IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable	**Yes**
Of Interest to other Judges	**Yes**
Circulate to Magistrates:	**Yes/No**

Case No.: **153/2021**

In the matter between:

ZWELINZIMA JOSEPH NQURU	Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
DIRECTOR OF PUBLIC PROSECUTION: FREE STATE	Second Respondent
JW HARRINGTON	Third Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent
REGIONAL MAGISTRATE MEINTJIES	Fifth Respondent
REGIONAL MAGISTRATE GELA	Sixth Respondent

CORAM: SNELLENBURG, AJ

HEARD: 09 JUNE 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 2 December 2022 at 16h30.

INTRODUCTION

[1] Mr Zwelinzima Joseph Nquru [the applicant] is currently standing trial as accused in two criminal cases involving stock theft, both of which are pending in the Welkom Regional Court[1] and the Virgina Regional Court[2] respectively. The third respondent is executing his duties as the prosecutor in both cases.

[2] The applicant applies on motion for an order that the first and second respondents, being the National Director of Public Prosecutions [NDPP] and the Director of Public Prosecutions: Free State [DPP], be ordered to remove the third respondent as prosecutor in the aforesaid criminal cases[3] and to replace the third respondent with another suitably qualified, objective and impartial prosecutor.[4] The applicant seeks costs against the first, second and third respondent.

[3] The first, second and third respondents oppose the application and seek dismissal with punitive costs.

[4] The fourth, fifth and sixth respondents abide by the court's decision.

[5] I granted condonation to the respective parties for late filing of various affidavits and granted leave to the first, second and third respondents to file further affidavits to which the applicant replied. The issues are fully ventilated and serve for adjudication.

THE APPLICANT'S CASE

[6] The applicant avers that the third respondent has failed to act in accordance with the Constitution of the Republic of South Africa, 1996 [the Constitution], the National Prosecution Authority Act 32 of 1998 [the NPA Act] and the National

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1 Case No.: **SHBF11/2015**.
2 Case No.: **STRV91/2016**.
3 Fn 1 and 2 above.
4 Prayers 1 and 2 of the notice of motion.

Prosecuting Authority Code of Conduct in as far as his professional and ethical duties as prosecutor are concerned.

[7] The applicant relies on the following professional and ethical duties:

7.1 In terms of the code of conduct for prosecutors:

7.1.1 the third respondent must act with integrity;

7.1.2 the third respondent's conduct must be objective, honest and sincere;

7.1.3 the third respondent must respect, protect and uphold justice, human dignity and fundamental rights as entrenched in the Constitution;

7.1.4 the third respondent must protect the public interest and strive to be and has to be seen to be consistent, independent and impartial;

7.1.5 the third respondent must maintain the honour and dignity of the legal profession and act in a manner consonant with his status as a public prosecutor.

7.2 In execution of his prosecutorial duties the third respondent is obliged to take into account all relevant circumstances and ensure that reasonable enquiries are made about evidence, irrespective of whether the enquiries are to the advantage or disadvantage of an alleged offender.

7.3 To respect the rights of an accused person in line with the Constitution, the relevant legislation and applicable instruments as required in a fair trial.

[8] It is necessary to deal in some detail with the applicant's case as appears from the founding affidavit. The applicant's case is founded on the following events which the applicant contends entitles him to the relief sought:

8.1 He knows the third respondent since 1997 when last mentioned was almost 20 years old from the District of Bethlehem, Free State. According to the applicant he knew the third respondent's father, Harrington Snr, by virtue thereof that his own father worked for a farmer who was acquainted with Harrington Snr and from being a carrier for Harrington Snr and his own father's employer when they hunted. The applicant says that he was amongst the people attending the third respondent's birthday party on 26 February 1997. The party was held on the farm Smaldeel which belongs to Mr Wynand Botha of Bothaville.

8.2 According to the applicant he received a call on Thursday, 7 August 1997 from Harrington Snr, who practices as attorney in Bethlehem, to assist him (Harrington Snr) to transport and conceal the body of one Daniel Shezi (the conspiracy). The applicant was 18 years of age. A group of conspirators, who the applicant identifies in the founding affidavit, were involved in what the applicant refers to as 'the apparent murder'. The group allegedly included two police officers of the Stock Theft Unit stationed at Vrede and Odendaalsrus respectively; two CID police officers stationed at Theunissen; one police officer stationed at Theunissen; the wife of one of the farmers who was also part of the conspiracy; and one police officer stationed at Odendaalsrus. The other participants were a businessman, a farmer and the owner of the vehicle used to transport the body.

8.3 The applicant reported the matter at the Theunissen Police Station the following day. A murder case with CAS number 51/08/1997 was opened and recorded. On 8 August 1997 the applicant confessed the aforesaid

incident to Magistrate Van Rensburg at Virginia, Free State. According to the applicant neither the applicant nor the persons implicated by him in the matter have been prosecuted to date.

