HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

Case No.: 5722/2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED: NO	
18 November 2024	[redacted]
DATE	SIGNATURE

In the matter between:

SELAPE THATO MATHUNYANE First Applicant

FINKY SONIA NGOMANE Second Applicant

And

BEN HAMILTON MOKOENA Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 18 November 2024 at 10:00.

Date heard: 12 November 2024

JUDGMENT

BHENGU AJ

[1] This is an opposed urgent application brought by the applicants seeking an order setting aside the summons instituting private prosecution and an order interdicting and restraining the respondent from reinstituting similar proceedings in the future. The issue before the court is whether the private prosecutor satisfied the requirements for private prosecution in terms of section 7(1)(a) of the Criminal Procedure Act, 51 of 1977 ("the CPA") and whether the summons should be set aside due to the noncompliance.

Background facts

[2] In 2022, the applicants were charged with FRAUD under Middleburg Case number 177/2/2022. The charge emanated from an allegation against the applicants that they misrepresented themselves as duly authorized members of the Middleburg & Hendrina Residents Front political party ("the Party") during a local government election. They allegedly delivered an amended election list to the IEC which was not authorized by the Executive Committee of the Party.

[3] On 23 July 2024, the Acting Director of Public Prosecutions, Mpumalanga Division of the High Court declined to prosecute the applicants. A *nolle prosequi* certificate was issued in terms of Section 7(2)(a) of the CPA.

[4] On 22 October 2024, the respondent in his capacity as a private prosecutor issued a summons in the Regional Court, Middleburg instituting private prosecution against the applicants in terms of section 7(1) of the CPA. According to the charge sheet, the applicants were charged on three counts, namely: - FRAUD, Contravening section 88e(i), and section 89(1)(a) and (b) of the Electoral Act, 73 of 1998. It is common cause that the applicants are summoned to appear at the Regional Court, Middleburg on the morning of 22 November 2024.

[5] The applicants approached this court on an urgent basis seeking an order setting aside the summons instituting private prosecution and an order interdicting and restraining the respondent from reinstituting, similar proceedings in the future.

[6] The respondent is opposing the application on three grounds. That the application lacks urgency, noncompliance with the provisions of section 6 of Promotion of Administrative Justice Act 3 of 2000 (PAJA) and/or Uniform Rule 53, and non-joinder of the National Director of the Public Prosecutions and the Clerk of the Criminal Court.

Urgency

[7] Counsel for the respondent conceded that a frontal challenge to the private prosecution has been allowed by the Constitutional Court. He however contended that the applicants brought this application to prevent their appearance in court on 22 November 2024. He submitted that to prevent the first appearance before a court on its own does not render the matter urgent. He contended that there are other suitable alternative remedies available in law that can provide the applicants sufficient redress than approaching the court on an urgent basis. The alternative remedies referred to by the respondent includes a request for postponement on the first appearance to allow this process to be brought before court in the ordinary cause. The second alternative remedy is for the applicants to bring an application to suspend the process of the private prosecution pending the review application in the ordinary course. He submitted that the matter should therefore be struck off from the roll for lack of urgency.

[8] In the founding affidavit deposed to by the first applicant, he stated the following under sub heading urgency: -

> "I submit that to appear in the Criminal Court would be to submit to an unlawful intrusion of the right to freedom of the second applicant and I, because the private prosecution is unlawful for want of proper authority.

> …The second applicant and I have the right not to be subjected to an unlawful private prosecution process. This application is brought on an urgent basis to protect and vindicate the rule of law and to protect us from unlawful, unconstitutional, and invalid private prosecution…
>
> The second applicant and I have no other suitable remedy in law but to approach this Honorable Court on an urgent basis to prevent our appearance before the Criminal Court on 22 November 2024.
>
> …we further intend to demonstrate intra that the respondent has no title to prosecute us, and that the private prosecution does not comply with the jurisdictional requirements as set out in section 7 and section 9 of the Criminal Procedure Act. I contend that the private prosecution is unlawful, invalid, and unconstitutional, which renders this application sufficiently urgent.

[9] It appeared from the papers and the legal argument by the applicants' counsel that the main ground relied upon to satisfy the requirement for urgency is that the private prosecutor lacked the necessary *locus standi* to institute the private prosecution in terms of section 7(1)(a) of the Act. If the court finds in favour of the applicants and set aside the summons, then that will render the appearance in the Regional Court on 22 November 2024 unlawful.

