

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NUMBER: 062027-2022

DATE OF HEARING: 12 January 2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
<u>2023/1/12</u>	<u>[Signature]</u>
DATE	SIGNATURE

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Applicant

and

JACOB GEDLEYIHLEKISA ZUMA First Respondent

THE DIRECTOR OF PUBLIC PROSECUTION, Second Respondent

KWAZULU NATAL

NATIONAL PROSECUTING AUTHORITY Third Respondent

THE REGISTRAR OF THE HIGH COURT; Fourth Respondent

SOUTH AFRICA, GAUTENG LOCAL

DIVISION, JOHANNESBURG

Delivery: This judgment has been delivered orally on 16 January 2023 in court and was thereafter uploaded to court online, and further communicated to the parties by email.

JUDGMENT

Summary: Urgent application – Part A and B. Part A concerns an interim interdict, pending the outcome of the hearing in Part B. Application to interdict the respondents from proceeding with a private prosecution set down to commence on less than a week from the hearing of the urgent application. Applicant accused of either being guilty as an accessory after the fact to a crime allegedly committed by the Public Prosecutor and a journalist in publicising the medical record of the respondent in contravention of section 41(6) of the Criminal Procedure Act or defeating the ends of justice. Respondent complaining that in publicising his medical record his dignity, privacy and bodily integrity and security were compromised.

Part A focused on whether the applicant has established urgency, *prima facie* right, absence of alternative appropriate effective relief, and balance of convenience in favour of the applicant.

Jurisdiction – the respondent contended that it is inappropriate for a civil court to entertain an issue that is already before a criminal court. The court rejected the proposition and found that there is clear authority that a party charged by a private prosecutor may approach and seek a relief to protect his or her rights in the civil court.

Private prosecution- The principles governing private prosecution and the requirements for a *nolle prosequi* certificate as contemplated in section 17 (2) of the CPA considered.

Interim interdict-The requirements of an interim interdict considered and applied.

Urgency- The matter regarded as urgent and thus the relief sought in the notice of motion granted.

The Court (Sutherland DJP, Molahlehi J and Senyatsi J)

[1] This is an urgent application for an interim interdict pending a decision in a hearing on the main controversy. That main controversy, stripped of the details, is about whether the first respondent, Mr Zuma, the ex-president of the Republic, has title to

bring a criminal prosecution against the applicant, Mr Ramaphosa who is the incumbent President of the Republic. (The other respondents are the Director of Public Prosecutions, Kwazulu-Natal and the National Prosecuting Authority who are referred by such names. Mr Zuma shall be referred to as the respondent) The interim interdict is sought to suspend any further steps being taken to continue with the private prosecution, including the requirement that the applicant is compelled to appear before a criminal court on 19 January 2023, less than a week away.

- [2] The charge alleged by the respondent against the applicant is that he is either guilty as an accessory after the fact to a crime committed by Adv Downer SC and a journalist, Ms Maughan, or of obstructing the course of justice by facilitating them evading justice. Adv Downer and Ms Maughan are alleged to have contravened section 41(6) of the National Prosecuting Authority Act 32 of 1998 (NPA Act) by publishing confidential information about the respondent's medical history. They have been charged accordingly, at the instance of the respondent, qua private prosecutor, but that trial has not yet begun. The respondent had made a demand, dated 18 August 2021, that the applicant cause an urgent enquiry to be instituted into alleged prosecutorial misconduct by Adv Downer in which conduct he had allegedly connived with Ms Maughan to publish confidential information. The applicant's conduct, which allegedly constitutes the *actus reus* of the crimes he supposedly committed, is that from 21 August 2021 the applicant by omission or commission enabled the principal perpetrators to evade liability for the crime of contravening section 41(6) of the NPA Act which, in turn, injured the dignity, privacy, bodily integrity and security of the respondent.

