IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU- NATAL DIVISION, PIETERMARITZBURG

Case No: CCD30/18

In the matter between:

THE STATE RESPONDENT

and

JACOB GEDLEYIHLEKISA ZUMA FIRST ACCUSED

(APPLICANT IN THE APPLICATION FOR LEAVE TO APPEAL)

THALES SOUTH AFRICA (PTY) LIMITED SECOND ACCUSED

and

Case No: D12763/18

In the matter between:

THALES SOUTH AFRICA (PTY) LIMITED APPLICANT

and

THE KWAZULU-NATAL DIRECTOR OF PUBLIC PROSECUTIONS FIRST RESPONDENT

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS SECOND RESPONDENT

THE NATIONAL PROSECUTING AUTHORITY THIRD RESPONDENT

ORDER

In the result, the following order is made:

1. Mr Zuma's application for leave to appeal is dismissed with costs such costs to include those consequent upon employment of two counsel.
2. Thales' application for leave to appeal is dismissed with costs such costs to include those consequent upon employment of two counsel.

JUDGMENT

Delivered on 29 November 2019

Mnguni, Steyn et Poyo Dlwati JJ:

[1] Before us for decision, are two applications for leave to appeal against the judgment and orders we made on 11 October 2019, firstly dismissing Mr J. G. Zuma's and Thales' applications for permanent stay of prosecutions with costs and; secondly in Thales' case only, dismissing its application for an order reviewing and setting aside the 2018 decision of Mr Shaun Abrahams, the former National Director of Public Prosecutions (NDPP) to reinstate the prosecution against it.

[2] Mr Zuma seeks leave to appeal to the Supreme Court of Appeal (the SCA) on the grounds embodied in his notice of appeal dated 1 November 2019. We shall refrain from repeating them in great detail except in so far as it may be necessary for the purposes of this judgment. We have classified them into three categories. The first entailed the constitution of the court hearing the application for permanent stay. The complaint in this regard was that it was an irregularity for the criminal trial to be reconstituted and the application to be heard as a civil trial by a Full Court of the High Court as this was contrary to the provisions of ss 110(2) and 145 of the Criminal Procedure Act 51 of 1977 (the Act). The contention was that the application should have been heard before a criminal court constituted as such to conduct Mr Zuma's criminal trial. Consequently, so the contention goes, the Full Court had no jurisdiction to conduct a criminal trial including interlocutory applications brought before a criminal court to determine whether there was a legal or factual basis on which the prosecution of Mr Zuma before that trial court should be permanently stayed. Ultimately, the contention is that this constituted a gross irregularity warranting the setting aside of the proceedings.

[3] The second related to the alleged violation of Mr Zuma's fair trial rights. These were contended to be delays in prosecuting Mr Zuma, ranging from the time that Mr Ngcuka announced his decision not to prosecute Mr Zuma despite there being prima facie evidence against him, the delays incurred after the matter was struck off the roll by Msimang J (as he then was) after Mr Pikoli had decided to prematurely charge Mr Zuma and the delays caused by the Democratic Alliance's review application challenging Mr Mpshe's decision to terminate the prosecution of Mr Zuma which was later conceded by the State and Mr Zuma after having rigorously defended it. It was contended that another

court would find differently than this court on the basis that Mr Zuma was not and could not have been responsible for the delays as the National Prosecuting Authority (NPA) had the responsibility to ensure a speedy trial.

[4] The third was what was referred to as the NPA's violations of Mr Zuma's constitutional rights when it, for instance, allowed political interference during the investigations and prosecution of Mr Zuma. These included: the Public Protector's findings that Mr Ngcuka's conduct, when he announced that he would not prosecute Mr Zuma, violated his constitutional rights to dignity; and Mr Pikoli's reporting to the then President of the Republic of South Africa and the Minister of Justice and Constitutional Development about the prosecution of Mr Zuma, the Browse Mole Report and the spy tapes as detailed in Mr Hofmeyr's affidavit in the Democratic Alliance's review application. It was contended that another court would find that the unconstitutional conduct of the NPA tainted the entire prosecution process.

[5] Thales on the other hand, filed its conditional notice of application for leave to appeal to the SCA on 31 October 2019. This was so as it had applied for direct appeal to the Constitutional Court in accordance with Constitutional Court Rule 19 to review and set aside Mr Abrahams' decision to reinstate the prosecution against it. Thales advanced three contentions. The first was that s 179 of the Constitution was not a source of the NDPP's power to institute a prosecution as relied on by Mr Abrahams. The second was that if s 179 constituted such a source then the NDPP in making his decision failed to comply with the binding Prosecution Policy. And, the third was that the NDPP's decision was taken on an irrational and therefore unconstitutional basis. It was further contended that the court had erred in placing any reliance on s 22 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) as empowering

the NDPP to reinstate Thales' prosecution. To the extent that the court placed reliance on a provision that was not relied upon by the NDPP, another court would find differently than this court did.

