IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable

Case No: 4477/2018P

In the matter between:

THOSHAN PANDAY **APPLICANT**

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

Heard: 14 August 2020.

Delivered: 16 September 2020.

ORDER

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1. The application is dismissed with costs.
2. The application to strike out is dismissed with costs.
3. All reserved costs will be costs in the cause.
4. The costs orders in paragraphs 1 to 3 hereof shall include the costs consequent on the employment of two counsel where this was done.

DRAFT JUDGMENT

GORVEN J

[1] This matter has its genesis in the 2010 FIFA World Cup hosted in South Africa. On 26 January 2018, Mr Abrahams, who was at the time the National Director of Public Prosecutions (the NDPP), communicated his decision to prosecute the applicant (Mr Panday) for fraud and corruption (the impugned decision). In this application, Mr Panday asks that:

'The decision of the respondent in terms of section 22(2)*(c)* of the National Prosecuting Authority Act 32 of 1998, on 26 January 2018, in Durban-Central CAS 781/2010, to prosecute the applicant be reviewed and set aside'.

[2] In the years since 1994, there has been a single National Prosecuting Authority (the NPA). The head is the NDPP.[1] This office was created by s 179(1)*(a)* of the Constitution,[2] read with the National Prosecuting Authority Act (the Act).[3] It is as well to briefly mention those members of the NPA who feature most prominently in this application. Mr Abrahams was NDPP for the period from June 2015 to August 2018. Thereafter Dr Ramaite was appointed Acting NDPP until 1 February 2019, since when Ms Batohi has been the NDPP. Ms Jiba was Deputy NDPP for a period after which Mr Mzinyathi was the Acting Deputy NDPP. At all material times, the Director of Public Prosecutions (the DPP) KwaZulu-

[1] I think it is fair to say that the position of NDPP has been a highly contested one in the years since the dawn of democracy in South Africa. This has led to a high turnover of occupants of that office.

[2] Constitution of the Republic of South Africa, 1996. Sections 179(1)*(a)* and *(b)* provide:

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

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.'

[3] National Prosecuting Authority Act 32 of 1998. This is the Act promulgated to give effect to the above provisions.

Natal was Ms Noko. Mr Letsholo was a senior advocate attached to the Durban Specialised Commercial Crime Unit (SCCU) of the NPA and Ms Vimbani was the Senior Deputy DPP for the SCCU.

[3] Some context will give perspective. The impugned decision was to prosecute Mr Panday in CAS 781, along with Colonel Navin Madhoe and Captain Ashwin Narainpershad. The latter two were members of the South African Police Service (the SAPS) at the time. The allegation is that those three (the three suspects) defrauded the SAPS. This concerned the supply of temporary accommodation to members of the SAPS during the FIFA World Cup. The investigations in CAS 781 went anything but smoothly and, as a result, spawned three further dockets.

[4] The first was CAS 386 alleging interference in the investigation under CAS 781. The National Head of the Directorate for Priority Crime Investigation (the DPCI), Lieutenant General Dramat, had requested a progress report from Major General Booysen in the investigation under CAS 781. General Booysen reported that he had been instructed by the KZN SAPS Provincial Commissioner, Lieutenant General Ngobeni, to abandon the investigation. General Dramat instructed that the investigation should continue, but that it should do so under the national office of the DPCI. CAS 386 was opened concerning the alleged actions of General Ngobeni. On 30 January 2017, Ms Noko decided not to prosecute CAS 386. On 26 January 2018, she was requested to investigate further. She again decided against prosecution. That decision was reviewed under s 22(2)*(c)* of the Act by the NDPP and a decision was taken to prosecute under CAS 386.

[5] The second was CAS 466 which also alleged interference. The allegation was that Colonel Madhoe, on behalf of Mr Panday, attempted to bribe General Booysen to quash CAS 781. An undercover operation was launched on 8 September 2011. This allegedly resulted in Colonel Madhoe handing cash of R1.43 million to General Booysen. This led to the arrest of Colonel Madhoe and to CAS 466. Ms Noko provisionally withdrew the matter. She made a final decision not to prosecute CAS 466 on 21 October 2014. In support, she put up a detailed memorandum which included references to, and reasons for, a recent decision not to prosecute under CAS 781. Her decision not to prosecute under CAS 466 was also reviewed by the NDPP under s 22(2)*(c)* of the Act, who decided to prosecute that matter.

[6] The third was CAS 122. This arose from allegations that Mr Panday fraudulently attempted to secure the unfreezing of funds which he claimed were payable to him by the SAPS and which were the subject of CAS 781.

[7] Apart from her decisions not to prosecute under CAS 386 and CAS 466, Ms Noko took a decision not to prosecute Mr Panday under CAS 781. It is this decision which Mr Abrahams reviewed under s 179(5)*(d)* of the Constitution read with s 22(2)*(c)* of the Act leading to the impugned decision.

[8] Section 179(5)*(d)* of the Constitution provides:

'The National Director of Public Prosecutions-

(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.'

And s 22(2)*(c)* of the Act provides:

'In accordance with section 179 of the *Constitution*, the *National Director*-

(c) may review a decision to prosecute or not to prosecute, after consulting the relevant *Director* and after taking representations, within the period specified by the *National Director*, of the accused person, the complainant and any other person or party whom the *National Director* considers to be relevant.'

Although both s 179(5)*(d)* of the Constitution and s 22(2)*(c)* of the Act use the word 'review' this is not a review by a court. It is, in effect, a mechanism whereby the NDPP can reverse the decision of a DPP. This must be borne in mind so as not to confuse that kind of review with a judicial review such as the present one.

[9] A decision to prosecute is not susceptible of review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[4] It may be reviewed only if it offends the principle of legality. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,[5] it was said that the principle of legality expresses the fundamental idea that 'the exercise of public power is only legitimate where lawful'.[6] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*, Chaskalson P expressed it as follows:[7]

'The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.'

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[4] The definition of 'administrative action' in s 1 of PAJA excludes such a decision. Section 1*(b)(ff)* of PAJA provides that administrative action does not include 'a decision to institute or continue a prosecution'.

[5] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR (CC) 1458.

[6] *Fedsure* para 56.

[7] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (CC) para 20.

[10] It may be that a decision not to prosecute would be reviewable under PAJA. This question has so far been left open.[8] Unlike a decision to prosecute, such a decision is not explicitly excluded from the definition of administrative action under PAJA. Professor Hoexter believes it is reviewable under PAJA.[9] However interesting that debate may be, it must await a future occasion.