- [3] This court is not, at this time, called upon to pronounce on the merits or demerits of the contending views on that question. The relief sought is in accordance with the practice of this court divided into parts A and B. The Main case is addressed in the relief sought in Part B. It is part A which is before us at this time in which the pertinent issues are, straightforwardly, whether a case is made out to interdict the further proceedings in the envisaged private prosecution pending a decision on that question in an orderly hearing in part B, to be set down in due course. Nothing which is stated in this judgment is intended to prejudge the outcome of the hearing in the main controversy.
- [4] The five elements of the relief sought are plain: urgency, a prima facie right, albeit open to some doubt, harm, the absence of alternative appropriate effective relief and the balance of convenience favouring the applicant. The law on these elements is trite and require no elaboration.
- [5] In addition, the jurisdiction of this court to consider the relief at all is questioned. The debate on that point ventilated two rival propositions. The respondent contends that the court has no jurisdiction because it is inappropriate that a civil court addresses an issue which is before the criminal court. The argument was advanced that if the applicant wishes to challenge the title of the respondent to bring a private prosecution, he should raise that point in the criminal trial court on 19 January 2023. Section 106 (h) of the Criminal Procedure Act 51 of 1977, (CPA) specifically mentions that a plea of no title by a private prosecutor can be pleaded. It is contended that this explicit remedy in the CPA, is part and parcel of the scheme of the division between the civil

process and the criminal process and a clear distinction should be maintained between them. Moreover, we were reminded that the courts have a well-established aversion to litigious challenges to the process of court ostensibly to paralyse the progress of a given case in what has come to known under the rubric of the Stalingrad defence. Further, we were directed to the remarks of Wallis JA in the *Moyo and Sonti case* (*Moyo v Minister of Justice and Constitutional Development & Others; Sonti v Minister of Justice and Constitutional Development & Others* 2018 (8) BCLR 972 (SCA) at para [157]; we emphasize the critical text:

‘In section 35 the Constitution guarantees a range of rights to arrested, detained and accused persons. Section 35(3) guarantees to all accused persons the right to a fair trial. That is secured in practice by the provisions of the Criminal Procedure Act 51 of 1977 (the “CPA”). The appellants do not seek to impugn the provisions of the CPA in any way, yet they are seeking to assert their fair trial rights before a civil court. That should give pause for thought. Why are issues germane only in the context of criminal proceedings being canvassed and determined in civil proceedings and not in the constitutionally compliant forum, and in accordance with the constitutionally compliant statute, provided for the adjudication of criminal cases?’

[6] On the other hand, there is clear authority for contrary proposition that a party who is charged by a private prosecutor may indeed approach a civil court for relief as is sought in this case. *Solomon v Magistrate, Pretoria* 1950 (3) SA 603 (T) at 607 is the first of several decisions cited to us which indicate that to be so. After having considered the contention, the court in *Solomon* addressed the proposition at pp 606 – 608. We emphasise the critical passages:

“[counsel] maintained that under these provisions the grounds upon which this application was based were left to the determination of the Court in which the prosecution was laid, and fell to be decided in that Court after the hearing of evidence. The provisions referred to were intended to be exhaustive and they excluded the jurisdiction of this Court to intervene. I was unable to agree to this view, and accordingly overruled the preliminary objection, for these reasons -

I can find in the sections relied upon no evidence that the provisions relating to the costs of unfounded and vexatious prosecutions or the title of the prosecutor to bring the proceedings, were intended by the Legislature to be exhaustive and to exclude any right to invoke the assistance of the Supreme Court, as the applicant now does. Mr. Retief maintained (I think in support of his contention that the provisions referred to were exhaustive) that under secs. 17 and 18 of the Act the private party who had obtained the *Attorney-General's* certificate was given an absolute right to prosecute, of which he could not be deprived by the Court. No doubt the sections referred to do bestow a right to prosecute, subject to the necessary conditions, but I cannot take the view that that fact excludes the jurisdiction of the Court to interfere on proper cause. If Mr. Retief's contention were correct, this Court would have no power to intervene even though it were shown in the clearest possible manner that the party who had instituted the private prosecution had no interest whatever in the outcome of the trial and had embarked upon it for some ulterior motive, such for example as to prevent a business competitor from leaving the country on his lawful business, or to delay him in so doing. In such a case, if the prosecution were launched in a superior Court, I do not consider that it could be held that the remedies provided in the sections of the Act to which Mr. Retief referred were exhausted. The taking out of the summons would clearly be an abuse of the process of the Court, in that it had been undertaken not with the object of having justice done to a wrongdoer, but in order to enable the prosecutor to harrass the accused or fraudulently to defeat his rights (see *King v Henderson* (1898, A.C. 720); cf. *Berman v Brimacombe* (1925 TPD 548)). The process of the Court, provided for a particular purpose, would be used not for that purpose, but for the achievement of a totally different object, namely for the oppression of an adversary. The Court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings (*Western Assurance Co v Caldwell's Trustee* (1918 AD 262); *Corderoy v Union Government* (1918 AD 512 at p. 517); *Hudson v Hudson and Another* (1927 AD 259 at p. 267)), and though this power is usually asserted in connection with civil proceedings it exists, in my view, equally where the process abused is that provided for in the conduct of a private prosecution. In such a case as I have postulated, therefore, this Court would in my opinion by virtue of its inherent power be entitled to set aside a criminal summons issued by its own officials or to interdict further proceedings upon it. It is also by virtue of its inherent power that the Court interferes to restrain illegalities in inferior courts either by way of interdict or *mandamus* or by declaratory order, as it has on occasion done (see, e.g., *Rex v Boon* (1912 TPD 1136); *Schlosberg v Attorney-General* (1936, W.L.D. 59); cf. *Joseph Baynes, Ltd v Minister of Justice* (1926 TPD 390), per STRATFORD, J., at p. 398; *Rascher v Minister of Justice* (1930 TPD 810)). I have no doubt whatever that in a similar case the Court would have power to stop a private prosecution in an inferior court.