8.4 The applicant reported the matter to the Organised Crime Unit at Welkom on 11 January 1998 and was interviewed by one Krappies Meiring of the unit to whom the applicant states he made a full disclosure of the incident.

8.5 On 20 January 2004 the applicant addressed a letter of complaint to the office of the then National Police Commissioner, the late Jackie Selebi, regarding the failure of the police to investigate the matter. The applicant was informed that the matter would be allocated to Louis Bester and Piet Pieterse of Serious Violence Crime, Pretoria. Although the applicant initially had good communication with the aforesaid Officers, the Officers ceased communication with him without any explanation and valid reason.

8.6 During August 2004 stock theft involving theft of 93 cattle belonging to Becks Meintjies of White City Farm, Theunissen was committed. Wynand Botha and his son Chris Botha were arrested and detained in connection with the aforesaid offense.

8.7 The applicant alleges that he and one Philip Schutte were called ‘and transported’ to the Theunissen police station by Harrington Snr. On their arrival at the police station, Harrington Snr and another attorney, Erasmus, who practiced in Virginia, were present. Detective Mokoteli of Odendaalsrus Stock Theft Unit was the investigating officer, and, in his presence, arrangements were made that the applicant, against payment, and Philip Schutte would ‘take a fall’ so that Wynand Botha and his son Chris could be released. Harrington Snr would represent

the applicant and attorney Erasmus would represent Philip Schutte. Wynand and Chris Botha were ‘unconditionally released’ and the applicant and Philip Schutte were charged with the crime of stock theft. They were both released on bail on the same day.

8.8 The Regional Court prosecutor, Raymond McBethy, however presented Schutte’s evidence as s 204 witness. Schutte implicated the applicant in the commission of the crime. Harrington Snr ‘appointed’ Anton Kruger, an attorney practicing at Virginia and Theunissen, to represent the applicant during the trial.

8.9 The applicant states that he was not involved in the commission of aforesaid stock theft and only became the accused person as result of an arrangement and the financial benefit he was receiving. On advice of Mr Kruger the applicant pleaded guilty to the stock theft that he did not commit. He was convicted by Regional Court Magistrate Jurie Human and sentenced to an effective period of 12 years imprisonment.

8.10 The applicant avers that his mother received a monthly income of R5 000.00 (five thousand rand) in return for him pleading guilty to the crime he did not commit. He states that Harrington Snr arranged with Wynand Botha to make the payments to his mother. These payments were discontinued at some stage without explanation. Whilst the applicant was incarcerated, Chris Botha however deposited amounts ranging from R100.00 to R200.00 to the prison in the applicant’s favour. Wynand and Chris Botha together with Harrington Snr, in effort to keep peace between themselves and the applicant and to ‘cover for their bad deeds that landed him in prison for the crime he did not commit’, paid visits to the applicant until 2009.

8.11 According to the applicant there was an attempt to kill him on 23 December 2009 when his food was poisoned. Instead, another inmate ate the food and died instantly. The applicant avers that members of Correctional Services were involved, ‘apparently at the request of Benny de Klerk, Wynand Botha and Harrington Snr’.

8.12 During September 2010 and whilst he was serving his prison term, a stock theft case was reported at Theunissen under CAS number 75/09/2010. The complainant was Johan Prinsloo of Goedehoop Farm Theunissen. The applicant was one of the accused persons together with Loutjie Smith, Seun Greysel and Hennie Klopper who, ‘on turn of events’, turned State witnesses.

8.13 Mr Raymond McBethy again acted as prosecutor. The case served before Regional Court Magistrate Ludidi who acquitted the applicant after a ‘thorough defence by Legal Aid attorney Zanele Tomoso’ was presented. The applicant states that the complainant in this case, Johan Prinsloo, is the son in law of Becks Meintjies who was the complainant in the case wherein he was sentenced to twelve (12) years imprisonment.

8.14 During 2011, a police officer, one Styger, being one of the police officers implicated in the aforesaid conspiracy, acted as an investigating officer in the Welkom CAS number 514/01/2011 that implicated the applicant in the commission of another stock theft. To the applicant’s surprise the complainant once again was Johan Prinsloo, and his co-accused was Chris Botha who later turned a state witness. The Public Prosecutor in this case was Radebe. Wynand Botha also testified on behalf of the state in the matter. Regional Court Magistrate, the late Mr Bosch, convicted the applicant and sentenced him to an effective period of 8 years imprisonment. The applicant states that he was convicted

despite the fact that the crime he was convicted of was committed whilst he was serving the 12-year sentence. He was therefore incarcerated when the crime was committed.