[6] Furthermore, it was contended that when the NDPP took the decision to reinstitute the prosecution of Thales, this deprived Thales of any opportunity to seek the review had the decision been taken by the DPP. In any event, so went the contention, there was no special reason as prescribed in the Prosecution Policy of the Prosecution to reinstitute the prosecution, and to this extent, the court erred in finding the existence of a special reason and another court would find differently to this court.

[7] We turn now to the arguments presented before us in pursuance of these applications. At the commencement of the argument, Mr *Sikhakhane SC,* on behalf of Mr Zuma, tendered an apology to the court for what he considered to be an attack on the court contained in Mr Zuma's notice of application for leave to appeal. Pausing here for a moment, we observed that this apology only came after Mr *Breitenbach SC,* on behalf of the State, submitted in footnote 10 of his heads of argument that Mr Zuma ought to be penalised for the disrespectful and intemperate language used in his notice of appeal as this ought not to have made its way to the court papers in the first place. We have taken liberty of quoting his footnote in full.[1]

[1] Specifically – the underlining is ours – the following: p 4 para 8 ("the High Court sought refuge in the SCA judgment that incorrectly found that motive of a prosecutor is irrelevant"), p 6 para 13 (the Court "adopted a sanitised version of facts biased against Mr Zuma and aimed at assisting the NPA's violations of Mr Zuma's constitutional rights"), pp 8-9 para 17 ("It appears the High Court worked backwards in determining this matter, instead of rigorously and objectively assessing the legal grounds on their merits"), p 13 para 26 ("the High Court simply parroted Mr Pikoli's reasons"), p 16 para 34 ("The High Court simply abused the ruling of the Supreme Court of Appeal…") p 18 para 35 ("to confine the conduct of Mr McCarthy merely to the timing of the service of the indictment is erroneous and calculated to sanitise the gravity of the prejudice against Mr Zuma"), p 18 para 38 ("The High Court failed to appreciate its role in this application, slavishly aligning itself to the findings of the Supreme Court of Appeal made in a different application to the one the High Court should have

[8] As correctly pointed out by Mr *Breitenbach*, the language used in Mr Zuma's application for leave to appeal in paras 8, 13, 17, 26, 34, 35, 38, 39, and 41 do not belong in a proper court process. Without diverting our focus from the issues in this application, we deem it necessary to voice our displeasure on the disrespectful manner in which this court was addressed in Mr Zuma's notice of application for leave to appeal. This, we do, despite Mr *Sikhakane*'s apology as we do not deem it sufficient in the circumstances of this case. In our view, comments or allegations that are scandalous or vexatious to the court ought to be avoided at all costs, as they can bring the administration of justice into disrepute. They can also undermine the public's confidence in the courts and disturb the moral authority of judicial process. We do not suggest that the courts must not be criticised for their judgments but we are of the view that such comments must be respectful and grounded on the judgments as they can have a wider impact than merely hurting the judges' feelings or impugn their reputation. All officers of the court ought to know better and we do no more than urge them to take cognisance of the Constitution and their oath of office in matters of this nature. Disturbingly, in Mr Zuma's heads of argument dated 20 November 2019 no attempt was made to deal with this pernicious issue.

[9] Perhaps prior to turning to the applications for leave to appeal it is apposite to restate the test applicable for such applications. These applications are regulated by s 17 of the Superior Courts Act 10 of 2013 (the Superior Courts Act). Section 17(1) provides that 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

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concerned itself with"). P 19 para 39 ("The high Court astonishingly found…") and p 20 para 41 ("It simply failed that test – rather making what appears to be gratuitous remarks about Mr Zuma'a political fortunes").

heard, including conflicting judgments on the matter under consideration.