Mr. Retief referred me to *Rex v Diab* (1924 TPD 337 at p. 341), in which MASON, J.P., said that the right and duty of prosecution was absolutely under the control and management of the *Attorney-General* and, so long as he complied with the provisions of the law with reference to prosecutions and trials the Court was not entitled to interfere. He argued that similarly a private prosecution was absolutely under the control and management of the private prosecutor and that the Court could not intervene. The case of the private prosecutor is, however, different from that of the *Attorney-General*, in that the title of the former to prosecute is conditional upon his possession of such an interest as is described in the Act, and the Court is therefore entitled to inquire into the question whether he has such an interest or not."

[7] Since then the proposition has been affirmed in the Constitutional era in *Van Deventer v Reichenberg* 1996 (1) SACR 119(C), *Nedcor Bank Ltd v Gciltshana* 2004 (1) SA 232

(SECLD) and in *Nundalal v DPP, KZN [2015] ZAKZPHC 25 (8 May 2015)*. It therefore plain that, upon such authority, section 106(h) of the CPA cannot be construed to be the exclusive route by which a person aggrieved by a private prosecution can challenge the title of the private prosecutor. Moreover, the proposition advanced about avoiding cross contamination between the civil courts and civil process and the criminal courts and criminal process is overstated. In truth there is no substantive distinction between a criminal court and a civil court – there is only one court and the streaming of criminal cases and of civil cases to different judges is merely an organisational convenience. There are no distinct jurisdictional competences. Ancillary thereto it follows that the process of such a court is also seamless. No question can arise of a trespass into the work of another court with a distinct jurisdiction. It is these respects that the present case does not evoke the suspicion posed by Wallis JA in the *Moyo and Sonti Case*.

[8] Accordingly, to sum up, the notion that the only route of relief a party can invoke to contest the title of a private prosecutor is to raise the question of title as a plea as mentioned in section 106 (h) of the CPA is misconceived. In any event the very appearance of the applicant before the criminal court is what is sought to be prevented by the relief sought in this urgent application, premised on the contention that to appear in the criminal court per se, would be to submit to an unlawful intrusion on the rights to freedom of the applicant, if the private prosecution is unlawful for want of proper authority.

[9] Herein lies also the key factor that demonstrates the urgency relied upon in this matter. The trial date is 19 January 2023, less than a week away. There were other

grounds of urgency relied upon initially, but one alone is sufficient. It is axiomatic that if the aim is to avoid having to appear, even if merely for a formal postponement, the matter before this court is urgent. To reiterate, the nub of the applicant's case is that to submit to the summons is a violation of his rights to freedom because it is an unlawful summons issued by a person without title to prosecute privately.

[10] It is alleged that the urgency is self-created but the premise for that contention is specious to say the least. The papers detail the progress of the parties' exchanges from the moment the summons was served. First there was an exchange about a defective summons. The respondent denies the defect but chose, in any effect, on 21 December 2022 to file a further Summons attaching the *nolle prosequi* he relies upon, this act being described by him as 'supplementary'. This matter was enrolled for hearing on 10 January 2023 - 20 calendar days thereafter. There are no grounds for criticism evidenced at all.

[11] The critical question for decision is whether there is an apparent right, even if only *prima facie*, that is threatened. Again there is a plethora of contentions in this regard. However, again, shorn of the details and nuances in these over-lengthy papers, the *prima facie* right which is shown is straightforward.