[11] Because the impugned decision involved the exercise of public power, the principle of legality applies to it. A decision based on the principle of legality has two features:

'Firstly, the [decision maker] must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.'[10]

The first feature is to act within the law. This includes that the decision maker is empowered to make such a decision and does so in accordance with the precepts of the empowering provision. The second feature is that all exercise of public power 'must be rationally related to the purpose for which the power was given'.[11] Mr Panday submits that Mr Abrahams complied with neither of the *Masetlha* features.

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[8] In *Kaunda and Others v President of the Republic of South Africa and Others* [2004] ZACC 5; 2005 (4) SA 235; 2005 (1) SACR 111; 2004 (10) BCLR 1009 (CC) para 84 Chaskalson CJ said:
'In terms of the Promotion of Administrative Justice Act a decision to institute a prosecution is not subject to review. The Act does not, however, deal specifically with a decision not to prosecute. I am prepared to assume in favour of the applicants that different considerations apply to such decisions, and that there may possibly be circumstances in which a decision not to prosecute could be reviewed by a Court.' (references omitted)

[9] Professor Hoexter argues that the legislature distinguished between decisions to prosecute and decisions not to prosecute because when a decision is made not to prosecute, the public interest requires a review. In a decision to prosecute, however, the public interest would be catered for by a trial in due course. Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 242.

[10] Per Moseneke DCJ in *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566; 2008 (1) BCLR 1 (CC) para 81.

[11] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247; 2005 (6) BCLR 529 (CC) para 75.

[12] The first ground of attack on the legality of the impugned decision is that Mr Abrahams failed to consult Ms Noko before reviewing her decision. There is no challenge to the power of Mr Abrahams to review the decision of Ms Noko. This ground invokes the first feature of *Masetlha*, contending that he did not comply with the empowering provision which required prior consultation with Ms Noko.

[13] The second ground is a failure of rationality. This invokes the second feature of *Masetlha*. It relates to recordings of intercepted communications (the intercepted material). These were obtained after an order was made and subsequently extended by a designated judge under the Regulation of Interception of Communications and Provision of Communication-Related Information Act (the Interception Act).[12]

[14] I deal first with the contention that Mr Abrahams failed to consult Ms Noko before reviewing her decision not to prosecute. The legality requirement here is that 'any statutory requirements or preconditions that attach to the exercise of the power must be complied with'.[13] This brings squarely into focus the requirement in s 179(5)*(d)* of the Constitution which is echoed in s 22(2)*(c)* of the Act. These provide that the NDPP may review such a decision 'after consulting the relevant Director'. In other words, s 22(2)*(c)* provides that the power to review a decision arises only after the DPP has been consulted. Unless a DPP has been consulted before a decision is made, any purported review of such a decision would be incompetent as being *ultra vires* the provisions of s 22(2)*(c)* of the Act and thus a breach of the principle of legality.

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[12] Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002.
[13] Hoexter op cit fn 9 at 253.

[15] This aspect turns on what is meant by 'after consulting' in that section. A distinction has been drawn in the cases between phrases such as 'in consultation with' and 'after consultation with'.[14] It has been held that 'after consultation with' means variously that the functionary must have regard to the views of the other functionary but is not bound by them[15] or must give serious consideration to their views.[16] I was not referred to, and nor did I find, any specific treatment of it in the context of s 22(2)*(c)* of the Act. It is worth considering the context and purpose to see whether the above approach applies equally to it.[17]

[16] The immediate context of the provision is the power accorded to the NDPP to intervene in decisions on prosecutions. This power was specifically mentioned in the preamble to the Act.[18] As has been seen, it is made concrete in s 22(2)*(c)* of the Act which provides that the NDPP 'may review a decision to prosecute or not to prosecute'. The immediate context finds expression in s 22(2) as a whole:

'In accordance with section 179 of the *Constitution*, the *National Director*-

(a) must determine prosecution policy and issue policy directives as contemplated in section 21;

(b) may intervene in any prosecution process when policy directives are not complied with; and

(c) may review a decision to prosecute or not to prosecute, after consulting the relevant *Director* and after taking representations, within the period specified by

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[14] *Unlawful Occupiers of the School Site v City of Johannesburg* [2005] All SA 108 (SCA) para 13.

[15] *Premier, Western Cape v President of the Republic of South Africa* [1999] ZACC 2; 1999 (3) SA 657; 1999 (4) BCLR 383 (CC) para 85.

[16] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9;1999 (4) SA 147; 1999 (7) BCLR 725 (CC) para 63.

[17] This applies the approach to interpretation in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593; [2012] 2 All SA 262 (SCA) para 18.

[18] As part of the preamble, the following is found:
'AND WHEREAS the Constitution provides that the National Director of Public Prosecutions may intervene in the prosecution process when policy directives are not being complied with, and may review a decision to prosecute or not to prosecute'.

the *National Director*, of the accused person, the complainant and any other person or party whom the *National Director* considers to be relevant.'

The content of the power conferred by s 22(2)*(c)* is to overrule decisions made by subordinates in the NPA.

[17] The purpose of granting the NDPP power to review is multi-faceted. The overriding purpose is to ensure that criminal proceedings are instituted when there is credible evidence that laws of the Republic have been transgressed by a particular person. This is, after all, the function of the NPA. Item D 1(d) of the Code of Conduct for Members of the National Prosecuting Authority (the Code),[19] provides that prosecutors should:

'in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence'.

This aims at ensuring that persons against whom there is such evidence are prosecuted. It is also aimed at avoiding spurious or speculative prosecutions. This is required in any society which is subject to the rule of law. One aspect of this purpose is to ensure that the policies of the NPA are applied in all matters. This is why the Constitution and the Act characterise the NDPP as the final arbiter in deciding on, and implementing, prosecution policy. Where a decision of a DPP has failed to properly implement prosecution policy, has overlooked crucial factors such as available evidence, or in any other way suffers from irrationality, this can be remedied. And all of this can be done without recourse to the courts to review and set aside such a decision and the concomitant delay which would be caused by any such court process.

[19] Code of Conduct for Members of the National Prosecuting Authority Under Section 22(6) of the National Prosecuting Authority Act, 1998, GN R1257, *GG* 33907, 29 December 2010.

[18] The context in which the requirement of consultation is framed is the intended use by the NDPP of the power of review. The purpose of this is clearly to ensure that a decision not to prosecute is not reversed by the NDPP in ignorance of the reasons of the decision maker. In practice, some such decisions may not have been accompanied by any reasons. To fail to establish those reasons could potentially result in an arbitrary or irrational decision by the NDPP. There may have been sound reasons, of which the NDPP is unaware, for having decided not to prosecute. The purpose is thus to obtain clarity from the decision maker as to the basis on which the decision under review was made.