8.15 The applicant is currently standing trial for stock theft in the Welkom Regional Court in case number SHBF11/2015 where the Regional Magistrate Meintjies is presiding, and the third respondent is acting as prosecutor. The applicant relies on the fact that the offences that he is accused of were committed whilst he was still in prison serving the additional sentence that was imposed by the Regional Court Magistrate, the late Mr Bosch. Harrington Snr volunteered to act on his behalf, an offer that the applicant avers he could not reject as result of the historic promises and undertaking that were made to him. The applicant states that Wimpie Steenberg, Johannes Coetzee, Paulos Dlamini, Hendrik Kroots, Luthando Tshangana (an attorney practising in Bloemfontein), Zacharia Mswati and one Paballo were his co-accused.

8.16 According to the applicant, Harrington Snr arranged a plea-bargaining agreement with the third respondent in terms whereof the applicant would plead guilty in return for a lighter sentence, namely that the sentence would run concurrently with the 8 years sentence he was serving, whilst the charges against his co-accused would be withdrawn. The applicant further states that it “was also amongst others, the term of the agreement between my then attorney Harrington Snr, the co-accused, with the approval of the investigating officer Greeff (one of the suspects in the aforesaid murder case) that I was to take a fall against payment”.

8.17 The applicant avers that he ‘cunningly agreed to the proposed agreement’ as he intended to end the conspiracy deeds that had been orchestrated against him over the years.

8.18 The charges against the co-accused persons were withdrawn and in return these persons made various payments on different occasions in terms of the agreement. The applicant appended as annexure "FA1" a document evincing a payment made to him by Luthando Tshangana which he says proves the allegation regarding co-accused persons making payments to him.

8.19 The applicant states that the third respondent was aware of the fact that he was not involved in the commission of the offences when the plea-bargaining agreement was negotiated and was notwithstanding prepared to accept a guilty plea from the applicant and not prosecute the ‘actual perpetrators’.

8.20 The applicant states that after having received various payments from the co-accused persons he reneged on the agreement by refusing to plead guilty so that he could expose the corrupt activities and the perversion of justice by the third respondent, law enforcement officers and court officers. The applicant says that after he refused to plead guilty, and instead of re-instituting criminal proceedings against the co-accused persons who were actually involved in the commissioning of crime whilst he was in custody at correctional facilities, the third respondent presented all the co-accused persons’ evidence on behalf of the state. This the applicant says was as result of the history “that we are having” and the involvement of Harrington Snr.

8.21 According to the applicant various attorneys and advocates that he appointed to defend him were instructed to put the version of events to the witnesses, but they failed to do so as result of which he consequently terminated their mandates.

8.22 The applicant is also prosecuted for stock theft in the Regional Court, Virginia, case STRV 91/2016. Regional Magistrate Gela is presiding, and the third respondent is prosecuting the case. The applicant is represented by Mr Kriel, an advocate.

8.23 The applicant avers that he was advised by his former attorney, in consultation with the third respondent, to testify for the state against his co-accused in that matter as the third respondent alleged that the applicant was merely passively and not “actively involved in the commission of crime due to his incarceration”. The applicant informed the third respondent and his former defence counsel that he was not involved in the commission of the alleged crime in any manner whatsoever, “be it passively or actively”.

8.24 The applicant laid criminal charges of bribery and defeating ends of justice at Bloemspruit Police Station, Bloemfontein with CAS numbers 185/10/2019 and 463/08/2019 against the third respondent and ‘others’. The matter is currently investigated by the law enforcement agencies.

8.25 The applicant states that the circumstances as set out above, prove that the third respondent is compromised as result of which the third respondent should recuse himself as prosecutor from the two criminal trials currently pending in the Welkom and Virgina Regional Courts. In the event that the third respondent does not recuse himself, the first and second respondent should remove him as prosecutor from the two cases.

8.26 The applicant avers that the third respondent, at some stage, ‘made a vow’ to him that he would ensure that he (the applicant) “rot and die in prison”. The applicant states that it is apparent that the third respondent is “fighting so many battles abusing his position due to his involvement

in various matters that is crystal clear from the history of the relationship I had with him or his people and in particular his father Harrington Snr, who failed to act as a fit and proper person in the circumstances due to amongst others, the wrong advices he furnished me with".

8.27 The applicant laments that notwithstanding the fact that he lodged various complaints with the Free State Director of Public Prosecutions, his complaints have not been entertained by that office. In the circumstances the applicant says that the first and second respondents are constrained to remove the third respondent as prosecutor in the two aforesaid criminal trials as justice will not be seen to be done if the third respondent is allowed to continue to act as prosecutor in the two trials.

8.28 The applicant says that he instructed his former attorneys, Messrs Mbodla Attorneys, out of desperation, to communicate with the Office of the first respondent to make the representation appended to his founding affidavit in support of the removal of third respondent from all cases where he (the applicant) is an accused. The representations were unsuccessful. The applicant also appended the first respondent's response to the representation.