[10] In considering the question of urgency I was referred to a decision in *Maughn v Zuma*[1] where the full court considered chronology of the history of the proceedings and concluded that the reasons for launching the application on an urgent basis were justifiable. In *casu* the summons was issued on 22 October 2024. The applicants are summoned to appear in the regional court on 22 November 2024. This urgent application was launched on 01 November 2024. This shows that there was no delay in instituting these proceeding. Counsel for the respondent conceded that the applicants' constitutional right to personal freedom and security will be affected in the event that they fail to appear in court on 22 November 2024, in which event, they may be arrested. Having regard to the fact that the

[1] Maughan v Zuma (Campaign for Free Expression and others as amici curiae) and a related matter [2023] 3 All SA 484 (KZP) at para 23

applicants' constitutional rights are threatened, I am satisfied that they meet the requirements for urgency.

Non-Compliance with PAJA and/or Uniform Rule 53

[11] The respondent contended that the only basis on which the applicants could set aside the summons by a review process is governed by the provisions of section 6 of PAJA or alternatively in terms of the provisions of Uniform Rule 53. The respondent contended that the application does not comply with section 6 of PAJA, in that there is no record filed with this court as to the reasons for the clerk of the court to issue summons and that they also failed to produce a record from Director of Public Prosecutions, ("DPP") for purposes of evaluating the review. In this regard, he relied on *Nundalal v The Director of Public Prosecutions KZN and Another*[2] where the full court held that whenever administrative action is challenged, the starting point is to ascertain the reasons for the decision. He also relied on the SCA decision in TETRA Mobile Radio v MEC, Department of Works[3] where the SCA held as follows:

> "the Appeals Tribunal must have before it the same information that was before the Procurement Committee in order to provide a fair hearing to the aggrieved party"

[12] The applicants, in response contended that it is evident from the papers that the applicants are in possession of all the required documents upon which they rely for the relief sought. They contended further that there was no need for them to apply the provisions of Rule 53(4) to obtain additional information when they already have the relevant information in their possession. The applicants referred to the Constitutional Court decision in *Helen Suzman Foundation v Judicial Service Commission*[4] where it was held that: -

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[2] Nundalal v Director of Public Prosecutions KZN and Other (KZP) (unreported case no AR723/2014, 8-5-2015) (Pillay J) at para 12).
[3] Tetra Mobile Radio (Pty) Ltd. v Member of the Executive Council of the Department of Works and Others 2008 (1) SA 438 (SCA) at para 15
[4] Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC)

"The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings".

[13] I consider that the applicants are not challenging the decision of the DPP in declining to prosecute or the validity of the *nolle prosequi* certificate of the DPP. The applicants are also not challenging the action of the clerk of court in issuing the summons. I am of the view that the record forming the basis of the DPP's decision to issue a *nolle prosequi* is irrelevant in the absence of a challenge to the decision. I further agree with the applicants' contention that the clerk of the court is not a decision maker when issuing summons. The respondent's point in limine in this regard must fail.

Non-Joinder

[14] The respondent contended that the clerk of the criminal court and/or the DPP all have a material interest in the outcome of the matter. The respondent submitted that failure to join these parties constitutes a material defect in the proceedings and justifies a dismissal of the application.

[15] In response, the applicants counsel contended that once the DPP has issued a *nolle prosequi* certificate, he ceases to be involved in the matter. The decision to privately prosecute in terms of section 7(1)(a) is entirely that of the private prosecutor. The applicants submitted that they do not challenge the validity of the *nolle prosequi* certificate and therefore there is no need to cite the DPP and he has no interest in the matter after issuing the *nolle prosequi* certificate. The applicants also referred to Nundalal[5] *supra* where Pillay J stated the following regarding this issue: -

"Whether the private prosecutor fulfills the jurisdictional requirements is not the DPP's concern. Nor is it her concern what the person requesting the certificate plans to do with it. For employment or other purposes he could request it simply as proof that he is freed from prosecution".

[5] Nundalal at para 21).

[16] Similarly, in response to the challenge for the non-joinder of the clerk of the criminal court, the applicants contended that there is no obligation to the registrar or clerk of the court to check the validity of the *nolle prosequi* certificate. He contended that all the relevant parties have been cited.

[17] It is trite that the principal rule with regards to joinder and non-joinder of parties is that interested parties who may be prejudiced by an order issued by a court should be joined in the proceedings. In *Judicial Service Commission and Another v Cape Bar Council and Another*[6] the SCA stated the following regarding direct and substantial interest: -

> "If a party has a direct and substantial interest in any order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings unless the court is satisfied that he has waived his right to be joined. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder objection".

