THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM	The Registrar, Supreme Court of Appeal
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***Democratic Alliance v The Acting National Director of Public Prosecutions* (288/11) [2012] ZASCA 15 (20 March 2012)**

Media Statement

Today the Supreme Court of Appeal (SCA) upheld an appeal by the first appellant, the Democratic Alliance (DA), against a judgment of the North Gauteng High Court (Pretoria), in terms of which that court held that the DA had no locus standi to review a decision by the first respondent, the Acting National Director of Public Prosecutions (Acting NDPP) to discontinue a prosecution against the third respondent, the President of the Republic of South Africa, Mr Jacob Zuma. The North Gauteng High Court had also consequently refused an application by the DA for an order compelling the record of the decision to discontinue the prosecution.

The SCA however dismissed an appeal by the second and third appellants Mr Richard Young and CCII Systems (Pty) Ltd (CCII) against a finding by the North Gauteng High Court that they had no locus standi in the review application.

The SCA dealt first, with the question whether a decision to discontinue a prosecution was reviewable and considered the submissions on behalf of the Acting NDPP that a review could only be brought on very narrow grounds, such as bad faith. The SCA re-emphasised that the exercise of public power was regulated by the courts through judicial review. It re-iterated that in a constitutional state there are by definition legal limits to power, and that the courts are bestowed with authority to determine the legality of various activities including those of public authorities. The SCA said the following:

'Section 1(*c*) of the Constitution proclaims the supremacy of the Constitution and the concomitant supremacy of the rule of law. In fulfilling the constitutional duty of testing the exercise of public power against the Constitution, courts are protecting the very essence of a constitutional democracy.[1] Put simply, it means that each of the arms of government and every citizen, institution or other recognised legal entity, are all bound by and equal before the law. Put differently, it means that none of us is above the law. It is a concept that we, as a nation, must cherish, nurture and protect. We must be intent on ensuring that it is ingrained in the national psyche. It is our best guarantee against tyranny, now and in the future.'

The SCA recorded that it had been accepted by the first and third respondents that the office of the NDPP exercises public power and that the decision to discontinue a prosecution was subject to a rule of law review. It stated that in light of the concession it was difficult to understand why the NDPP persisted in pursuing the appeal on this aspect and that it did not reflect well on the NDPP.

Having held that the decision to discontinue a prosecution was indeed reviewable, the SCA considered the submission that a reduced record of the decision sought by the DA would be of little value. It is necessary to note that Mr Zuma had made representations to the Acting NDPP which had been done without prejudice and on a confidential basis and he had refused to waive the conditions under which those representations had been made. Thus the DA sought a reduced record, that is, a record without the representations. The SCA stated that questions involving the extent of the record and its value to the court hearing the review application are speculative and premature. It said the following:

'In the event of an order compelling production of the record, the office of the NDPP will be obliged to make available whatever was before Mr Mpshe when he made the decision to discontinue the prosecution. It will then fall to the reviewing court to assess its value in answering the questions posed in the review application. If the reduced record provides an incomplete picture it might well have the effect of the NDPP being at risk of not being able to justify the decision. This might be the result of Mr Zuma's decision not to waive the confidentiality of the representations made by him. On the other hand, a reduced record might redound to the benefit of the NDPP and Mr Zuma.'

The SCA went on to state:

'Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed. The DA, in its application to compel discovery, has merely asked for an order directing the office of the NDPP to despatch within such time as the court may prescribe the record of proceedings relating to the decision to discontinue the prosecution, excluding the written representations made on behalf of Mr Zuma to the office of the NDPP. Subject to the question of standing which is dealt with next I can see no bar to such an order being made.'

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[1] See *DA v President of RSA* 2012 (1) SA 417 (SCA) para 122.

In respect of the DA's locus standi, the SCA had regard to the fact that the DA is a registered political party active in the national parliament and that its constitution committed it to the values enshrined in our Constitution. The SCA stated the following:

'It was accepted on behalf of the third respondent that all political parties participating in the National Parliament can be taken to subscribe to constitutional principles. Section 48 of the Constitution provides that before members of the National Assembly begin to perform their functions they must swear or affirm faithfulness to the Republic and obedience to the Constitution. All political parties participating in parliament must necessarily have an interest in ensuring that pubic power is exercised in accordance with constitutional and legal prescripts and that the rule of law is upheld. They represent constituents that collectively make up the electorate. They effectively represent the public in parliament. It is in the public interest and of direct concern to political parties participating in parliament that an institution such as the National Prosecuting Authority (NPA), acts in accordance with constitutional and legal prescripts. It can hardly be argued that citizenry in general would be concerned to ensure that there was no favouritism in decisions relating to prosecutions. Few members of political parties or members of the public have the ability, resources or inclination to bring a review application of the kind under discussion.