8.29 The applicant states that the facts satisfy the requirements for a final interdict/mandamus.

8.30 In conclusion the applicant contends that his constitutional guaranteed right to a fair trial is violated if the third respondent is allowed to prosecute the trials where he is an accused, as one of the most important components of a fair trial is the prosecution that is 'bereft of fear, favour or prejudice'.

THE FIRST, SECOND AND THIRD RESPONDENT'S CASE

[9] The Deputy National Director of Public Prosecutions deposed to the answering affidavit on behalf of the first to third respondents. The second and third respondents respectively also deposed to affidavits. The third respondent in particular dealt with the allegations levelled at him. I also granted leave that the aforesaid respondents may file further affidavits to deal with, amongst other, allegations by the applicant in his replying affidavit.

[10] Before dealing in more detail with the respondents' evidence, it is convenient to summarise the main grounds of opposition.

10.1 As point of departure the first and second respondent join issue with the procedure the applicant followed in making this application to this Court to remove the third respondent as prosecutor. The respondents contend that the applicant should have made a substantial application to the trial court(s) for the third respondent's recusal.

10.2 The decision to accept or reject the applicant's representations for the recusal of the third respondent rests with the deponent to the answering affidavit. Both he and the second respondent considered the applicant's representations for removal of the third respondent. All the allegations against the third respondent were investigated and found to be without merit. The Deputy National Director of Public Prosecutions therefor rejected the applicant's representations and directed that the prosecution of the applicant by the third respondent should continue.

10.3 The applicant has not made out a case for the removal of the third respondent as prosecutor from the two criminal trials.

[11] Regarding the background and merits of the matter, the following is relevant.

11.1 The applicant is an inmate in the Grootvlei correction facility where he is currently serving a sentence of imprisonment after being convicted of numerous stock theft charges. He is currently standing trial in Bultfontein and Virgina Magistrate's Courts facing charges of stock theft. In both cases the State is represented by the third respondent.

11.2 The two trials forming the subject matter of this application commenced respectively in August 2015 and on 1 November 2018. Both trials have reached the stage where the state has closed its case and the applicant must present his case, if he so elects. In the case serving in the Virgina Magistrate's Court, the applicant unsuccessfully applied for his discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 [the CPA].

11.3 The applicant has never made an application for the recusal of the third respondent in either of these cases despite the fact that he had knowledge of the grounds and allegations on which he now relies prior to the commencement of both cases. The reasonable inference to be drawn from the applicant's failure to apply for the third respondent's recusal before either of the cases commenced, is that the request to remove the third respondent was not bona fide, but an attempt to delay prosecution of the matters against him.

11.4 As far as the complaints to the first and second respondents' offices are concerned, including the 'corruption complaint' received by the first respondent's office through the Secretary of the Portfolio Committee on Justice and Correctional Services, the following:

11.4.1 The second respondent's office have been receiving complaints from the applicant over the years where he made allegations against a number of prosecutors and police officials. The latest

allegations is against the third respondent. All the allegations pertaining to prosecutors and police officials were investigated and found to be without merit. The criminal complaint against the third respondent is dealt with later.

11.4.2 The applicant's files are voluminous and related to allegations made against prosecutors involved in cases in which the applicant was an accused, but primarily against the third respondent.

11.4.3 During the investigation of complaints, the Regional Head of the Department of Correction Services confirmed that the applicant had also over the years complained about wardens, opened dockets against them and reported them to the Minister.

11.4.4 This appeared to be the applicant's modus operandi.

11.4.5 The Acting National Director of Public Prosecutions' office received various affidavits, contained in dockets in respect of the applicant's cases in issue, that had been submitted over the years during the investigation of the applicant's allegations against the third respondent.

11.4.6 The first respondent's office updated the applicant's various legal representatives on regular basis.

11.4.7 The various letters, responses and reports are appended to the answering affidavit by the respondents.

11.5 Regarding the criminal charges by the applicant against the third respondent, the charges were opened during 2019. The NPA has not

been advised of the outcome of these investigations. The investigating officer was requested to supply a report pertaining to his investigation into the criminal allegations levelled at the third respondent. Save to indicate at some point that the investigation was not finalised, no report has been received.

11.6 The first respondent points out that no proof of any of the allegations have been produced, nor has any collaborating evidence been produced by the applicant.

11.7 Regarding the alleged proof of payment by a co-accused, an affidavit by Mr Tshangana is appended to the answering affidavit. Mr Tshangana confirms that he was appointed to administer the applicant's estate and sell farms on his behalf whilst the applicant is incarcerated. The payment that the applicant relies on was made to the applicant by Mr Tshangana in execution of his aforesaid duties. Mr Tshangana denies the allegations levelled against him.

11.8 The applicant's erstwhile legal representatives are not spared. According to the applicant all his erstwhile representatives refused to put his version, as dealt with in the founding affidavit, to state witnesses.

