 invited to submit representations to the acting NDPP in relation to the said matter, i.e Brits CAS 219/04/2011, to enable him to consider same before making a final decision in the matter.

Yours faithfully

M SILAS RAMAITE, SC
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
HEAD: NPS ...'

[12] In this letter the Deputy NDPP called upon the applicant to make representations before the acting NDPP can make a final decision regarding whether to prosecute or not to prosecute the applicant. The structure and powers of the prosecuting authority are set out in section 179 of the Constitution.

[13] Section 179 of the Constitution in the relevant parts provides as follows:

'(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consists of –

- (a) a National Director of Public Prosecutions who is the head of the prosecuting authority, and is appointed by the President, as the head of the national executive; and
- (b) Director of Public Prosecutions and Prosecutors as determined by an Act of Parliament.

(2) 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.

(3) ...

(4) ...

(5) The National Director of Public Prosecutions –

- (a) ...
- (b) ...
- (c) ...
- (d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
 - (i) the accused person
 - (ii) the complainant
 - (iii) any other person or party whom the National Director considers to be relevant.
- (6) ...
- (7) All other matters concerning the prosecuting authority must be determined by national legislation.'

[14] The national legislation referred to in section 179 was enacted in the form of National Prosecuting Authority Act 32 of 1998 (NPA Act). Section 20 of the NPA Act deals with the power to institute and conduct criminal proceedings. It provides as follows in the relevant parts:

- '(1) The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to –
 - a) institute and conduct criminal proceedings on behalf of the State;
 - b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
 - c) discontinue criminal proceedings vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.
- (2) ...
- (3) Subject to the provisions of the Constitution and this Act, any Director shall, subject to the control and directions of National Director, exercise the powers referred to in subsection (1) in respect of –
 - a) the area of jurisdiction for which he or she has been appointed; and
 - b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director.
- (4) Subject to the provisions of the Constitution and this Act, any Deputy Director shall, subject to the control and directions of National Director, exercise the powers referred to in subsection (1) in respect of –
 - a) the area of jurisdiction for which he or she has been appointed; and

- b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director.
- (5) Any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the National Director, or by a person designated by the National Director.
- (6) A written authorization referred to in subsection (5) shall set out –
 - a) the area of jurisdiction;
 - b) the offences; and
 - c) the court or courts,in respect of which such powers may be exercised.
- (7) ...'

[15] Section 179(5)(d) of the Constitution empowers the NDPP to review decisions to prosecute or not to prosecute, and further provides the procedure to be followed. The applicant does not dispute the fact that the first respondent has the power to review a decision not to prosecute. The applicant however contends that the decision by Johnson is the decision by the first respondent and therefore the first respondent is *functus officio*.

[16] The applicant's attorneys made representations on behalf of the applicant to the NDPP and copied the DPP and others in their letter dated 6 November 2011. Johnson was tasked to deal with the matter. The applicant's attorneys confirmed the above position in an email dated 16 November 2012. The email states as follows:

'Dear all

Pursuant to the letters that we have sent to the NDPP, the DPP and others, I had a telephone conversation with Adv. Andrea Johnson from the DPP this morning.

She advised that a decision has been taken that she would be in charge of the matter and that the decision to prosecute or not will, ultimately, be hers to make.

She further advised that she will meet the IO on Monday, next in order for her to ascertain what investigation, if any still needs to be done in the matter.

She has asked that we, in the mean time, provide her with detailed written representations.

I secured a meeting with her at 11:00 on the 10th of December 2012 to make additional oral representations.

She has assured me that no decision will be made before she considered both our oral written representations.

Kemp and Laurence

Can you please advise whether you are available on the 10th December 2012?

Regards ...'

[17] It is clear from the above email that the matter was dealt with by Johnson from the second respondent's office and further that she undertook to consider all the applicant's oral and written representations before making her decision. The applicant's attorneys made further representations on behalf of the applicant to Johnson at the meeting of the 13th December 2012. Numerous correspondences were exchanged between Johnson and applicant's attorneys.