[12] In our legal system the only agent that can lawfully bring a criminal prosecution is the state. The NPA is the organ of state that manages prosecutions. There is an exception to that exclusivity. In a specific instance when the state declines to prosecute a party against whom an aggrieved person has lodged a complaint with the police, a

certificate may be obtained from the NPA to open the door to a private prosecution by a person who can show that they were harmed by the commission of the alleged crime alleged in the police complaint. That certificate is usually known by its Latin sobriquet, a *Nolle Prosequi*. The process is closely regulated by section 7 of the CPA. The relevant portion reads thus; we emphasise the critical provisions:

“Private prosecution on certificate *nolle prosequi*

- (1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence-
 - (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;
.....
may....institute and conduct a prosecution in respect of such offence....
- (2)
 - (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.
 - (b) The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).
 - (c) A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process referred to in paragraph (a) within three months of the date of the certificate.
 - (d)”

[13] Accordingly, the authority to conduct a private prosecution is one granted to a private person within the four corners of the *nolle prosequi*. No person is required to subordinate themselves to a private prosecution except where the state has issued a valid *nolle prosequi* which relates to a crime allegedly committed by that person. A person who, in the absence of a *nolle prosequi* relevant to a given person, issues a summons to bring that person before a criminal court, violates that person’s rights to personal freedom. There may be several other respects in which such a person’s other

rights may be further violated, but key to any expression of any relevant right being violated by an unlawful private prosecution is that of personal freedom, which is a right guaranteed by our constitution and implicated in sections 9, 10 and 12 of the constitution. These sections guarantee equality, dignity and freedom and security of the person. Further, part of the argument advanced by the applicant also invokes the right to just administrative action as dealt with in section 33 of the Constitution, as shall be alluded to hereafter.

[14] In this case the title of the respondent to bring a private prosecution against the applicant is challenged on a number of grounds. The critical proposition is that the *nolle prosequi* upon which the respondent relies is either inapplicable to the applicant, or, is unlawful if it can be properly construed to indeed be applicable to the applicant. Some of the legal issues raised are novel. We list the issues which a court in due course shall have to decide.

14.1 Does the text of the *nolle prosequi*, properly interpreted, relate to the applicant?

14.2 Is the text too vague to be a valid certificate? It is contended that a *nolle prosequi* should name the persons who the NPA decided not to prosecute in order to be valid. On the papers two *nolle prosequi* were issued. The first named Adv Downer. Upon demand to the NPA by the respondent who wished to also charge Ms Maughan, a revised document was issued omitting his name and stating “any person.” Whether a revision in this form is proper must be decided.

14.3 It is claimed that because the charge levelled, as an accessory after the fact or of obstructing the course of justice is a crime that could be committed only after the principal crime had occurred and the *nolle prosequi* refers only to the *date* of the principal crime, ergo, the *nolle prosequi* could not have contemplated the applicant.

14.4 The author of the *nolle prosequi*, the NPA, has denied, for what that is worth, that it related to the applicant. Whether what the author states is relevant or admissible is itself contested. The NPA are yet to answer fully and it has indicated it shall do in relation to Part B of the relief sought.

14.5 The question of whether the *nolle prosequi* can be interpreted to include the applicant depends in part on whether the police complaint mentions the applicant, as contemplated in section 7(2) of the CPA. It is common cause that the applicant is referred in to the formal complaint but the significance of that reference is disputed. The respondent contends that the mere mention of his name is enough. The applicant's case is that the mention of his name is not in relation to a *complaint articulated against him*, but rather mere narrative which alludes to the fact that the applicant was conducting an enquiry into the publication of the confidential information. It is contended that if that is the correct import of the reference, the applicant is not included as a potential accused in the police complaint

14.6 It is contended that is not apparent that the state ever applied its mind to the crimes of which the applicant is now alleged to have committed, and thus, having

regard to section 7(2) of the CPA the *nolle prosequi* could not be understood to refer to him. As already stated, the NPA have yet to file an affidavit.

14.7 The applicant contends that the issue of such a *nolle prosequi*, being administrative action, required that he be afforded the benefit of *audi alterem partem* as contemplated in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in order for it to validly apply to him. It is common cause that the applicant was not afforded a chance to be heard before the issue of this *nolle prosequi*. There is authority in *Nandalal*, referred to earlier, for the proposition that the issue or refusal of a *nolle prosequi* is indeed administrative action. Whether *audi alterem partem* is indeed a requirement for the issue of a *nolle prosequi* is a novel legal issue which has yet to be decided.

