



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

**CASE NO.
1176/2023**

In the matter between:

MARYKE VAN DER WALT

FIRST APPLICANT

SAREL VAN DER WALT

SECOND APPLICANT

and

**THE DIRECTOR OF PUBLIC
PROSECUTIONS**

FIRST RESPONDENT

**THE MAGISTRATE EASTERN CAPE
REGIONAL COURT SPECIALISED
COMMERCIAL CRIMES COURT**

SECOND RESPONDENT

JUDGMENT ON REVIEW

Rugunanan J

[1] During 2017 the applicants appeared in the Regional Commercial Crimes Court, Port Elizabeth (now Gqeberha) in Case number CCC1/88/2013 on various counts relating to fraud and contraventions of the Income Tax Act 58 of 1962 and the Tax Administration Act 28 of 2011.

[2] The applicants were legally represented at the time.

[3] In accordance with section 85 of the Criminal Procedure Act 51 of 1977 they objected to the charges against them. On 27 November 2017 the presiding magistrate dismissed the applicants' objection.

[4] Extrapolated from a notice of motion comprising of six pages is that the applicants now approach this court seeking:

(a) a review and setting aside of the magistrate's judgment/order; and

(b) a permanent stay of the prosecution against them.

[5] It is at the outset necessary to state that the applicants offer no detail of the number of counts included in the charge sheet neither have they attached a copy of the charge sheet against which they persist in raising objections. This Court is unable to determine whether their objections related to:

(a) Non-compliance or failure to disclose the essentials of the charge;

(b) Failure of the charges to disclose an offence;

(c) Failure to set out an essential element of a specific offence; or

(d) Failure to set out sufficient particulars of any matter alleged in the charge/s.

[6] The applicants' complaint throughout their founding papers is that the charges against them are prejudicial. Their complaint can only be meaningfully evaluated if the aforementioned detail is put up and assessed against the contents of the charge sheet and the magistrate's findings. Where this information is not forthcoming and the charge sheet unavailable, the task which this Court is expected to undertake is rendered impossible.

[7] The ostensible basis on which the applicants seek relief is in terms of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). To this end they also seek an order that the period of 180 days envisaged by section 7(1) of the PAJA be extended to the date of the launch of the present application.

[8] In the alternative reliance is placed on sections 21 and 22 of the Superior Courts Act 10 of 2013.

[9] The review proceedings were instituted on 14 April 2023.

[10] The first respondent and second respondents respectively are the Director of Public Prosecutions, and the presiding magistrate.

[11] Neither of the respondents opposed the proceedings.

[12] The matter accordingly proceeded unopposed – each of the applicants representing themselves.

[13] In a letter dated 24 April 2023 directed to the registrar of this Court, the senior prosecutor of the Specialised Commercial Crime Unit conveys the following:

‘I further draw to your attention the following facts, the upshot of which is that all the prayers listed in the application are moot.

The criminal trial commenced on 20 April 2023 and both applicants pleaded not guilty to all charges. The State commenced the leading of evidence and the matter was remanded to 16 October 2023 for continuation of trial.’

[14] The review proceedings served before this Court on 10 October 2023.

[15] Before proceeding to deal with the relief sought by the applicants it is perhaps convenient to say something about their reliance on section 21 of the Superior Courts Act.

[16] Pared down to its minimum – and purely for the sake of giving context to the present matter – subsection (1) basically provides that a division of the High Court has jurisdiction over all persons and all offences triable within its area of jurisdiction.

[17] The prosecution against the applicants has not been instituted in a division of the High Court. It has been instituted in the regional commercial crimes Court in Gqeberha. The applicants hold employment and are residing in East London. The nub of their complaint is that the commute between the two centres will impact on their income earning capacities, their financial means and physical fitness to stand trial. It appears that what the applicants attempt to raise

in these proceedings is an objection to the jurisdiction of the court in which the criminal proceedings are pending. The applicants have indicated that they have pleaded not guilty to the charges against them. Neither one of them has indicated that they have raised a plea to the effect that the court before which they have been brought for trial has no jurisdiction.

[18] This court is not the forum in which the jurisdiction issue is to be addressed save to point out that the applicants have on their own accord not raised it in the appropriate forum.¹

[19] I now proceed address the essential relief sought by the applicants.

Review of the magistrate's decision

[20] Section 22(1)(b) of the Superior Courts Act provides that the grounds upon which the proceedings in any magistrates' court may be brought under review before a court of a division are 'interest in the cause, bias malice or corruption on the part of the presiding judicial officer'.

[21] The applicants' sole contention is that the magistrate erred in arriving at his decision. Whether this was a material error of law or fact or both, has not been demonstrated in the papers before this Court. Clearly, the applicants' bare contention does not traverse any of the recognised grounds set out in the section aforementioned.