[18] In the absence of a challenge of the decision of the DPP declining to prosecute or the decision of the criminal court clerk in issuing summons I am satisfied that neither the DPP nor the clerk of the criminal court has a vested interest on the outcome of these proceedings. The appointed private prosecutor, Mr Brandmuller, happens to be the respondent's attorney in these proceedings. I therefore find that all the interested parties are before court and that the challenge on the ground of nonjoinder should fail.

Legal Framework

[19] Private prosecution is provided for in terms of section 7 of the Act which reads as follows: -

> (1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence-

[6] Judicial Service Commission and Another v Cape Bar Council and Another [2013] 1 All SA 40 (SCA), 2013 (1) SA 170 (SCA) at [12].

(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, subject to the provisions of section 9 and section 59 (2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

[20] The full court in the *President of the Republic of South Africa v Zuma and Others*[7], referred to a Constitutional Court decision in *Moyo and Another v Minister of Police and Others*[8] where the Constitutional Court found that in appropriate circumstances, the interest of justice may be better served by allowing a frontal challenge than subjecting an accused person to an unlawful and unconstitutional prosecution. The court in The President of the Republic of South Africa v Zuma matter, further stated the following principle regarding frontal challenge to private prosecution: -

"There is no absolute rule against a frontal challenge to a prosecutor's title to prosecute. A frontal challenge ought to be discouraged and pertinent issues left to the trial court, where it lacks merit and only mainly serves to delay the commencement of the criminal trial. It ought to be allowed where a litigant wishes to challenge a clearly unlawful process in order to enforce his or her fundamental rights".[9]

[21] I now turn to deal with the applicants' grounds for challenge to the private prosecution.

Locus Standi

[22] It appeared from the applicant's founding papers that the crux of the challenge to the private prosecution is that the private prosecutor failed to meet the jurisdictional requirements for private prosecution as prescribed by section 7(1)(a) of the CPA. Counsel for the applicants in his heads of argument referred this court to several decisions where the applicants successfully set aside the private prosecution and in interdicted the private

[7] President of the Republic of South Africa v Zuma and Others [2023] 3 All SA 853 (GJ) at para 78
[8] *Moyo and Another v Minister of Police and Others* [2019] ZACC 40
[9] See footnote 7 at para 82.1.

prosecution. I have considered these decisions though I am unable to refer to them all in the judgment for the sake of brevity.

[23] Paragraph 9.2 of the applicants' founding papers reads as follows: -

> "In terms of section 7(1)(a) CPA, the respondent is obligated to prove 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.
>
> There must be a causal connection between the injury the respondent suffered and the offense that must exist when the summons was issued…
>
> There is no complaint statement by the respondent to satisfy the statutory prerequisites of section 7(1)(a) of the CPA…the respondent does not have locus standi to prosecute the second applicant and me…"

[24] Counsel for the applicants contended that the provisions of section 7 CPA are prescriptive and seeks to avoid frivolous and vexatious prosecutions for the same reason that the public prosecutors may decline to prosecute. He referred to a decision in *Phillips v Botha*[10] where the SCA found that where there was no causal connection between the injury suffered by the private prosecutor the alleged commission of the offence, the private prosecutor would lack *locus standi*.

[25] The court held in Nundalal[11] that the *crux of the dispute* between the parties should be considered in determining the question of whether a private prosecutor has a substantial and peculiar interest and has suffered an injury personally as a result of the offence. The private prosecutor's *locus standi* can therefore be determined without reference to the nature of the charges preferred against the applicants. The charge sheet in the private prosecution contains the following charges: -

[10] Phillips v Botha 1999 (1) SACR 1 (SCA)
[11] Nundalal at para 29

Count 1 – FRAUD

1.1 THAT the 1st and/or 2nd accused, intentionally and in writing made the false representation that they were authorized to act for and on behalf of the Middleburg and Hendrina Residents Front Political Party on 23 August 2021.

1.2 THAT the 1st Accused falsely misrepresented to the Independent Electoral Commission that he was entitled to change the electoral list for the 2022 local government elections.

1.3 THAT the 2nd Accused deliberately made false representation that the 1st Accused was the person duly authorized by the Independent Electoral Commission to act on behalf of the Middleburg & Hendrina Residents Front, when the 2nd accused had no authority or position on the executive of the Middleburg & Hendrina residents Front.

1.4 THAT set out above were calculated to cause prejudice to members of the Middleburg & Hendrina Residents Front.

[26] Count 2 and 3 related to the Contravention of section 88e(i) and section 89(1)(a) and (b) of the Electoral Act.