11.9 The only allegations that implicate the third respondent directly are contained in paras 9.31 and 9.42 of the founding affidavit. These paras contain bland allegations of an arrangement by the third respondent of a plea bargain and a vow to ensure that the applicant rots and dies in prison.

11.10 The bulk of the founding affidavit deals with a litany of alleged criminal offences which relates to the third respondent's father, his friends and

police officers. There is no allegation that the third respondent was involved in those matters, nor is any evidence presented to that effect.

11.11 The applicant however admits to various criminal activities, inter alia allegedly receiving payments for pleading guilty and reneging on agreements on his version.

11.12 The applicant accused the third respondent of paying him an amount of R10 000 for not making any accusation against his father in respect of the conspiracy in a complaint and representation. The allegation was however not repeated in the representations he made on 7 December 2020, nor is it relied on in the founding affidavit. The applicant also alleged in an email that a ‘plot meeting’ was held at the office of the DPP by the third respondent. This allegation does not appear in the founding affidavit.

11.13 The third respondent appended a report from the Deputy Provincial Commissioner, Free State Crime Detection to his affidavit. In terms of this report the applicant is orchestrating full scale stock theft and committing other criminal activities from prison. Whilst being in prison the applicant has been charged with 8 cases of stock theft and one case of fraud in different magisterial jurisdictions in the Free State. 7 cases of fraud, 1 case of theft and 3 cases of stock theft are currently being investigated against the applicant in different magisterial jurisdictions in the Free State.

11.14 The third respondent also appended an affidavit of the Deputy Director at the Department of Correctional Service, National Head Office, Mr Sarel Strydom, who amongst other states that whilst the applicant was incarcerated at the Kroonstad correctional centre, the authorities received information that the applicant was in possession of

‘contraband’. The applicant is not entitled to have any cellular phone or sim cards in his possession. The authorities found the applicant in possession of numerous cellular phones and sim cards on different occasions. To this end the applicant had 3 cellular phones and 14 sim cards on his person and in his cell when searched on 21 August 2018. On 24 April 2019, 2 cellular phones and 2 sim cards were confiscated from the applicant. The applicant appears to have laid complaints against the persons who were involved in the search and seizure of the cellular phones and sim cards.

11.15 The third respondent also appended an affidavit of PJ du Plessis, an investigator who investigates crimes committed from prison, who confirms:

11.15.1 Calls were made from cellular phones found in the applicant’s possession to farmers who were informed that in turn for payment of a small amount, their stolen stock will be returned to them.

11.15.2 The applicant conducted scams to defraud farmers whilst in prison.

11.15.3 The applicant is linked to other suspects in cases by virtue of the cellular phones that were confiscated and cell phone records.

11.15.4 The applicant contacted witnesses from prison.

11.15.5 Whilst busy with the investigation he became aware that he and other persons involved in cases against the applicant

including the third respondent, were in one or other way linked by the applicant to a murder scene.

11.16 The applicant made 37 000 calls between 1 November 2015 and 15 September 2016.

11.17 The third respondent's evidence contained in his affidavits can be succinctly summarised as follows:

11.17.1 The third respondent is the nodal point for stock theft matters in the Free State, meaning that he is the designated prosecutor responsible for management of stock theft prosecutions in the Free State. Attorneys acting for accused persons in stock theft matters addresses queries and make arrangements for cases with the third respondent.

11.17.2 The third respondent denies the allegations levelled against him by the applicant.

11.17.3 The police officers seconded to stock theft units referred to by the applicant have all investigated the applicant for stock theft.

11.17.4 The third respondent has never seen the applicant outside his prosecutorial duties. He never had a birthday party on date and at the venue alleged by the third respondent.

11.17.5 Harrington Snr practiced as attorney for 30 years and specialised in criminal cases. It is possible that he would have represented the applicant at some point, but Harrington

Snr never represented the applicant in any case that the third respondent has prosecuted.

11.17.6 Mr Tshangana testified in the Welkom case that whilst he was appointed by the applicant to administer his estate and sell his farms, he (the attorney) would call the applicant regularly. He was always able to reach the applicant on a cellular phone notwithstanding his imprisonment. The relevant pages of the transcription are appended to the third respondent's affidavit.

11.17.7 The Welkom case consists of various charges originating from various police dockets registered on the police cas system in which numerous individuals laid charges of theft and fraud against the applicant.

11.17.8 Various persons were arrested as co-accused of the applicant in different police investigations. Most of them were used as state witnesses to testify against the applicant in the Welkom case.

11.17.9 The third respondent denies being party to the plea-bargaining agreement that the applicant relies on.

11.17.10 No warning statement has ever been taken from him in relation to the charges in CAS 185/10/2019 and he has no knowledge of the charges. The allegations against him are spurious. More than 2 years have passed, and the investigation should have been completed by now. The matter has also never been brought to the NPA to make a decision to prosecute.