[18] The letter of the 22 August 2013 contains the decision taken by Johnson not to prosecute the applicant. It is this decision that the applicant refers to as the decision of the first respondent. The relevant parts of the letter state as follows:

'RE: S V MOTI AND OTHERS

1. The representations made by your office refer. These include the written and verbal representations made with regards the matter that was previously on the Brits court roll.
2. After having considered all the evidence together with the representations this office has decided as follows:
 - 2.1 Mr Moti will NOT be prosecuted on any of the matters on which you directed your representations
 - 2.2
 - 2.3
 - 2.4 The matter has been referred to the office of the DPP for the institution of the Prosecution.
 - 2.5 The other matters have also been sent to the office of the DPP for an allocation to an advocate who must decide how to prosecute the other cases.
 - 2.6 I have recommended that the prosecution of the November matter be dealt with as matter on its own and not together with the rest
3. This office thus closes its file.

Yours faithfully

A JOHNSON
SNR DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
DPP NORTH GAUTENG'

[19] It is apparent from this letter that the decision not to prosecute was taken by Johnson. Johnson's designation is Senior Deputy Director of Public Prosecutions as it appears at the end of the letter. The letter communicating Johnson's decision is on

the letterhead of Director of Public Prosecutions North Gauteng, Pretoria. The oral representations were made to Johnson. The correspondences exchanged was between the applicant's attorneys and Johnson.

[20] It is submitted on behalf of the applicant that the decision by Johnson is the decision of the first respondent. It is contended that the NDPP cannot revisit its own decision. It is not clear to me on what basis it is contended that Johnson's decision is the decision of the NDPP. Although the representations were made to the NDPP's office, the decision was made by the DPP's office. There is no indication that the power to make that decision was delegated to Johnson to make it the NDPP's decision.

[21] Section 20(1) of the NPA Act provides that the power to (a) institute and conduct criminal proceedings on behalf of the State; (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and (c) discontinue criminal proceedings vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.

[22] Johnson who is a Senior Deputy DPP in the office of the DPP North Gauteng, Pretoria obtained written and verbal representations from the applicant's attorneys and considered the representations before making the decision not to prosecute the applicant. Section 20(4) of the NPA Act provides that the deputy director shall exercise the powers to discontinue criminal proceedings subjected to the control and directions of the director concerned.

[23] In the case of *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paragraph 64 it is stated:

"... 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 this."

[24] It was further submitted that Ramaite's decision is the same as Baloyi's decision and should thus suffer the same fate. In my view the two decisions are not the same. Baloyi's decision is the decision of the DPP while the decision by Ramaite is the decision of the Deputy NDPP.

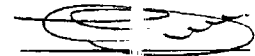
[25] Section 179(5) empowers the NDPP to review the decision to prosecute or not to prosecute after consultation with the DPP and after taking representations from the accused, the complainant or any other person or party whom the National Director considers to be relevant. Baloyi's decision was correctly reviewed as section 179(5) does not empower the DPP to review its own decision.

[26] In the NDPP v Zuma case it was stated that 'In the context of sub-sec (5), the power to review can only be an 'apex' function, in other words, a function of the head of the NPA *qua* head. Paragraph (d) accordingly deals only with the review of a decision by the 'relevant' DPP ...'

[27] Johnson as a Deputy DPP had the power to discontinue criminal proceedings against the applicant. The power to review is in terms of the Constitution and the NPA Act the function of the NDPP. The letter written by Ramaite invited the applicant to make representations to enable the acting NDPP to consider them as provided for in section 179(5). I find that the first respondent is empowered by section 179(5) of the Constitution to revisit Johnson's decision and therefore the Deputy NDPP acted within the scope of the empowering statute.

In the result I make the following order:

1. Application is dismissed.



P D MOSEAMO
ACTING JUDGE OF THE HIGH COURT