SUPREME COURT OF APPEAL SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Zuma v DA (771/2016 & 1170/2016) [2017] ZASCA 146 (13 October 2017)

The Supreme Court of Appeal (SCA) today granted two applications for leave to appeal and thereafter dismissed the two appeals brought by the current President of the Republic South Africa, Mr Jacob Gedleyihlekisa Zuma (Mr Zuma), the Acting National Director of Public Prosecutions (the ANDPP) and the Head of the Directorate of Special Operations (the DSO), respectively.

The appeals were directed against a judgment of the Gauteng Division of the High Court, Pretoria (the court a quo) in terms of which it held that the decision on 1 April 2009 by the then ANDPP Mr Mokotedi Mpshe, to discontinue the prosecution of Mr Zuma on serious criminal charges, including charges of racketeering, corruption, money laundering and fraud, was irrational. The decision was consequently reviewed and set aside by the court below. The order was at the instance of the first respondent, the Democratic Alliance (the DA).

The litigation history of the present appeal before the SCA stems from the following factual background. Initially, after investigations related to the criminal charges had commenced in 2001, corruption charges were brought by the National Prosecuting Authority (the NPA) against Mr Zuma during 2005, prior to his election to the high office he currently holds. The charges against Mr Zuma were instituted after the conviction of his former business associate, Mr Shabir Shaik, on fraud and corruption charges. During 2006 the case against Mr Zuma was struck from the roll by Msimang J in the Durban and Coast Local Division of the High Court, after an application by the State for a

postponement to complete its investigation and finalise an indictment was refused. This had the result that the prosecution was terminated.

On 28 December 2007, a new indictment containing charges of corruption and money laundering was served on Mr Zuma. In 2009, the SCA in *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) (hereinafter referred to as *NDPP v Zuma*) held that the then ANDPP, Mr Mokotedi Mpshe, was the official that had taken the decision to prosecute.

Subsequent to the indictment being served, further legal battles were waged by Mr Zuma against the NPA concerning search warrants and other issues related to his prosecution. On 10 February 2009, more than a year after the new indictment was served, Mr Zuma's legal representatives, in an attempt to persuade the NPA to discontinue the prosecution, made written representations, purportedly for consideration by Mr Mpshe. On 20 February 2009, 10 days after they made written representations, Mr Zuma's legal representatives, attorney Michael Hulley and his counsel Mr Kemp J Kemp SC, made oral representations to the NPA. Mr Zuma's legal representatives were adamant that individuals in the NPA, past and present, conspired to discredit him. They referred to the fact that Mr McCarthy, the head of the DSO at the time, had used the resources of the NPA to source negative intelligence concerning Mr Zuma. They also indicated that they were in possession of recordings of telephone conversations between Mr McCarthy and various politicians, including Mr Bulelani Ngcuka (the then National Director of Public Prosecutions, Mzi Khumalo and Ronnie Kasrils (Minister of Intelligence Services at the time).

Having received the representations and being concerned about the effect of the recordings referred to above, Mr Mpshe was anxious about how best to respond to the charges against Mr Zuma. The prosecution team involved in the day-to-day running of the prosecution maintained that the evidence on which the charges were based was untainted and advised that the prosecution should continue as the case against Mr Zuma was strong. On 6 April 2009 Mr Mpshe made a public announcement in which he stated that he had taken the decision to discontinue the prosecution of Mr Zuma and issued a detailed media statement providing the reasons for this decision.

It is those reasons and the legality of Mr Mpshe's decision to discontinue and thus terminate the prosecution that were at the centre of the applications for leave to appeal and ultimately the appeals themselves.

The SCA had regard to the judgment by Ledwaba DJP (with Pretorius and Mothle JJ concurring) in the court below, who held that Mr Mpshe had disregarded the prosecution team's recommendations that even if the allegations regarding Mr McCarthy were true, the decision to halt the prosecution had to be made by the trial court. The court below agreed with the view of the prosecution team and held that it was for a court of law to deal with allegations of abuse of process. The court below also had

regard to the dictum of the SCA in *NDPP v Zuma* to the effect that a prosecution is not wrongful merely because it is brought for an improper purpose and that it would only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent.

In addition to confirming the reasoning by the court a quo, the SCA held that the case presented by the NPA, that Mr McCarthy's alleged conduct in influencing the timing of the service of the indictment was so egregious that it amounted to an abuse of process, was largely based on conjecture and supposition. Furthermore, the SCA held that in reviewing his own decision to institute the criminal proceedings against Mr Zuma, and ultimately making the decision to terminate the prosecution, Mr Mpshe wrongly invoked and relied on s 179(5)(*d*) of the Constitution and s 22(2)(*c*) of the NPA Act, thus rendering his decision irrational.

