



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Moussa v S (181/2014) [2015] ZASCA 61 (14 April 2015)

The Supreme Court of Appeal (SCA) today handed down judgment in a matter relating to the constitutionality of s 38 of the National Prosecuting Authority Act 32 of 1998 (NPA Act) which allows for the appointment of private counsel to assist in specialised prosecutions on the basis that it impinged on the constitutional imperative of prosecutions without fear, favour or prejudice.

The appellant, Mr Sylla Moussa, a Guinean national, was charged, during June 2006, with 16 counts of fraud, and in the alternative, with three counts of theft and three counts of money laundering in terms of the provisions of the Prevention of Organised Crime Act 121 of 1998. The preamble to the indictment stated that he was in control of two accounts held by corporate entities with Absa Bank. The accounts labelled 'credit accounts' bore a no-risk status which meant that the appellant could immediately make withdrawals against cheque deposits into the account. The appellant allegedly conducted 'cross-fire fraud' which had been described in the indictment as depositing no value cheques or 'facilitation cheques' into a beneficiary bank account at Absa and drawing against the drawer's account of the same bank resulting in artificial credit being created in the beneficiary account. The balances and credits recorded on the respective bank statements of the beneficiary and drawer bank account would therefore not be representative of the genuine or underlying funds created by such transactions, but would be artificial and designed to mislead Absa into accepting that the accused or the corporate entities were conducting *bona fide* transactions or were involved in genuine and *bona fide* arm's length business transactions while they were not.

After his arrest in June 2006, the appellant appeared in the Johannesburg Regional Court and was released on R100 000 bail. During March 2008, his trial was transferred to the Gauteng Local Division of the High Court, Johannesburg. Due to the nature of the commercial transactions in relation to which the appellant was charged, the National Prosecuting Authority (the NPA) took the view that it required the skills of a specialised prosecutor and thus engaged the services of Mr Zirk Pansegrouw (Pansegrouw), an advocate in private practice and member of the Pretoria Bar who also happened to be a former prosecutor. The NPA thus appointed Pansegrouw in terms of s 38 of the NPA Act. Faced with Pansegrouw as the prosecutor appellant's legal representative contested Pansegrouw's authority to conduct the prosecution. After documentation was produced relating to Pansegrouw's

appointment, the appellant challenged the fact the Pansegrouw had not taken an oath that had to be taken by prosecutors in terms of s 32(2) of the NPA Act, the appellant accordingly launched an application in the Gauteng Local Division in which he sought an order that Pansegrouw had no authority to prosecute him; that his trial was unfair and for a permanent stay of his prosecution. When the application came before Mailula J in the Gauteng Local Division, she enquired whether the appellant would accept Pansegrouw taking the prescribed oath before the trial commenced. However, the appellant instead, choose to challenge the constitutionality of s 38 of the NPA Act, which enables the NPA to engage persons outside of it to perform prosecutorial services in specific cases.

The appellant then launched an application seeking an order declaring s 38 to be unconstitutional on the basis that it permitted the appointment of a prosecutor outside the NPA's normal staff complement and therefore did not give effect to enshrined constitutional principles requiring the prosecuting authority to exercise its functions without fear, favour or prejudice. The application was heard by Campbell AJ, three years after Pansegrouw had taken the oath. Campbell AJ considered that when persons are engaged as prosecutors in terms of s 38 of the NPA Act, they can hardly be regarded as free agents. In his view, they were subject to the control and direction of senior officers of the NPA, within the structure of the NPA Act. The court reasoned that Pansegrouw was obliged to carry out his functions as a prosecutor in the manner contemplated by s 179(4) of the Constitution, and that the absence of an oath in s 38 did not detract from the manner in which private counsel appointed in terms of the NPA Act are required to perform their duties. The court resultantly dismissed the application with costs, and it was against that order and the findings referred to above that the appeal to the SCA was directed.

The SCA found that the engagement of person with specialised skills to assist in prosecutions was not statutorily novel. The Court, after considering relevant provisions of the NPA Act, held that the statutory scheme was directed at establishing a single national prosecuting authority with strict controls to ensure independence and impartiality. The SCA found that in terms of the statutory scheme, private counsel were only engaged after due consideration at the highest level of the NPA. It held that given the hierarchical structure of the NPA and the established controls and supervision, prosecutorial independence and impartiality were not undermined by s 38 of the NPA Act.

The SCA accordingly agreed with the court below that the structure of the NPA Act is such that controls and supervision are in place to ensure compliance with constitutional norms that dictated prosecutions without fear, favour or prejudice.

The SCA held that it is not the mere taking of the oath that guaranteed prosecutorial independence and impartiality and ensured an accused's fair trial rights. The Court held that the manner in which prosecutions are initiated and conducted is the true test of prosecutorial independence. The Court found that whether a trial is fair usually falls to be determined on a case by case basis and that our courts would be astute to ensure that the constitutional guarantees of prosecutions without fear, favour or prejudice and fair trial rights are met.

The SCA further found, after a survey of the law in comparable foreign jurisdictions, that there was nothing there that detracted from the Court's aforesaid conclusions.

The SCA accordingly dismissed the appeal with costs.

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