11.17.11 As far as the applicant's replying affidavit is concerned, annexure RA2 thereto is a warning statement which is a confidential document kept in the police docket. It is not furnished to the complainant. It is concerning that the applicant is in possession of this statement.

11.17.12 The allegations of the conspiracy (murder) have been investigated. None of the allegations could be verified or confirmed.

DISCUSSION

[12] The more serious the allegation or its consequences, the stronger must be the evidence before a court will find the allegation established.[5]

[13] Motion proceedings, except where the proceedings relate to interim relief, are designed to resolve legal issues based on common cause facts. Save in special circumstances, motion proceedings cannot be used to resolve factual disputes because they are not designed to determine probabilities. The famous Plascon-Evans rule[6] establishes that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such order. The exception is of course where the respondent's version consists of 'bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or

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[5] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) (2009 (1) SACR 361; 2009 (4) BCLR 393; [2009] 2 All SA 243; [2009] ZASCA 1) para 26; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55; *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) (2008 (2) SACR 421; [2008] ZACC 13) paras 8 - 10.*Gates v Gates* 1939 AD 150 at 155; *R(N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468 ([2006] 4 All ER 194) para 62.

[6] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) 634 - 635

so clearly untenable that the court is justified in rejecting them merely on the papers'[7].

[14] The question of onus does not arise in motion proceedings, nor the rule of evidence, i,e. if the facts are peculiarly within the knowledge of a defendant the plaintiff needs less evidence to establish a prima facie case, since thus rule applies only to trials. The approach to motions referred to above, applies regardless of where the onus may lie.[8] The respondent does not have to prove a negative.

[15] The test in respect of the apprehension of bias of a prosecutor is not similar to the test which applies to a judicial officer. The tests are fundamentally different. It is not axiomatic that a perception of bias held against a prosecutor will lead to an accused not having a fair trial.[9] In addition-

> "In adversarial criminal proceedings, such as ours, it is inevitable that prosecutors will be partisan. Their role in criminal prosecutions makes it inevitable that they will be perceived to be biased. In S v Van der Westhuizen 2011 (2) SACR 26 (SCA) ([2011] ZASCA 36) it was said that:
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> 'In our practice it is not the function of a prosecutor disinterestedly to place a hotchpotch of contradictory evidence before a court, and then leave the court to make of it what it wills. On the contrary, it is the obligation of a prosecutor firmly, but fairly and dispassionately, to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and other defence witnesses, with a view to discrediting such evidence for the very purpose of obtaining a conviction. That is the essence of a prosecutor's function in an adversarial system and it is not peculiar to South Africa.' [Footnotes omitted.]"[10]

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7 National Director of Public Prosecutions v Zuma, supra.

8 *Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A); *National Director of Public Prosecutions v Zuma* supra at para 27.

9 *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 14 and S v Zuma and Another 2022 (1) SACR 575 (KZP).

10 *S v Zuma and Another* 2022 (1) SACR 575 (KZP) para 104.

(Footnotes omitted.)

THE CORRECT FORUM

As stated above, the respondents submit that the application for the third respondent's recusal must be made in the trial court as that court must ultimately decide whether the accused receives a fair trial.

[16] The applicant contends that the fact that he could have made the applications for recusal in the trial court, does not divest the High Court of jurisdiction to entertain this application and grant the relief sought.

[17] The respondent's objection to the application for the third respondent's recusal in this forum, is well founded. The application should have been made in the trial court(s).

[18] The two cases commenced years ago and have reached the point where the applicant as accused must now either close his case or present evidence. It is significant that the applicant failed to deal with the status of the two cases. This application only saw the light after his application for discharge in one of the matters was dismissed.

[19] It is also significant that whilst the applicant complains of a perceived bias should the third respondent be allowed to prosecute the cases where he is the accused, the state has closed its case in both matters. The applicant did not disclose that the cases have in fact reached an advanced stage where all that remains is that he, as accused, presents his case.

[20] None of the allegations now made in these proceedings in affidavits have been put to any of the state witnesses. The applicant had the opportunity to have the allegations tested in the trial court. He has elected not to do so.