[19] It is in this context and for that purpose that the words 'after consulting' must be construed. So 'after consulting' in s 22(2)*(c)* accords with the authorities mentioned above. In the present context, it means to give serious regard to the views of the DPP. What this entails in practice will vary because it is case and context specific. It is not possible to prescribe a universal checklist which fits every situation. For example, if exhaustive memoranda have been prepared motivating the decision not to prosecute, the requirement to consult may be satisfied by an enquiry whether any additional reasons should be taken into account. On the other hand, if no reasons have been furnished for the decision, something more will be required.

[20] With this in mind, the facts determining whether Ms Noko was consulted, as envisaged in s 22(2)*(c)* of the Act, must be established. A chronology will lend clarity. Of importance is that Mr Letsholo was the prosecutor charged only with overseeing CAS 781. Another prosecutor dealt with CAS 466. Matters proceeded as follows:

- On 14 February 2014, Mr Panday made representations in writing on the matter.
- On 25 March 2014, Mr Letsholo communicated his decision not to prosecute to Ms Vimbani giving his reasons in a six-page memorandum (the 2014 memorandum).
- On 21 October 2014, Ms Noko directed a seven-page memorandum to the SAPS investigating officers in CAS 466 indicating that she had decided not to prosecute that matter. In it, she referred to CAS 781, saying that this had been 'disposed of recently with a decision not to prosecute anyone as there was no evidence to prosecute any person with any offence.'
- On 9 February 2015, the Independent Police Investigative Directorate (IPID) directed a communication to the NDPP urging that the decisions not to prosecute under CAS 466 and CAS 781 be reviewed. The memorandum ran to 27 pages and set out summaries of the allegations in all four of the associated dockets, a chronology of events bearing on them, a summary of the forensic investigation conducted by PricewaterhouseCoopers (PwC) on CAS 781, summaries of witness statements in the dockets and an analysis of the evidence.
- On 9 October 2015, Mr Letsholo directed a further six-page memorandum to Ms Noko, Mr Mwrebi and Ms Vimbani concerning CAS 781 (the 2015 memorandum) which confirmed his earlier decision.
- On 28 October 2015, Ms Vimbani addressed a one-page memorandum on the matter to Ms Noko and Mr Mwrebi. This simply enclosed the two reports of Mr Letsholo and the representations sent by Mr Panday, confirmed her attendance at certain meetings and her agreement with the decision of Mr Letsholo not to prosecute.
- On 29 October 2015, Ms Noko directed a one-page memorandum to Mr Abrahams saying:

'I have perused the reports by both Advs. Letsholo and Vimbani regarding this matter. I am in agreement with their decision to decline to prosecute.'

No further reasons were given by her.

- On 9 May 2016, Ms Jiba addressed a 12-page memorandum to Mr Abrahams in response to his request of 23 February 2016 that she provide an opinion on CAS 466 and CAS 781. She recommended that the three suspects be prosecuted for fraud and corruption under CAS 781 'as a prima facie case has overwhelmingly been made against them.' She also made recommendations concerning CAS 466, CAS 386, and CAS 122.
- On 2 October 2016, Mr Abrahams invited Mr Panday to make representations because the decision of Ms Noko not to prosecute was in the process of being reviewed.
- On 9 October 2017, Mr Panday submitted representations running to some 55 pages.
- On 23 November 2017, Mr Mzinyathi directed a five-page memorandum to Mr Abrahams dealing with the submissions made by Mr Panday and Colonel Madhoe, the reasons put up by Ms Noko, as well as a summary of the substantial facts and an evaluation of the matter. He too recommended that the three suspects be prosecuted on charges of fraud and corruption in CAS 781.
- On 27 November 2017, Mr Abrahams signed his assent to the memorandum of Mr Mzinyathi.
- On 26 January 2018, Mr Abrahams wrote to Mr Panday's attorneys, informing them of the impugned decision.

[21] In the application papers, Mr Panday accepted that, prior to the impugned decision being made, an exchange of correspondence between Mr Abrahams and Ms Noko took place. It is not clear if this comprised only a request by Mr Abrahams and a single response from Ms Noko. It is

also not clear that such response was by way of her memorandum of 29 October 2015. Whatever the case, Ms Noko had the opportunity to motivate her decision to decline to prosecute. She did so by addressing a memorandum to Mr Abrahams, giving as her reasons those in the reports of Mr Letsholo. She also gave further reasons for declining to prosecute CAS 781 in her memorandum concerning CAS 466. Mr Panday says that this was insufficient. However, it cannot be said that Ms Noko did not have the opportunity to explain her reasons to Mr Abrahams. It can also not be said that he was not aware of her reasons or made his decision in ignorance of them.

[22] Since what is required is context specific in the light of the purposive interpretation of 'after consulting' above, it is my view that this satisfied the requirement. There was 'adequate' consultation with Ms Noko.[20] The contention of Mr Panday that the jurisdictional fact of his having consulted Ms Noko was not established and that, as a result, Mr Abrahams was not legally empowered under the Act to review her decision, does not hold good. The first feature in *Masetlha* of acting within the empowering provision was satisfied. Mr Abrahams was empowered under s 22(2)*(c)* of the Act to review her decision. The first ground of the challenge to the impugned decision must accordingly fail.

[23] Having concluded that Mr Abrahams was empowered to review the decision of Ms Noko, the second feature in *Masetlha* concerning rationality must be considered. In order to do so, certain issues affecting the evidence which can legitimately form the basis for a decision on that

[20] In *Minister of Home Affairs and Others v Scalabrini Centre and Others* [2013] ZASCA 134; 2013 (6) SA 421; [2013] 4 All SA 571 (SCA) para 43, Nugent JA used this term, saying:
'[A]n obligation to consult demands only that the person who is entitled to be consulted be afforded an adequate opportunity to exercise that right. Only if that right is denied is the obligation to consult breached.'

aspect must be addressed. The answering affidavit was delivered on 31 May 2019. On 18 October 2019, Mr Panday launched an application to strike out either the whole, or parts, of the answering affidavit of the NDPP. This sought the following relief:

'1. That the answering affidavit by Silas Ramaite purportedly filed in his capacity as the Respondent be struck out in its entirety on grounds that (a) he was not (as he purports he was) the Respondent and (b) was not authorised to depose to same on behalf of the Respondent.

2. In the alternative to paragraph 1, that the contents of [in excess of 50 paragraphs] of the answering affidavit presented by Silas Ramaite, purportedly in his capacity as the Respondent, be and are hereby struck out on grounds that the contents constitute inadmissible hearsay and/or argumentative speculation and/or are vexatious and/or scandalous.'