The following is a summary of what appears towards the end of the SCA judgment:

(i) The case presented by the NPA, principally through Mr Hofmeyr, was that Mr McCarthy's conduct, in influencing the timing of the service of the indictment so that it occurred after the ANC's Polokwane conference was so egregious that it amounted to an abuse of process to justify a discontinuation of the prosecution. This was based largely on conjecture and supposition. The allegations by Mr Hofmeyr of political machinations on the part of Mr McCarthy were irrelevant because they were unconnected to the integrity of the investigation of the case against Mr Zuma and the prosecution itself.
(ii) The authenticity and legality of the recorded conversations which Mr Mpshe considered vital to his decision to discontinue the prosecution are not beyond doubt. Since the recorded conversations were considered vital, greater thought ought to have been given by the NPA to these issues.
(iii) The manner in which the affidavits were drawn and the case conducted on behalf of the NPA was inexcusable.
(iv) The reasons for discontinuing the prosecution provided by Mr Mpshe do not bear scrutiny for the recordings themselves on which Mr Mpshe relied, even if taken at face value, do not impinge on the propriety of the investigation of the case against Mr Zuma or the merits of the prosecution itself.
(v) Even if one were to accept that Mr McCarthy had his own ulterior purpose for having the indictment served after the Polokwane conference rather than before it, what is indisputable is that it was in any event not practically possible to have the indictment served before the conference. There were nonetheless sound other reasons, such as the stability of the country, accepted as such by both Mr Mpshe and the then Minister of Justice and Constitutional Development, that dictated service of the indictment after the Polokwane conference. In the circumstances, Mr McCarthy's alleged motive in relation to the timing of the service of the indictment was ultimately irrelevant.
(vi) The submission on behalf of the NPA and Mr Zuma, that Mr McCarthy had a central role in the timing of the service of the indictment is at odds with the contradictory account provided by the NPA in relation to who had made the decision about the timing of the service of the indictment. Mr Mpshe had told Mr Downer that the timing of the service of the indictment had been his decision alone. In a

supplementary affidavit he explained that he had been untruthful in that regard in order not to bring Mr Downer under the impression that he had been influenced by the then Minister of Justice and Constitutional Development. That explanation itself impacts negatively on Mr Mpshe's credibility and on the soundness of his decision to discontinue the prosecution.

(vii) The exclusion of the prosecution team from the final deliberations leading up to the decision to discontinue the prosecution appears to have been deliberate and is in itself irrational.

(viii) The case law that formed the basis for Mr Mpshe's decision to terminate the prosecution does not, in fact, support it. On the contrary, the cases, including an appeal court decision overlooked by Mr Mpshe, are to the effect that questions of abuse of process in relation to a prosecution should be decided by a trial court and not determined by way of an extra-judicial pronouncement.

(ix) In his media statement in which he provided reasons for terminating the prosecution, Mr Mpshe referred to the following dictum in of this Court in *Zuma*:

'A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.'

However, he missed its true meaning and import and misapplied it.

(x) In the circumstances set out above, Mr Mpshe's stated purpose of preserving the integrity of the NPA and advancing the cause of justice, can hardly be said to have been achieved. The opposite is true. Discontinuing a prosecution in respect of which the merits are admittedly good and in respect of which there is heightened public interest because of the breadth and nature of the charges and the person at the centre of it who holds the highest public office, can hardly redound to the NPA's credit or advance the course of justice or promote the integrity of the NPA. Regrettably, the picture that emerges is one of Mr Mpshe and Mr Hofmeyr straining to find justification for the termination of the prosecution.

(xi) Thus the conclusion of the court below, that the decision to terminate the prosecution was irrational, cannot be faulted.

(xii) In reviewing his own decision to institute criminal proceedings against Mr Zuma, and ultimately making the decision to terminate the prosecution, Mr Mpshe wrongly invoked and relied on s 179(5)*(d)* of the Constitution and s 22(2)*(c)* of the NPA Act. These provisions deal with the review by an NDPP of a decision of a DPP and were inapposite. Thus, the concessions on behalf of Mr Zuma and the NPA that, on that basis, the decision to terminate the prosecution was liable to be set aside, were rightly made.

(xiii) In light of what appears above, it is difficult to understand why the present regime at the NPA considered that the decision to terminate the prosecution could be defended.

The applications for leave to appeal were granted and the appeals dismissed and the following order was made:

1 The applications for leave to appeal are granted.

2 The appeals are dismissed with costs, including the costs of three counsel and the costs related to the applications for leave to appeal. The National Prosecuting Authority and Mr JG Zuma are to pay such costs jointly and severally, the one paying the other to be absolved.