[27] Paragraph 2 of the general preamble of the charge sheet reads as follows:

"AND WHEREAS at all relevant times, Ben Hamilton Mokoena is a private person who has substantial and peculiar interest in the charges contained herein below"

[28] In response to an attack on his *locus standi,* the respondent sets out his substantial and peculiar interest as follows in paragraph 20 of his answering affidavit: -

20.2.1 I was at all relevant times, the appointed Secretary General of the Middleburg Hendrina Residents Front and the appointed person for purposes of communicating with the Independent Electoral Commission.

20.2.2 My complaint is set out in the counts described in the charge sheet are that the 1st and/or 2nd accused intentionally and in writing made false representations that they were authorized to act for and on behalf of the Middleburg Hendrina Residence Front Political Party on 23 August 2021, when I was in fact the authorized representative.

20.2.3 My interest is that I could be held liable for non-compliance with the provisions of the Electoral Act if false information is provided to the Independent Electoral Commission.

20.2.4 In this instance, this is exactly the cause for my complaint in that Mr Mathunyane delivered an amended election list to the IEC which was not authorised by the Executive Committee of the Middleburg Hendrina Residents Front.

20.2.5 In the circumstances, I as the appointed Secretary General and responsible person could be held liable for the losses incurred by persons who were now removed from the list unlawfully. (underlining is my own emphasis).

20.2.6 The fact that the 1st applicant in particular has usurped my authority and my name has resulted in personal injury in consequence of the commission of the said offence.

[29] In *van Deventer v Reichenberg and Another*[12] the court held that a private prosecutor must satisfy these four elements in order to comply with the provisions of section 7(1)(a) of the Act, namely: - i) substantial and peculiar interest, ii) in the issue of the trial, iii) arising out of some injury, iv) which he individually suffered in consequence of the commission of the said offence. The respondent's counsel submitted that it is sufficient that the respondent stated in the general preamble of the charge sheet that he has substantial and peculiar interest in the charges. He argued that it is not necessary to specify what that peculiar interest entails. I am of the view that proving the substantial and peculiar interest in the context of section 7 requires more than just stating that the respondent has a substantial and peculiar interest. The respondent contended that he submitted a complaint statement though he failed to provide proof on his papers. I am going to deal with the peculiar interest and injury as detailed in the respondent's answering affidavit.

[30] According to paragraph 20.2.5 the person who incurred losses are candidates of the Party whose names were allegedly unlawfully removed from the list. The Party itself might have suffered loss as a result of the change of its candidate list. The injury was not suffered by the respondent in his personal capacity. His complaint as set out in his answering affidavit is based on his perceived threat that he could be held liable for the losses

[12] van Deventer v Reichenberg and Another 1996 (1) SACR 119 (C), at 127 C to G

incurred by the said candidates. This perceived eventuality may or may not even happen. Although the respondent, as the Secretary General of the Party may have been aggrieved by the actions of the applicants in submitting the incorrect list to the IEC, I am of the view that this does not qualify as a personal injury as envisaged in terms of section 7(1)(a) of the Act.

[31] I am satisfied that the applicants have discharged their onus in proving that the private prosecutor did not meet the requirement in terms of section 7(1)(a) and that the summons should be set aside as invalid. I am of the view that the lack of *locus standi* is dispositive of the matter. I am however going to deal with the two additional grounds for challenging the validity of the summons.

Incorrect charges on the charge sheet

[32] It is common cause that the applicants were charged with FRAUD. This is evident from the *nolle prosequi* certificate which reads as follows: -

> I, …declare that after careful perusal of the aforesaid case docket.
> **Middelburg CAS 177/2/2022**
>
> And all the statements concerned, I decline to prosecute as set out hereunder: -
>
> **SELAPE MATHUNYANE** and **FINKY SONIA NGOMANE** on a charge **FRAUD.**
>
> SIGNED AND DATED AT NELSPRUIT ON THIS THE 23RD DAY OF JULY 2024.

[33] The applicants contended that the charge sheet bears additional charges for contravening section 88e(i) and 89(1)(a) and (b) of the Electoral Act, 73 of 1998. It is common cause that no such charges appear on the *nolle prosequi* certificate. The applicants contends that the private prosecutor had no authority to institute private prosecution against then in respect of the said charges.