[24] Uniform Rule 23(2) requires that such an application be launched within the period allowed for the delivery of any subsequent pleading. This was not done. On 15 November 2019, the NDPP delivered the confirmatory affidavits mentioned in the answering affidavit but which had not been annexed to it. This was followed on 27 November 2019 by the answering affidavit in the strike out application. This took the point that the strike out application was out of time. No replying affidavit was delivered. It also provoked no application for condonation for the late launching of the strike out application. Mr Panday contented himself with delivering a notice in terms of Rule 30(2) to the effect that the delivery of the confirmatory affidavits amounted to an irregular step and that argument would be advanced at the hearing of the strike out application that they should be struck out. Despite this, no application in terms of Rule 30 was brought. As such, the application to strike out and the question of whether the late delivery of the confirmatory affidavits was an irregular step need not be determined.

[25] In any event, and in case I am wrong in this, the application to strike out lacks merit. Apart from the issue concerning the initial failure to attach the confirmatory affidavits, the complaints are fourfold. First, that the deponent, Dr Ramaite, falsely claimed to be the NDPP at a time when he was not. Secondly, that he did not state that he was authorised to depose to the affidavit on behalf of the then NDPP, Ms Batohi. Thirdly, that instead of a number of people putting up affidavits, Dr Ramaite put up an overarching one where the persons who had personal knowledge simply confirmed his averments concerning them. Fourthly, that if the averments were not hearsay and thus inadmissible, they were scandalous, vexatious, or amounted to argumentative speculation.

[26] The first of these arose from inattention to passing time. Three prior answering affidavits had been deposed to by Mr Ramaite when he was the Acting NDPP and, thus, the nominal respondent. They were withdrawn without opposition due to formal errors. The present one contains the averment that he was the Acting NDPP at a time when this was no longer the case. He explains that this was an oversight. It in no way warrants being struck out on that basis. At most, it might in certain circumstances cast a shadow over the reliability of other averments in his affidavit but that is not the gravamen of the complaint or the relief sought.

[27] The second of these complaints is likewise of no moment. The deponent to an affidavit is merely a witness. That witness is utilised in the discretion of the legal representatives of a litigant. If the evidence adduced is relevant and admissible, that is all that is required. A witness need not be authorised. They must simply be able to give relevant evidence on the subject matter. The only person who must be authorised in litigation is the

attorney representing the litigant in question.[21] This has received attention before and it is surprising that in a matter of this nature the position has been so misconstrued. Unsurprisingly, this contention, which was extensively canvassed in the heads of argument, was not pressed at the hearing.

[28] For the third of these, Mr Panday calls in aid a *dictum* of the Supreme Court of Appeal in the matter of *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another*,[22] where Leach JA said:

'This might be an acceptable way of placing non-contentious or formal evidence before court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events to do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency.'[23]

It bears mention that this *dictum* does not support the striking out of the averments made in that fashion. They were not struck out in *Drift Supersand* or in the other matter relied on by Mr Panday of *Eskom Holdings SOC Ltd v Masinda*.[24]

[29] The *dictum* in *Drift Supersand* merely expresses displeasure with the practice coupled with the legal consequence that the cogency of the evidence would, in many instances, be diminished. In any event, that matter differs from the present one. The detail required in that matter had not been covered even in the main affidavit and the confirmatory affidavit took it no further. Some of the salient features on which evidence should

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[21] *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615; [2004] 2 All SA 609 (SCA) para 19; *ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP) para 27.

[22] *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] ZASCA 118; [2017] 4 All SA 624 (SCA).

[23] *Drift Supersand* para 31.

[24] *Eskom Holdings SOC Ltd v Masinda* [2019] ZASCA 98; 2019 (5) SA 386 (SCA) para 3.

have been led were absent. *Eskom* provides even less support for the contention of Mr Panday. There the court said:

'Despite this slovenly practice, it can be accepted that Eskom averred that the electrical supply installation included equipment of incorrect sizes, did not meet prescribed standards, had been erected by an unauthorised contractor, and constituted an immediate danger to the public.'[25]

It is therefore clear that, far from striking the affidavit out, the court placed reliance on the averments in it to which the comment applies. Where the requisite detail appears in one of the affidavits, the resulting evidence is not hearsay and is admissible. That is the position in the present matter.

[30] Although it is not best practice, I respectfully suggest that it is by no means unusual to adopt this approach. In certain circumstances, doubtless very few, that approach can relieve a court of the need to assemble a jigsaw puzzle of pieces from multiple affidavits so as to obtain a full picture. In the present matter, memoranda, correspondence, opinions, reports, and affidavits by a myriad of people make up the papers. As it is, they are voluminous and complex. This complexity and prolixity would be exacerbated if each witness had to testify separately on the detail of their evidence. The averments in the answering affidavit, where supported by confirmatory affidavits, are admissible.

[31] The averments likewise do not meet the stringent test for striking out on the basis of being scandalous or vexatious. This is said to be based on criticism and innuendo aimed at Mr Letsholo, in particular. Whilst the answering affidavit contains criticism of him, it is in muted terms. As will be seen later, it could justifiably have been more trenchant. Averments in the answering affidavit also do not amount to argumentative speculation.

[25] *Eskom* para 3.

The affidavit does resort to legal argument at times but does not do so without a factual basis. All of this means that the application to strike out must be dismissed.

[32] Before I consider the other two grounds of the main application, it is appropriate to sketch the general approach to matters such as this. Prosecutorial independence is a hallmark of the separation of powers. This is because a decision to prosecute or not to prosecute is specifically allotted to the prosecuting authority by s 179(2) of the Constitution.[26] It was said in *S v Basson*:[27]

'It flows from s 179(2), the State's power to institute criminal proceedings, that the prosecution of crime is a matter of importance to the State. It enables the State to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of citizens. And by providing for an independent prosecuting authority with power to institute criminal proceedings on behalf of the State, the Constitution makes it plain that effective prosecution of crime is an important constitutional objective.'

The power of the NDPP to reconsider decisions to prosecute or not to do so is an incident of this overall power.

[33] Courts will seldom intrude on such a decision. Apart from the separation of powers issue, the decision in question is a policy laden one,[28] requiring account to be taken of a number of factors. These include the need under item D 1(d) of the Code to 'proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible'

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[26] Section 179(2) provides:
'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.'

[27] *S v Basson* [2005] ZACC 10; 2007 (3) SA 582; 2005 (12) BCLR 1192 (CC) para 144 (references omitted).

[28] The approach to such decisions is dealt with in a number of matters, one of which is *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490; 2004 (7) BCLR 687 (CC).

and in general the implementation of prosecution policy.[29] This is why a review on the basis of the principle of legality 'is currently more limited and less searching than review in terms of the PAJA'.[30]

[34] I have earlier touched on reviews based on the principle of legality. The ground under consideration alleges a lack of rationality. In *Democratic Alliance v President of the Republic of South Africa and Others*,[31] the Constitutional Court held:

'[R]ationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.'