14.8 Is the *actus reus* alleged, i.e. neglecting to respond effectively after having been asked in his capacity as President of the Republic to cause an enquiry to be launched into the conduct of the NPA and of the Media for publicising confidential information actually a crime? If not, it is argued that no *nolle prosequi* could be validly issued in respect thereof. Implicated herein is the question of whether, in our law, state officials who are neglectful of duties are liable to criminal sanctions. The respondent contends that they are. This is a proposition that is both novel and radical with extremely wide-ranging implications for the entire state apparatus.

[15] Were one or more of these grounds challenging the validity or applicability of the *nolle prosequi* to be established at the forthcoming hearing, the result would be to

invalidate the summons served on the applicant. What is sought by the applicant is a chance to do that. None of these claims are implausible on their own terms, even if they are ultimately found to be incorrect or inadequate to invalidate the private prosecution.

[16] Therefore, in our view a prima face case of a right to personal freedom being violated has been shown.

[17] Is there any material harm? It was argued that the harm of appearing in a criminal court on 19 January was not material. This contention misses the point. The harm lies not in the temporary inconvenience of physically attending a hearing, if only for a formal postponement. The critical harm concerns a fundamental constitutionally guaranteed right to personal freedom. That value, which is foundational to our constitutional order may never be treated lightly. Our history instructs us that it is a matter of pride that South Africans value and assert our freedom above all other considerations in the face of whatever adversity we chance upon to meet. Our law must guard that right and its exercise unreservedly.

[18] Among the contentions advanced as to why the threshold for an interdict had not been cleared was that the decision in the *OUTA* case. (*National Treasury & others v Opposition to Tolling alliance & Others 2012 (6) SA 223 (CC)*) applied to a decision by a private prosecutor. The *OUTA* case held that where it is sought to interdict a statutory authority from performing a function within its remit a higher threshold existed than when seeking such relief against a private litigant. This approach

safeguards organs of state from being paralysed by litigation which might damage the broader public interest. Thus, only in an exceptional case should an interdict be granted against an organ of state. The contention advanced to us was that a private prosecutor exercises statutory authority and must be treated alike. This is not correct. The respondent's contention is untenable. The legislative scheme in terms of which the statutory authority in which the power to conduct the prosecution of persons is vested, and in a given case, declines to prosecute must not be understood to be a delegation of statutory authority to the private prosecutor. A private prosecution is properly so called – private not public. The *OUTA case* cannot be applicable.


[19] Is there a viable alternative to this interim interdict? Plainly there is not. This we take to be axiomatic, as it would require the applicant to appear before a criminal court and by so doing implicitly submit to a process which he claims is unlawful. Were the applicant to succeed later to have the private prosecution declared invalid, the harm of the submission to unlawful action cannot be undone.

[20] As to the balance of convenience, the respondent suffers no harm if there is a delay in the private prosecution in order to debate the controversies alluded to in this judgment. As mentioned earlier, the trial of the alleged principal offenders has yet to begin. Their conviction is a necessary condition for criminal liability by the applicant.

[21] The costs were hotly debated. However, it is unnecessary in this urgent hearing to address the costs which shall be reserved for a decision at the hearing of the main case.

[22] An order therefore issues as follows:

- (1) The application is urgent and the ordinary forms and service provided for in the Uniform Rules of Court are dispensed with.
- (2) Pending the final determination of Part B, the first respondent is interdicted from taking any further steps to give effect to the *nolle prosequi* certificates of 21 November 2022 and 6 June 2022 (“the certificates”) and/or the summonses issued by the Registrar on 15 and 21 December 2022 (“the summons”), or to pursue the private prosecution under case number: 059772/2022 against the applicant in any way.
- (3) The costs occasioned by this urgent application shall be reserved for decision at the hearing of Part B of this case.
- (4) The parties’ representatives are directed to immediately approach the office of the Deputy Judge President, Johannesburg, to arrange a case management meeting to set an agreed date for the hearing of part B.



for **The Court**
(Sutherland DJP et Molahlehi and Senyatsi JJ)

Heard: 12 January 2023

Judgment: 16 January 2023

Appearances:

For the Applicant:

Adv N Maenetje SC,

with him, Adv N Muvangua and Adv P Sokhela

Instructed by State Attorney, Johannesburg.

For the 1st Respondent:

Adv D Mpofu SC,

with him, Adv S Moela, Adv Mavhungu and Adv K Pama-Sihunu

Instructed by WN Attorneys Inc

For 2nd and 3rd respondents

Adv T Mathibedi SC,

with him, Adv T De Klerk

Instructed by the State Attorney, Pretoria.