[21] In S v Zuma and Another [**Zuma**][11], Koen J referred to the passage in *Porritt another v National Director of Public Prosecutions and others* [Porritt] where the Court, referring to the Constitutional Court judgment in *S v Shaik*, concluded that:[12]

> 'The protection of an accused person, therefore, lies not in a general standard of independence and impartiality required of all prosecutors, but in the right to a fair trial entrenched in s 35(3) of the Constitution. That right was described in S v Shaik in these terms:
>
> "The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one - way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires 'fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime."'[13]
>
> The central objective is to bring about substantial fairness in the 'ensuing criminal trial (which) will be a matter to be decided by the trial court.'[14]

[22] In Zuma, Koen said the following at paras 108 and 111:

> 'Whether an accused will ultimately receive a fair trial, is a question to be answered on all the evidence. It is probably most appropriately decided, although this is solely in the discretion of the trial court, at the end of the trial.[15] If the alleged lack of objectivity or independence, whether due to alleged political interference, or influence by outside intelligence agencies, or any other cause, is such that an accused will not receive a constitutionally fair trial, then a variety of remedies might be available, in the discretion of the court, in terms of s 172(1)(b) of the Constitution, as the circumstances may demand. But the remedy does not lie in s 106(1)(h). It

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[11] *S v Zuma and Another* 2022 (1) SACR 575 (KZP) para 106.

[12] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 14; *S v Shaik* [2007] ZACC 19, 2008 (2) SA 208 (CC) para 43; and S v Zuma and Another 2022 (1) SACR 575 (KZP) para 106.

[13] *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC) para 43.

[14] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 18 quoting with approval from *Director of Public Prosecutions, Western Cape v Killian* 2008 (1) SACR 247 (SCA) para 28; R v Sole 2001 (12) BCLR 1305 at 13332F-H.

[15] *S v Zuma and another, Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and others* [2019] ZAKZDHC 19, 2020 (2) BCLR 153 (KZD).

has nothing to do with the prosecutor's 'title to prosecute.' And if the fair trial rights of the accused are unaffected, then there is no need to remove the prosecutor.'

and,

'[111] The SCA held in Porritt that the protection of an accused person lies not in a general standard of independence and impartiality required of all prosecutors, but in the right to a fair trial entrenched in s 35(3) of the Constitution.[16] As was also remarked in Delport,[17] the question in regard to irregularities is always whether they have resulted in a failure of justice, as irregularities do not in and of themselves lead to a failure of justice.[18] In Delport, the fact that the appellants had not claimed that they suffered any trial related prejudice was held to be fatal, albeit that their appeal was struck from the roll for other reasons. In Moussa,[19] referring to the above principle in Porritt, the court held that whether a trial is fair usually falls to be determined on a case-by-case basis, and stressed that courts will be astute to ensure that the constitutional guarantees of prosecutions without fear, favour or prejudice, and fair-trial rights, are met.[20] The SCA in Porritt concluded, quoting with approval from its decision in Director of Public Prosecutions, Western Cape v Killian[21] that:

'The question remains whether the prosecutor's . . . role in this case created a substantive unfairness per se . . . Whether fulfilment of that . . . role does involve or bring about substantive unfairness in an ensuing criminal trial will be a matter to be decided on the facts of each case by the trial court.'

[23] Koen J concluded as follows at para 112[22]:

'Thus, following Porritt,[23] if an accused believes the prosecutor assigned to their case will not exercise, carry out or perform their powers, duties and functions in good faith, impartially and

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[16] *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) para 14.

[17] *Delport and others v S* [2014] ZASCA 197, 2015 (1) SACR 620 (SCA), [2015] 1 All SA 286 (SCA) para 35.

[18] *Cf Williams and another v Janse van Rensburg and others (2)* 1989 (4) SA 680 (C) at 683D-684B.

[19] *Moussa v The State and another* 2015 (2) SACR 537 (SCA), [2015] 2 All SA 565 (SCA).

[20] *Moussa v The State and another* supra at para 29.

[21] *Director of Public Prosecutions, Western Cape v Killian* 2008 (1) SACR 247 (SCA) para 28.

[22] *S v Zuma and Another* supra.

[23] *Porritt* above at paras 7 – 8.

without fear, favour or prejudice, or that the prosecutor is an essential witness in the case, then the accused may bring a substantive application to the court for an order that the prosecutor be removed and replaced.'

[24] In Director of Public Prosecutions, Western Cape v Killian[24] the Court said the following:

'The question remains whether the prosecutor's dual role in this case created a substantive unfairness per se. Neither precedent nor principle persuades me that it did. Whether fulfilment of that dual role does involve or bring about substantive unfairness in an ensuing criminal trial will be a matter to be decided on the facts of each case by the trial court. Unfairness does not flow axiomatically from a prosecutor's having had that dual role.'

[25] The application should have been made in the Court hearing the trial, not to this Court. The trial court is best placed to decide pertinent issues in the case.

THE MERITS

[26] Besides for my conclusion that the application had to be brought in the trial court, the application is in any event foredoomed to failure.

[27] I take the liberty to borrow from Davis J in Bester NO and Others v CTS Trailers (Pty) Ltd and Another[25], the injunction by Harms DP in National Director of Public Prosecutions v Zuma[26] that motion proceedings are designed for the resolution of legal disputes based on common-cause facts looms large.

[28] The respondents' version does not 'consist of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers'.

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[24] 2008 (1) SACR 247 (SCA).