A 'rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions.'[32] The rationality test involves 'restraint on the part of the Court.'[33] That is the approach I am enjoined to apply.

[35] The attack on the rationality of the impugned decision of Mr Abrahams is mounted on two interrelated fronts. These are summed up in the heads of argument of Mr Panday:

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[29] *Ronald Bobroff & Partners Inc v De La Guerre* [2014] ZACC 2; 2014 (3) SA 134; 2014 (4) BCLR 430 (CC) para 7.
[30] Hoexter op cit fn 9 at 124.
[31] *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 para 32. See also *Bobroff* para 7.
[32] *Democratic Alliance* para 42.
[33] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247; 2005 (6) BCLR 529 (CC) para 86.

'At a procedural level he was required to sufficiently acquaint himself with the impugned recordings and [Mr] Letsholo's ([Ms] Noko's) reasoning. At a substantive level he was required to base his decision on those reasons.'

Mr Abrahams twice requested General Ntlemeza to provide him with the intercepted material. He received no response. The first aspect of the procedural challenge above submits that, having called for the intercepted material, he was obliged to wait for it to be provided to him before making the impugned decision. The second aspect requires him to have acquainted himself with the reasons of Mr Letsholo and Ms Noko.

[36] It is necessary to consider the evidence against which these submissions must be measured. This involves evaluating whether obtaining the intercepted material was essential to any rational decision to be made on the matter. In other words, was obtaining the intercepted material a necessary means to attain the end of a decision to reverse the decision of Ms Noko and to prosecute Mr Panday under CAS 781.

[37] CAS 781 arose from concerns raised by Brigadier Kemp, head of the KZN SAPS Provincial Financial Services. His concerns were aroused by the amount spent on SAPS accommodation procurement in the 2009/2010 financial year. Apart from the fact that R55 million was expended that year, only a single agent had been used to obtain quotations. Most expenditure benefitted Goldcoast Trading CC which is allegedly linked to Mr Panday. It also appeared that invoices had been substantially inflated over the actual cost of accommodation. In addition, it appeared that invoices had been split into amounts of less than R200 000 so as to avoid the need for a full procurement process and the scrutiny attendant on it. The invoices were allegedly approved by Colonel Madhoe, to whom payments were also allegedly made.

[38] Brigadier Kemp's discoveries were discussed at a meeting in early May 2010. After further investigation took place, CAS 781 was opened. Mr Muller of the NPA oversaw the matter. It was initially allocated to an advocate who subsequently left the employ of the NPA, after which it was allocated to Mr Letsholo. The investigation included subpoenas which were unsuccessfully challenged by Mr Panday in case 12044/10. They are said by the NDPP to have yielded 'a trove of statements' supporting payments to Colonel Madhoe. In addition, a search warrant was obtained which produced a 'large cache of documents'. These, the NDPP says, support the allegations of fraud and corruption. A 400-page report by PwC analysing these documents is said by the NDPP to confirm this.

[39] On 12 October 2010, one of the investigating officers claimed to have received threatening telephone calls related to the investigation. This was communicated to General Deena Moodley of Crime Intelligence. An application was brought under the Interception Act based on these allegations. On 15 November 2010, the designated judge authorised that certain communications could be intercepted. The period was ultimately extended to 29 September 2011. Colonel Padayachee of Crime Intelligence was the sole custodian of the intercepted material.

[40] Mr Panday says that he became aware of the intercepted communications at a meeting on 18 September 2011 (the September meeting). It is common ground that on that day a meeting took place in the office of General Moodley. Apart from the two of them, also present were Warrant Officer Moodley, Colonel Padayachee and Lieutenant Colonel Chetty. Mr Panday claims that at that meeting, recordings of intercepted phone calls were played back. His founding affidavit says:

'On the device I heard a recording of telephone conversations and I heard my own voice. The recordings were of conversations I had had with various individuals. One of those people was my Attorney, Ms Giyapersad. In it, we were heard to be discussing the merits of my criminal case under Cas 781 as well as the approaches we would use in defence of the charges and the search and seizure operation which had been conducted by the police in relation to Cas 781. At that point General Deena Moodley said "now that we know what defences you will use, I will make sure that all those avenues are closed to you."'

The gravamen of the complaint is that unauthorised interceptions of his communications with his attorney breached attorney-client privilege. Because this disclosed his defences, any subsequent trial would result in a failure of justice.

[41] The evidence of the NDPP differs sharply from the version of Mr Panday. The September meeting was called at the request of Mr Panday. He approached Warrant Officer Moodley, an old school friend, to seek assistance in dealing with the allegations against him. At the September meeting he indicated his willingness to co-operate. General Moodley told him to instruct his legal advisor to put any proposal to the prosecutor. No recordings were played back at that meeting. The Interception Act carefully circumscribes the disclosure of such material.[34] Recordings such

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[34] The relevant parts of s 42 and s 43 of the Interception Act provide:
'42 Prohibition on disclosure of information
(1) No person may disclose any information which he or she obtained in the exercising of his or her powers or the performance of his or her duties in terms of this Act, except-
(a) to any other person who of necessity requires it for the performance of his or her functions in terms of this Act;
(b) if he or she is a person who of necessity supplies it in the performance of his or her functions in terms of this Act;
(c) information which is required in terms of any law or as evidence in any court of law; or
(d) to any competent authority which requires it for the institution, or an investigation with a view to the institution, of any criminal proceedings or civil proceedings as contemplated in Chapter 5 or 6 of the Prevention of Organised Crime Act.
. . .
(3) The information contemplated in subsections (1) and (2) includes information relating to the fact that-
(a) a direction has been issued under this Act;
(b) a communication is being or has been or will probably be intercepted;

as those of the intercepted material are encrypted. They can only be played back using special de-encryption software. Colonel Padayachee was the sole custodian of the intercepted material and he alone listened to all of it. As an additional measure, the intercepted material was kept in a safe to which only Colonel Zulu had a key. The intercepted material was not signed out at that time. General Moodley was not involved in the investigation of CAS 781 and, in any event, was unaware of the contents of the intercepted material. He categorically denies uttering the words attributed to him by Mr Panday. Nothing was said about his having heard conversations between Mr Panday and his erstwhile attorney or of being able to neutralise his defence as a result of the interceptions. In addition, none of the intercepted material relates to the investigation in CAS 781. It does not form part of that docket and will not be used in any prosecution under it. It relates to CAS 466 concerning attempts to improperly influence the outcome of the investigation under CAS 781.

[42] Where the NDPP disputes facts relied upon by Mr Panday, the approach in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* applies.[35] The version of the NDPP must prevail, unless it is so untenable

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(c) real-time or archived communication-related information is being or has been or will probably be provided;

(d) a decryption key is being or has been or will probably be disclosed or that decryption assistance is being or has been or will probably be provided; and

(e) an interception device is being or has been or will probably be installed.