[34] Counsel for the respondent acknowledged that count 2 and 3 did not form part of the *nolle prosequi* certificate. He however contended that the 2 charges were meant to serve as alternate charges to the main charge of FRAUD. He stated that the private prosecutor has a right to amend the charge sheet to reflect the charges correctly. I do not agree with this argument. I'm of the view that section 7(2)(a)[13] of the CPA limits the charges that the private prosecutor can prefer on the applicants to the specific charges indicated in the *nolle prosequi* certificate, in *casu*, a charge of FRAUD. I therefore find that the charges in count two and three of the charge sheet are unlawful and should be set aside.

Nolle Prosequi certificate not produced to the clerk of the criminal court

[35] The applicants contended that the summons was served without the *nolle prosequi* certificate being attached thereto. That the respondent's failure to attach the *nolle prosequi* certificate on the summons is proof that the respondent did not produce the required certificate to the clerk of the criminal court in terms of section 7(2) CPA. The applicants submitted that the absence of a stamped *nolle prosequi* certificate is a material defect in the private prosecution. Applicants' counsel relied on Nundalal[14] where the court held that a private prosecutor bore the onus of proving that he had lodged the certificate with the clerk when he sought to have his summons issued against the applicant.

[36] It is common cause that the *nolle prosequi* certificate was not attached to the summons when the summons was served on the applicants. The applicants' attorney received a copy of the certificate via email after requesting same from the respondent's attorney. The *nolle prosequi* certificate that he received did not bear a stamp of the civil court as proof

[13] Section (2) (a) CPA – "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".
[14] Nundalal supra at page 39

that it was produced to the clerk of court. The respondent in his answering affidavit stated that he submitted the *nolle prosequi* certificate to the clerk of the criminal court, otherwise, the clerk would not have issued the summons. In considering this issue I take note that a valid *nolle prosequi* was provided to the applicants when it was requested. The applicants have stated that they are not challenging the validity on the *nolle prosequi* certificate and that they are also not challenging the decision of the clerk of the court in issuing the summons. I therefore find the challenge of the invalidity of the summons purely on this ground should fail.

Interdict

[37] Ancillary to the order setting aside the private prosecution, the applicants sought an order interdicting and restraining the respondents from re-instituting similar proceedings. It is trite that a party seeking an interdictory relief, must establish a clear right, reasonable apprehension of harm and the absence of an alternative remedy. The applicants' rights not to be subjected to an unlawful prosecution are fundamental rights which are guaranteed in our constitution and qualifies as a clear right. Regarding reasonable apprehension of harm, the applicants contended that without the interdictory interdict, the respondent may attempt to correct the noncompliance and re-institute the unlawful prosecution thus further infringing their constitutional rights.

[38] The respondent contended that alternative remedy available to the applicants is to obtain an interim interdict preventing continuation of the private prosecution pending a review brought in terms of PAJA and/or Rule 53. Having found that the provisions of PAJA and Uniform Rule 53 finds no application in this matter, I am satisfied that the possibility of the respondent re-instituting the private prosecution is a reasonable threat to the applicants right and that there is no alternative remedy available to the applicants but to seek an interdictory relief.

[39] I am of the view that the applicants have discharged their onus that the public prosecution is unlawful, invalid and unconstitutional. It follows that they satisfy the requirements for a final interdict.

Costs

[40] The applicants contended that the private prosecution was brought without complying with the statutory prerequisites of section 7(1) of CPA. That it amounted to an abuse of the court process. They asked for a cost order against the respondent on a punitive scale as between an attorney and client.

[41] I agree with the applicant's counsel that the private prosecution in this case amounted to an abuse of court process. This is aggravated by the fact the respondent even went further to prefer additional charges that were not part of the *nolle prosequi* certificate. I am of the view that his conduct is vexatious and justifies an award of costs on the scale as between attorney and client scale.

[42] In the result, I make the following order: -

1. The summons in a criminal case, summons number: 219/24 issued in the Regional Division of Middelburg on 22 October 2024 for the purpose of instituting private prosecution against the applicants by the respondent is declared to be unlawful, unconstitutional, invalid and set aside.

2. The respondent is interdicted and restrained from re-instituting, proceeding with, or from taking any further steps pursuant to, the private prosecution of the applicants.

3. The respondent is ordered to pay the applicant's costs on an attorney and client scale.

JL BHENGU AJ
ACTING JUDGE OF HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, (MIDDELBURG)

Appearances

For the applicants:	Adv MJ Kleyn briefed by Cavanagh Richards Attorneys
For the respondent:	Mr AP Brandmuller, Brandmullers Attorneys
Date heard:	12 November 2024
Date of judgment:	18 November 2024