¹ Section 110 of the Criminal Procedure Act 51 of 1977 reads:

'110. Accused brought before court which has no jurisdiction-

- (1) Where an accused does not plead that the court has no jurisdiction and it at any stage –
 - (a) after the accused has pleaded a plea of guilty or of not guilty; or
 - (b) where the accused has pleaded any other plea and the court has determined such plea against the accused,
appears that the court in question does not have jurisdiction, the court shall for the purposes of this Act be deemed to have jurisdiction in respect of the offence in question.
- (2) Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.'

[22] The applicants have not, in the least, been able to demonstrate that the magistrate misconceived the nature of the proceedings under section 85 of the Criminal Procedure Act as a qualification of the general principle of gross irregularity (assuming of course there may be scope for this being integrated into any of the specified categories in section 22, either individually or as a collective).

[23] Accordingly, the Superior Courts Act is of no assistance to the benefit of the applicants.

[24] Turning to the purported review under the PAJA.

[25] In *ABSA Bank Ltd v De Villiers & Another* [2009] JOL24624 (SCA), Navsa JA held:

‘Importantly, PAJA which gives effect to administrative action that is lawful, reasonable and procedurally fair as contemplated in the Constitution provides bases on which “administrative action” can be reviewed. Administrative action does not include the judicial functions of a judicial officer referred to in section 166 of the Constitution, which includes the Magistrates’ Courts.’

[26] This *dictum* is in line with the definition of administrative action in section 1 of the PAJA. The definition excludes the judicial functions of a magistrate. It follows therefore that the magistrate’s decision of 27 November 2017 is excluded from review where the applicants have not shown that it is unlawful, unreasonable or procedurally unfair (even if it is assumed that any of these grounds may be included in the scope of section 22 aforementioned).

[27] The purported review accordingly fails and it is therefore unnecessary to consider the issue of delay.

Permanent stay of prosecution

[28] The applicants' founding papers are by no means a model of clarity. The second applicant states:

'We understand the decision made by [the magistrate] not to entertain our section 85 application in our favour, is an administrative action as defined by the Act and subject to section 1(ff) of the Promotion of Administrative Justice Act... which allows for review of the decision to institute or continue a prosecution.'

[29] What may well be intended to be conveyed is that the magistrate's dismissal of the applicants' objection to the charges tantamounts to a decision to institute or continue the prosecution.

[30] The magistrate does not act as prosecuting authority.

[31] Under section 179 of the Constitution of the Republic of South Africa, it is the National Prosecuting Authority that enjoys the institutional independence, authority and power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting such proceedings.

[32] Nowhere in the applicant's papers is any basis established for impugning the competence of the first respondent as an incumbent of the national prosecuting authority to have instituted or to have made a decision to continue with the prosecution against them.

[33] Where the applicants seek recourse to section 1(ff) of the PAJA for claiming a stay of the prosecution it can safely be concluded that they have misconstrued the definition of administrative action contained in section 1 of

the PAJA. The definition excludes from review ‘a decision to institute or continue a prosecution’.

[34] The exclusion does not advance the case put up for the relief claimed.

[35] Stated differently, the PAJA does not assist the applicants in advancing grounds for reviewing ‘a decision to institute or continue a prosecution’ for the purpose of attaining a permanent stay of their prosecution.

[36] Following the magistrate’s decision on 27 November 2017 the applicants, purportedly acting on legal advice, sought a stay of the prosecution. The proceedings interceded in the trial court during June 2018 and were unsuccessful. What followed was a review of those proceedings in this Court during April 2019.

[37] In November 2021 the applicants learnt that the review was unsuccessful.

[38] An appeal to the Supreme Court of Appeal appears to be pending once Legal Aid South Africa has made a decision to provide legal representation. As at March 2023 the applicants maintain that they are yet awaiting a decision in that regard. Elsewhere in their papers they indicate without providing specific detail that only a few days before trial they learnt that Legal Aid South Africa will not offer assistance for proceedings in the Supreme Court of Appeal – but that it is open to them to appeal the refusal by Legal Aid South Africa.

[39] It is evident that the quest for a permanent stay of prosecution has mutated into a parallel process: on the one hand there is the relief claimed in the proceedings before this Court, while on the other hand lies the proceedings (potentially) pending before the Supreme Court of Appeal.

[40] On the papers presently before this Court the applicants have not made out a case for a stay of the prosecution against them.

[41] In similar vein, it is considered unnecessary to deal with the issue of delay as the PAJA finds no application in the circumstances of this matter.

[42] In the result the application is dismissed.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

BESHE J: I agree.

N. G. BESHE
JUDGE OF THE HIGH COURT

Appearances:

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Date delivered: 12 October 2023