It is of fundamental importance to our democracy that an institution such as the NPA, which is integral to the rule of law, acts in a manner consistent with constitutional prescripts and within its powers, as set out in the National Prosecuting Authority Act 32 of 1998. Certainly the membership of the DA can rightly be expected to hold the party they support to the foundational values espoused in the DA's constitution and to expect the DA to do whatever is in its power, including litigating, to foster and promote the rule of law. In this regard see *Justice Alliance of South Africa & others v President of the Republic of South Africa & others* 2011 (5) SA 388 (CC) para 17 and the recent decision of the full court in *Bio Energy Afrika Free State (Edms) Bpk v Freedom Front Plus* and *Freedom Front Plus v Moqhaka Local Municipality & others* 2012 (2) SA 88 (FB) paras 15-17. It clearly is in the public interest that the issues raised in the review application be adjudicated and, in my view, on the papers before us, it cannot seriously be contended that the DA is not acting, genuinely and in good faith, in the public interest. See *Freedom Under Law v Acting Chairperson: Judicial Service Commission & others* 2001 (3) SA 549 (SCA) para 21.The question whether, in making the decision to discontinue the prosecution of Mr Zuma, the NPA had acted in accordance with the law or had wrongly and unlawfully succumbed to political power and influence, as alleged by the DA, is a matter for decision in the review application after all the papers have been filed. Presently, it follows that the DA has standing to act in its own interests, as well as in the public interest, and is entitled to pursue that application to its conclusion.'

Dealing with the appeal by the second and third appellants against a refusal by the North Gauteng High Court of their application to intervene in the review application on the basis of their lack of locus standi the SCA stated the following:

'It is difficult to discern with any degree of precision, or at all, the ambit of their complaint against Mr Zuma. It is even more difficult to establish that a complaint, however vague, was lodged with the NPA itself. We were not pointed to any part of the record from which it appears which of the two parties seeking to intervene had in fact lodged a complaint with the NPA. There is much force in the submission that, having regard to the litigation between CCII, which was a bidding party, and government agencies and the subsequent monetary settlement, the basis of which has not been disclosed, it cannot be said that there is any protectable interest that CCII could advance in the review application. The motivation

for entering the fray is in my view clear from what is stated by Mr Young himself, namely, that which, in modern terminology, is referred to as a 'fall-back position' – in the event of the DA being held not to have locus standi. In my view the conclusion of the court below in respect of the standing of the parties seeking to intervene is correct. It follows that the application to intervene must fail.'

The SCA dealt with the submission on behalf of the first and third respondents that allowing too lenient an approach to questions of locus standi would have a disastrous impact on prosecution services in that it would lead to a flood of challenges to prosecutorial decisions, which could, in turn, cause the national prosecuting authority to virtually grind to a halt. The SCA stated that courts are no strangers to floodgates arguments and that courts would be astute to ensure that those asserting a right to challenge prosecutorial decisions have in fact provided a legally recognised basis for doing so.

The SCA made the following order:

'1 In respect of all three issues between the first appellant and the first and third respondents, the appeal is upheld with costs and the first and third respondents are ordered jointly and severally to pay the first appellant's costs, including the costs attendant on the employment of two counsel.

2 In respect of all the issues between the second and third appellants and the first and third respondents the appeal is dismissed and the second and third appellants are ordered to pay the first and third respondents' costs jointly and severally, including the costs attendant on the employment of two counsel.

3 The order of the court below in respect of the application to intervene remains unaltered, but the remainder is substituted as follows:

'1 The issues raised for separate adjudication by the respondents are determined as follows:

1.1 The respondents' objection to the standing of the first applicant in the review application is dismissed with costs including the costs attendant on the employment of two counsel.

1.2 The first respondent's decision of 6 April 2009 to discontinue the prosecution of the third respondent is held to be subject to review.

1.3 In the Rule 6(11) application the first respondent is directed to produce and lodge with the Registrar of this Court the record of the decision. Such record shall exclude the written representations made on behalf of the third respondent and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching to the representations (the reduced record). The reduced record shall consist of the documents and materials relevant to the review, including the documents before the first respondent when making the decision and any documents informing such decision.

1.4 The first and third respondents are ordered to pay the applicant's costs jointly and severally including the costs attendant on the employment of two counsel.'

4 The substituted order set out in para 1.3 above is to be complied with within 14 days of date of this judgment.'

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