[25] 2021 (4) SA 167 (WCC) para 44.

[26] Fn 5 above, *National Director of Public Prosecutions v Zuma*.

[29] The evidence establishes a modus operandi by the applicant to lay complaints and charges against prosecutors and investigating officers who are involved in cases where he is charged and prosecuted.

[30] According to the applicant other prosecutors, before the third respondent became involved in the prosecution of cases where he is accused, as well as legal representatives have conspired against him or partook in corrupt activities. Legal representatives refused to follow his instructions to cross-examine witnesses regarding his version as dealt with in these proceedings or to put the version to state witnesses.

[31] The applicant has not lodged a single a complaint with the Law Society or its successor, the Legal Practice Council. The applicant, on his own version, is not shy to lay complaints if he opines that he has been wronged. The applicant would surely have lodged a complaint if his legal representatives did not follow his instructions.

[32] On his own version the applicant is not shy to deceive others and to lie on oath. In a word, on the applicant's own version he is anything but trustworthy. How the applicant came to be in possession of the warning statement which the third respondent made, and which is not supposed to be in the applicant's possession at this stage, has not been explained.

[33] The applicant's case is founded, to a large extent, on the fact that he was incarcerated when the alleged offences for which he is standing trial was committed and that the third respondent knows that he is innocent. It will be recalled that the applicant alleges that the third respondent would have said that he knows that the applicant is innocent and was a party to the alleged plea-bargaining agreement, in terms whereof the applicant would plead guilty although being innocent. Not only are these allegations denied by the third respondent, but the respondents' version clearly shows that the applicant's

incarceration has not prevented him from pursuing criminal activities with assistance of other people. That much is clear from the number of cases where the applicant is charged with stock theft, fraud and theft committed whilst he was incarcerated, and the number of cases currently being investigated against the applicant.

[34] A perusal of the applicant's version also reveals that during presentation of the state cases in the two matters, not a single incident is recorded during the trials itself where the third respondent would have made himself guilty of prosecutorial misconduct. The allegations all relate to incidents that allegedly occurred years ago, preceding the trials, involving mostly the third respondent's father and other people.

[35] The delay in making an application for recusal implicates the interests of justice.[27] The applicant has not dealt with the effect of the order. The applicant argues that if the third respondent *continues* to act as prosecutor, his right to a fair trial will be violated and that another prosecutor can merely step in and continue with the trials. That must then mean that the applicant's fair trial rights, on his version, has not been violated thus far? This submission would, in and of itself, be dispositive of the application. If the application succeeds, what would be the effect on the cases? If the cases need to start de novo, the applicant surely had to address the impact on the interests of justice. More so in light of the fact that both cases commenced years ago.

[36] As stated above, the more serious the allegation and the consequences, the stronger must be the evidence before a court will find the allegation established. The applicant has not adduced a single shred of admissible evidence in substantiation of the allegations. The applicant had to establish his case. He had failed to do so.

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[27] *Bennett and Another v The State* 2021 (2) SA 439 (GJ) para 63.

[37] Counsel for the respondents correctly pointed out during argument that, regarding the criminal charges of bribery and defeating the ends of justice, it is not the applicant's case that the third respondent ever bribed him. The allegations relating to bribery relate to other persons. This submission is well founded.

[38] The respondents' affidavits in fact show that the applicant has failed to take the Court fully into his confidence.

[39] The request for removal of the third respondent does not appear to be made genuinely.

[40] On the common cause facts and the facts alleged by the respondents, the applicant is not entitled to the relief sought. The non-disclosure of material facts pertinent to the relief, to name but one, the fact that both cases have reached the stage where the state has closed its case, justifies labelling this application an abuse of process.

[41] The application stands to be dismissed with costs.

COSTS

[42] The respondents contend that a punitive cost order is justified considering the spurious attacks on the third respondent and other officials. I am inclined to agree.

[43] The applicant was warned by the first respondent to make the application in the trial court. He did not heed the advice. The applicant elected not make a frank disclosure of all relevant and pertinent facts. In addition, the applicant, made unsubstantiated and very serious accusations which called into question the third respondent's professional integrity. The same goes for the police officers and legal representatives.

[44] By reason of special considerations arising from the conduct of the applicant, I consider it just to award costs against the applicant on the scale as between attorney and client.

ORDER

[45] In the premises:

1. The application is dismissed.

2. The applicant must pay the first to third respondents' costs on the scale as between attorney and client, such costs to include the costs of 2 counsel where so employed.

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N SNELLENBURG AJ

Appearances:

On behalf of the applicant:	Adv M.S. Mazibuko
Instructed by:	NP Mazibuko, Mazibuko & West Attorneys, Bloemfontein

On behalf of the 1, 2nd and 3rd respondents:	Advv T Lupuwana assisted by K Matai
Instructed by:	TJ Moleko State Attorney Bloemfontein