[10] In *S v Smith*,[2] Plasket AJA (as he then was) had this to say about the reasonable prospects:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.' (Original footnote omitted)

This was quoted with approval in *MEC Health, Eastern Cape v Mkhitha*.[3]

[11] As correctly held in *Acting National Director of Public Prosecutions & others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions & others*[4] the use of the word 'would' indicate a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

[12] The first ground of the application for leave to appeal was based on the jurisdiction of this court. Mr *Sikhakhane*, correctly in our view, conceded that this issue was never raised in the papers nor in argument during the application and therefore ought not to be before us. He, therefore submitted that he was abandoning this ground of the application for leave to appeal. In any event our

[2] *S v Smith* 2012 (1) SACR 567 (SCA) para 7.
[3] *MEC Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016).
[4] *Acting National Director of Public Prosecutions & others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions & others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016); [2016] JOL 36123 (GP).

view on this matter was that it was the prerogative of the Judge President of this division in terms of s 14 of the Superior Courts Act to have the court constituted in the manner in which it was. This also found support in the Norms and Standards for the Performance of Judicial Functions issued by the Chief Justice on 28 February 2014. Furthermore, as Mr Zuma has not pleaded to any charges before this court, his trial cannot be deemed as having commenced. We therefore find that there is no merit in this ground of appeal and we do not believe that another court will find differently.

[13] The second ground relates to the delays in prosecuting Mr Zuma and the delays incurred during the prosecution of Mr Zuma leading to the matter being struck off the roll and the Democratic Alliance's review application. These have been thoroughly considered in our judgment in the context of this application, especially from paragraphs 126 to 150 of our judgment. We do not believe that another court, after properly considering our judgment in context and in its totality, would find differently.

[14] The final ground related to the constitutional violations of Mr Zuma's rights. Reference in this regard was made to political interference as found by Nicholson J, the Browse Mole Report, Spy tapes and Mr Hofmeyr's affidavit in the Democratic Alliance review application. Whilst the submission on behalf of Mr Zuma was that even though these have been pronounced upon by the SCA, this was in a different context. We do not agree. It is unlikely that the SCA will find differently than that the prosecution is not wrongful merely because it is brought for an improper purpose. This is especially so as the SCA was examining the conduct of the various individuals complained about. In addition, even Mr Mpshe had conceded in his media statement in 2009 that the integrity of the investigation has never been tainted.

[15] Furthermore, the submission that we over emphasised the seriousness of the crime more than Mr Zuma's rights has no merit whatsoever. The seriousness of the crime is but one of the factors to be considered in an application for a permanent stay. We therefore are not persuaded that another court, in particular the SCA, would come to a different conclusion than the one we arrived at. There is also, in our view, no other compelling reason why we should allow the appeal. It is in the interests of justice and bringing the matter to finality that no appeal should ensue.

[16] With regard to costs, we were mindful that in applications of this nature it is not usual to grant a costs order against an applicant. However, in our view, Mr Zuma's complaints were not genuine, hence a costs order. In any event there was no compelling reason why the costs should not follow the result, the current application included. This issue was also not raised in argument before us despite the State' argument for such an order.

[17] We now turn to Thales' grounds of appeal. Mr *Katz SC* on behalf of Thales submitted that Thales only sought leave to appeal the review relief, the NDPP's decision to reinstate prosecution against Thales. The submission in this regard was that the NPA Act and not s 179 of the Constitution gives effect to the power of the NDPP to institute criminal proceedings. However, Mr Abrahams had relied on s 179(2) of the Constitution in his letter of 14 February 2018, to reinstate the prosecution against Thales and this was wrong, so went the submission. Therefore, the court erred, whilst examining s 179(2) of the Constitution, to consider and examine the provisions of s 22 of the NPA Act as it had not been relied upon. Reference to paragraph 163 of the judgment was made in this regard. It was contended therefore that another court would

interpret the provisions of the Constitution and the Act differently and that it constitutes a compelling reason to grant leave to appeal.

[18] We do not agree, and more importantly, the SCA has already pronounced on this issue in *National Director of Public Prosecutions v Zuma*.[5] We do not believe that it would find differently because of the context of this application. It follows therefore that Mr Abrahams' decision could not have been irrational or contrary to the NPA Policy. In the circumstances, we are not persuaded that another court would find differently and the application for leave to appeal ought to fail.

Order

[19] In the result, the following order is made:

[19.1] Mr Zuma's application for leave to appeal is dismissed with costs such costs to include those consequent upon employment of two counsel.

[19.2] Thales' application for leave to appeal is dismissed with costs such costs to include those consequent upon employment of two counsel.

Mnguni J

Steyn J

Poyo Dlwati J

[5] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 64.

Appearances

Heard:	22 November 2019
For the 1st Applicant/Accused:	Mr M Sikhakhane SC, Mr T Masuku SC and Mr M Sikhakhane
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For the 2nd Applicant/Accused:	Mr A Katz SC and Ms M Adhikari SC
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For the Respondent:	Mr A Breitenbach SC, Ms N Mayosi and Ms H Rajah
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