43 Disclosure of information by authorised person for performance of official duties

Notwithstanding section 42 (1), any authorised person who executes a direction or assists with the execution thereof and who has obtained knowledge of-

(a) the contents of any communication intercepted under that direction, or evidence derived therefrom; or

(b) real-time or archived communication-related information provided under that direction,

may-

(i) disclose such contents or evidence or real-time or archived communication-related information to another law enforcement officer, to the extent that such disclosure is necessary for the proper performance of the official duties of the authorised person making or the law enforcement officer receiving the disclosure; or

(ii) use such contents or evidence or real-time or archived communication-related information to the extent that such use is necessary for the proper performance of his or her official duties.'

[35] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

as to be rejected out of hand.[36] It has been held that a 'real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed'.[37] The rule in *Plascon-Evans* applies no less to matters where allegations are made of unlawful means to obtain evidence.[38] The version of the NDPP is no bald denial of the averments of Mr Panday. On the contrary, it meets that very test. Neither can it be said that the evidence of the NDPP in this regard is untenable.

[43] This means that, as regards the intercepted material, the following evidence forms the factual basis for a decision in the present application. No recordings of intercepted communications were played back during the September meeting. No conversation between Mr Panday and his erstwhile attorney was heard at that meeting. Nothing was heard of the defences on which Mr Panday would rely in CAS 781. No breach of attorney-client privilege took place. No comment was made that, as a result of having intercepted such a conversation, the SAPS could neutralise the defences which Mr Panday would raise. None of the material arising from the interceptions forms part of the docket in CAS 781. None of that material is relevant to CAS 781. The NDPP does not intend to use any of that material as evidence in any prosecution under CAS 781. On this basis, Mr Panday's submission that the receipt by Mr Abrahams of the intercepted material was required to make a rational decision cannot be sustained.

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[36] *Plascon-Evans* at 634E-635C.

[37] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371; [2018] 2 All SA 512 (SCA) para 13.

[38] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1; 2008 (2) SACR 421; 2008 (12) BCLR 1197 (CC) para 10.

[44] Although this was not argued before me, it may be contended that Mr Abrahams could not have approached the matter on the basis that these factual disputes would be resolved in favour of the NDPP. The question then arises whether, if that is the case, his failure to insist on receiving the intercepted material renders the impugned decision irrational. For this enquiry, it is necessary to have regard to the steps taken by him and the material before him at the time.

[45] In the first place, it has been shown that Mr Abrahams had before him the reasons of Mr Letsholo and Ms Noko for the decision not to prosecute. If these reasons were flawed or, indeed, were contradicted by other, credible, material, this would impact the attitude of Mr Abrahams to the intercepted material. The reasons of Mr Letsholo were, in essence, threefold. First, that the intercepted material had been improperly obtained. Second, that it had been withheld from him by the SAPS when it should properly have been included in the docket in CAS 781. Third, that it included material in breach of Mr Panday's attorney-client privilege, had been played back to Mr Panday during the September meeting, and was followed by General Moodley stating that the defences of Mr Panday had been disclosed and would be neutralised.

[46] As to the first, Mr Letsholo clearly took the view that the interceptions had not been lawfully obtained. This is shown by the following statements in the 2014 memorandum:

'[T]here is nothing in the docket to suggest . . . that there was an application made for the authority to permit the police to monitor certain telephone conversations.'

and

'Clearly, this tapping of phones was a blatant abuse of power . . . with far-reaching consequences'.

and

‘[T]hat public policy also set itself firmly against admitting evidence obtained through improper means or evidence obtained in deliberate or flagrant violation of the Constitution.’

and

‘It is submitted with respect that the issue surrounding the tapping of the phones is inextricably linked to the manner in which the evidence was obtained in this matter. That the evidence as it stands at this point is irredeemably stained.’

and

‘To take this matter to court under these circumstances would mean that I as the prosecutor will have to turn a blind eye to the manner in which the evidence had been obtained and subject the judicial process to moral defilement . . .

and

‘More so in the light of the stance by the Higher Courts on deterring the police from employing improper means to acquire evidence . . .’.

and he concludes:

‘I am not prepared as a representative of the State to go to court with dirty hands. I do not want to be seen to be condoning improper investigative techniques by the police.’

All of this is premised on the intercepted material having thrown up evidence under CAS 781. As has been seen, this is not the case. Still less can it be said that the intercepted material was improperly obtained. It had been obtained pursuant to a directive under the Interception Act given by a judge designated to do so.

[47] In the 2015 memorandum, having realised that the intercepted material was obtained pursuant to such a direction, Mr Letsholo persisted in his attitude that the intercepted material was improperly obtained, concluding with the following supposition:

‘Furthermore, that in the process of obtaining the necessary authorisation the designated Judge must have been misled into granting the said authorisation since the investigations in this matter did not require such directives.’

He is, of course, correct that the investigation in CAS 781 did not require such directives. It did not make use of them. Where he is incorrect is in his belief that they were utilised to obtain evidence in CAS 781 rather than in CAS 466. This misconception would have been dispelled if he had taken the appropriate steps to establish the relevant facts.

[48] As to the second, he states in the 2014 memorandum:

'It is important to note that at no stage whatsoever, was I informed by the Investigating Officers in this case that there are tape recordings available in this matter . . .

During the meeting on 14 March 2014, one of the Investigating Officers [in CAS 781] Colonel S. Y. Govender, was asked why they did not inform me about the evidence relating to the tapping of the telephone conversations. His response thereto was that, they had taken a decision, as the police to take out everything relating to the taped conversations. I then informed him that it was not for them to decide which evidence is relevant for the case and which other evidence is not.

He then told me they were informed by the Crime Intelligence Unit, that there were threats on their lives, as the Investigating Officers of this case. That the Crime Intelligence Unit decided to make an application to be granted authority for the tapping of the phones only for the purposes of verifying the allegations of the threats against the Investigating Officers.

. . .

Colonel Govender was then informed that, all the evidential material in respect of the tapping of the phones will have to be included in the docket and be made available to the prosecution team.

His reply was that the Crime Intelligence Unit has already indicated that they will not make the recordings available to no one (sic), alternatively, they will have to make a decision as to what is it, according to them (CIU), that they will release, but they will definitely give us only the edited version of the tapes and not all the recordings in their original form.

I indicated to him that, if that be the case, we will be faced with serious challenges in court and further informed him that the Crime Intelligence Unit cannot take such steps and interfere with the evidence.'

[49] In the first place, the memorandum has no logical foundation. He records that he had been told that the interception directive was obtained, not for the purpose of the investigation in CAS 781, but to verify whether threats had been made against the investigators dealing with it. On what conceivable basis could he then conclude that the intercepted material had any relevance to the charges in CAS 781 or that the investigators should have told him that recordings were available 'in this matter [CAS 781]'?

[50] Secondly, he shows ignorance of the provisions of the Interception Act limiting the disclosure of the intercepted material.[39] If the intercepted material is not required for CAS 781, the holder may not release it to persons investigating that offence. An interception is an infringement of the right to privacy of the persons involved. The right to privacy is given in the Constitution.[40] That is why interceptions require a direction by a judge on application. This section of the Interception Act seeks to limit that infringement. It must be borne in mind that, when a direction such as this is utilised, there is no knowing what communications might be intercepted. Such communications might include calls between an attorney and their client. There is no way of ensuring that these are not intercepted. In such a case, the need to limit access to intercepted material, including that it should not be furnished to persons involved in prosecuting an offence to which privileged communications relate is self-evident.

[51] Apart from the illogical conclusions drawn by Mr Letsholo, Colonel Govender disputes his version of their conversation on 14 March 2014. He says that when Mr Letsholo asked him about the intercepted material, he

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[39] Section 42(1) of the Interception Act. See fn 34.

[40] Section 14*(d)* of the Constitution provides:
'Everyone has the right to privacy, which includes the right not to have –
. . .
(d) the privacy of their communications infringed.'

said that, as part of the team investigating CAS 781, he had nothing to do with them. It was obtained to verify whether threats had been made against investigators. He insisted that Mr Letsholo contact Colonel Padayachee since the latter was the custodian of the material. This would give him the full picture before he made any decision not to prosecute on the basis of the intercepted material. Mr Letsholo refused to do so and instructed Colonel Govender not to himself contact Colonel Padayachee.

[52] For his part, Colonel Padayachee says:

'No transcripts were given nor was any information utilised to further the investigation in Cas 781/06/2010.'

In other words, the intercepted material was not relevant to CAS 781. This is borne out by his further evidence. This also shows that the belief of Mr Letsholo that the intercepted material was being withheld from the prosecution is unfounded. A meeting was held at the Durban office of the DPP in November 2012. Those present included the advocates from the DPP dealing with the four dockets, the investigating teams dealing with them, and Colonel Padayachee. The latter gave a briefing on the results of the interception application. The advocate in charge of CAS 781 was Mr Muller, who was Mr Letsholo's superior. (At that stage, Mr Letsholo had not yet been assigned to CAS 781.) At the meeting Mr Muller indicated that CAS 781 was a straightforward forensic investigation and he was not interested in the intercepted material. Transcripts of some of the intercepted material and the authorisations were requested by, and handed to, the prosecution team dealing with CAS 466.

[53] If Mr Letsholo had heeded the advice of Colonel Govender and approached Colonel Padayachee, he could not have maintained his belief that the intercepted material was being withheld from him. He would have

been told that the material was not relevant to the investigation in CAS 781. If he had still entertained doubts, he could have confirmed with Mr Muller that what Colonel Padayachee said about that meeting was correct and that Mr Muller had expressed no interest in the intercepted material. This would have satisfied Mr Letsholo that, indeed, as he correctly said in the 2014 memorandum:

'The nature of the investigations in this matter is straightforward and there was no need for an application of this nature to be made [to further the investigations in CAS 781].'

A virtually identical statement is made in the 2015 memorandum.

[54] As to the third, Mr Letsholo arrived at this conclusion purely as a result of his having uncritically accepted the *ipse dixit* of Mr Panday. This finds expression at various points in the 2014 memorandum, including this paragraph:

'What is quite disturbing and is of great concern to the State, is that, amongst others they even listened to privileged information, between Toshan Panday and his attorney about their strategy in defending this case.'

This is stated, not as reporting an allegation by Mr Panday, but as a fact. The reference is of course to the September meeting. As has been seen, this version cannot be relied on in this application. What is of great concern, is that, in the face of serious allegations of conduct so egregious as to lead him to decline to prosecute, Mr Letsholo failed to take the obvious and appropriate step of establishing whether General Moodley or Colonel Padayachee agreed with this allegation. This application has shown that they do not agree. As a result, Mr Letsholo relied at face value on the word of a suspect in the matter. Not only that, but a suspect who, it was alleged, had attempted to have the charges against him quashed by illegal means and so generated two additional dockets.

[55] The evidence of General Moodley and that of Colonel Padayachee concerning the September meeting is material to a decision not to prosecute. Mr Letsholo made absolutely no attempt to obtain this information. Had he enquired of them they would have disputed the claims of Mr Panday. In addition, if he had spoken to Colonel Padayachee, he would have been told of the meeting at which his superior, Mr Muller, declined to include any of the intercepted material in the docket in CAS 781, the very complaint of Mr Letsholo. To arrive at a decision of this nature without obtaining and taking into account such material information, as was done by Mr Letsholo, has been held by our courts to amount to an irrational decision.[41]

[56] The difficulties with his reasons are compounded by his failure to deal in his two memoranda with the actual evidence available in CAS 781. As is testified to by the NDPP, this amounts to thousands of documents, analysed by PwC in a 400-page report and said to support allegations of fraud and corruption against the three suspects. His simple, and erroneous, conclusion, was that the intercepted material tainted all of this evidence.

[57] The clearly deficient memoranda of Mr Letsholo were supported without more by Ms Noko. In addition, she provided further reasons in her memorandum on CAS 466, in which she said the following of her decision not to prosecute in CAS 781:

'Case 781 was dealt with by the Specialised Commercial Crime Unit (SCCU) in Durban and disposed of recently with a decision not to prosecute anyone as there was no evidence to prosecute any person with any offence . . . It appears Mr Panday and Col. Madhoe featured nowhere in the 781 then as the focus was on the PC.'

[41] *Democratic Alliance* para 52.

If one is looking for irrationality in the decision-making process in this matter, this is the place to find it. Ms Noko here stated that she had decided not to prosecute 'as there was no evidence to prosecute any person with any offence'. This simply ignores a 400-page report by forensic accountants and a 'trove' of documents which allegedly provide evidence of the involvement of Mr Panday in the offences. To say that 'Mr Panday and Col. Madhoe featured nowhere in the 781' beggars belief.

[58] Mr Abrahams did not only have these memoranda before him when deciding not to wait for the intercepted material before reviewing the decision of Ms Noko. He had requested, and been furnished with, a report by Ms Jiba addressing both CAS 781 and CAS 466. This refers to the fact that the intercepted information arising from the authorisation had appropriately been placed in the docket in CAS 466 and not CAS 781. Not only that, but Ms Jiba states that the information placed in CAS 466 'is quite revealing and definitely supports the available evidence' in CAS 466, not in CAS 781. As regards CAS 781, she indicates that the initial direction and an Information Note, which had been submitted to General Dramat, had been received and were annexed to her report. These placed the interception operation in perspective as having arising during the investigation of CAS 781 but as having had a bearing solely on CAS 466 since it dealt with alleged threats against investigators and not with the merits of the investigation of the FIFA World Cup corruption being investigated under CAS 781. She noted documents which she said 'support allegations of the benefits paid by Mr Panday' in the latter docket. In general, she indicated that documentary evidence supporting the charges was contained in it. She recommended that the three suspects in CAS 781 'be prosecuted for fraud and corruption as charged as a prima facie case has overwhelmingly been made against them.'

[59] In addition to the memoranda of Mr Letsholo, Ms Noko and Ms Jiba, Mr Abrahams had a further one from Mr Mzinyathi dated 24 November 2017. This addressed those memoranda, the 55-page set of representations of Mr Panday, and the evidence in the docket. Mr Mzinyathi, too, supported prosecution. Also, Mr Abrahams had the detailed memorandum and analysis of IPID. Apart from Mr Letsholo and Ms Noko, none of the others regarded the intercepted material as relevant to CAS 781. Prior to making the decision, Mr Abrahams also had before him a record running to some 3790 pages. These included 'thousands of pages of invoices' many statements of witnesses and the PwC report which analysed the financial documents and concluded that the documents supported charges of fraud and corruption against the three suspects.

[60] The simple question is whether the means used by Mr Abrahams of obtaining the reasons of Ms Noko, representations from Mr Panday, input from Ms Jiba and Mr Mzinyathi and the docket containing the thousands of documents and the PwC report can be said not to have related to the end of arriving at a decision to prosecute in CAS 781. Quite apart from resolving the matter on the basis of the *Plascon-Evans* rule, in the light of all that was before him, there was an ample basis for Mr Abrahams to disregard the unfounded and irrational assertions of Mr Letsholo about the intercepted material. That being the case, it cannot be said that Mr Abrahams ought to have insisted on receiving the intercepted material prior to making the impugned decision.

[61] In the light of the test for rationality applicable in the present matter, Mr Panday has not shown that Mr Abrahams did not use means appropriate to the end of reviewing the decision of Ms Noko. All of the

material before him roundly contradicted and showed up the lack of rationality of the reasons given by Mr Letsholo and Ms Noko for the decision not to prosecute. On the basis of the prosecution policy referred to above, Mr Abrahams could conclude that the decision to prosecute in CAS 781 was 'well-founded upon evidence reasonably believed to be reliable and admissible'. Whether that material will prove to be sufficient in any prosecution is a matter for a trial court to determine. This application deals only with an attack on the legality of the impugned decision. As a result, the application cannot succeed.

[62] Mr Panday conceded at the hearing that, on the papers and taking into account the factual disputes, this would be the correct outcome. As a last-minute submission, however, he requested that if the matter were to be determined on that basis, this issue should be referred for the hearing of oral evidence. This is inappropriate in the present matter. As has been shown, regardless of the factual disputes, Mr Abrahams had before him all of the above material. It is clear that the reports of Mr Letsholo, adopted without more by Ms Noko, were at best seriously deficient and at worst beset by irrationality. This is particularly so concerning the assertions in them concerning the intercepted material.

[63] What, then, of the allegations of Mr Panday that the impugned decision will result in his not being accorded a fair trial? This rests on his version of the September meeting. Apart from this not forming the basis of a decision in this matter, it has been held that whether the right to a fair

trial has been infringed is a matter best decided by a trial judge.[42] In *Sanderson v Attorney-General, Eastern Cape*,[43] Kriegler J said:

'Barring the prosecution before the trial begins . . . is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused.'

Courts have repeatedly stressed that issues arising from the gathering of evidence should be dealt with by trial courts and that pre-trial applications should generally be discouraged. In *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others*,[44] this was strongly expressed:

'I nevertheless do agree with the prosecution that this Court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5). Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later.'[45]

[64] This applies equally to the present matter. It differs from that of *S v Mushimba en Andere*,[46] on which Mr Panday relies, in at least two

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[42] *Key v Attorney-General, Cape Provincial Division and Another* [1996] ZACC 25; 1996 (4) SA 187; 1996 (2) SACR 113; 1996 (6) BCLR 788 (CC) para 13.

[43] *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1998 (1) SACR 227; 1997 (12) BCLR 1675 para 38. This admittedly dealt with a matter in terms of the Interim Constitution where it was claimed that inordinate delay should be visited with an order quashing charges but the principle holds good.

[44] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1; 2008 (2) SACR 421; 2008 (12) BCLR 1197 (CC) para 65.

[45] The reference is to s 35(5) of the Constitution which provides:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

[46] *S v Mushimba en Andere* 1977 (2) SA 829 (A).

respects. In that matter, a trial had been held and a special entry made. The present application seeks to deal with such matters before any trial is held. Secondly, in that matter, the facts differ materially. The headnote to the case summarises the issue accurately:

'[A] member of the staff of the firm of attorneys who defended the appellants at the trial, had given copies of statements by the appellants and defence witnesses and other confidential and privileged documents to the Security branch of the Police whilst the investigating officer in charge of the case was a member of the Security Police. Thereafter the statements and documents were given to the investigating officer who gave instructions to the State counsel. The State counsel was, however, unaware of the irregularities which had occurred.'

On the facts of this application, no such privileged material has been obtained and if it emerges that it was so obtained, a trial court can best deal with it.

[65] The second ground of the present matter concerns the low threshold of a rationality enquiry attendant on a legality review. As I have said, no case has been made out that the impugned decision lacked rationality. This means that both of the *Masetlha* features were satisfied by Mr Abrahams. The application must be dismissed. As to costs, there was no issue that costs of two counsel are warranted where they were employed. And it was agreed that the reserved costs should be made costs in the cause.

[66] In the result,

1. The application is dismissed with costs.
2. The application to strike out is dismissed with costs.
3. All reserved costs will be costs in the cause.
4. The costs orders in paragraphs 1 to 3 hereof shall include the costs consequent on the employment of two counsel where this was done.

GORVEN J

DATE OF HEARING:	14 August 2020
DATE OF JUDGMENT:	16 September 2020
FOR THE APPLICANT:	JJ Gauntlett SC QC (with him JE Howse SC) instructed by Kershnie Govender Attorneys, locally represented by Bhamjee Attorneys.
FOR THE RESPONDENT:	M Osborne instructed by The State Attorney, locally represented by NP Zulu Attorneys. Heads prepared by H Epstein SC (with him M Osborne & T Govender).