IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE:~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3) REVISED **NO**

DATE: 6 MARCH 2023

SIGNATURE: .....

Case No. B825/2023

In the matter between:

PORRITT, GARY PATRICK	**1ST APPLICANT**
BENNETT, SUSAN HILARY	**2ND APPLICANT**

And

NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA	**1ST RESPONDENT**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**2ND RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA	**3RD RESPONDENT**

Coram: Millar J

Heard on: 3 March 2023

Delivered: 6 March 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the Gauteng Division and by release to SAFLII. The date and time for hand-down is deemed to be 12H15 on 6 March 2023.

SUMMARY: Urgent application for a *mandamus* to compel the issue of a certificate *nolle prosequi* in terms of s 7(2)(a) of the Criminal Procedure Act – time period for institution of proceedings lapsing on 16 March 2023, 20 years after alleged offence – NDPP declined to prosecute on 19 November 2009 – unexplained delay in requesting certificate – when request made discovered that docket lost - insufficient time to reconstruct so that NDPP may issue a valid certificate – *lex non cogit ad impossibilia* – application dismissed; no order as to costs.

ORDER

It is ordered: -

1. The application is dismissed.

2. There is no order as to costs.

JUDGMENT

MILLAR J

INTRODUCTION AND BACKGROUND

1. The applicants seek a *mandamus* compelling the issue of a certificate of *nolle prosequi* in terms of s7(2)(a) and (b) of the Criminal Procedure Act 51 of 1977("CPA") by the second respondent – the National Director of Public Prosecutions ("NDPP"). The application was brought as a matter of urgency for the reasons that appear below.

2. The first applicant ("Mr. Porritt") was formerly a director of Shawcell Holdings (Pty) Ltd ("Shawcell"). This company, according to Mr. Porritt was finally liquidated in June 2003. It is alleged that the liquidation was in direct consequence of income tax assessments levied by the South African Revenue Services ("SARS") in the sum of R162 929 001.00 (One Hundred and Sixty-Two Million Nine Hundred and Twenty-Nine Thousand and One Rand).

3. The second applicant ("Ms. Bennett") was a director of PSC Guaranteed Growth Fund ("PSC"), a company that is also in liquidation and whose 3000 shareholders entire investment was with Shawcell.

4. According to the applicants, neither of them have any legal qualifications, both however have gained experience of the criminal justice system since 2002 when they were first arrested. Their engagement with the criminal justice system continues to this day with them presently being on trial in the High Court in Johannesburg.

5. Ms. Bennett appeared personally to move this application. Mr. Porritt is presently incarcerated at the Johannesburg Central Prison and did not appear

for this application. Ms. Bennett made common cause with Mr. Porritt and the submissions made by her were also made on his behalf.

6. It was alleged by the applicants that SARS in levying the assessments that they had, had also sought independent advice before doing so. It was in consequence of the assessments (and ostensibly on the basis of the advice) which the applicants contend was fraudulent, that Shawcell had been liquidated and the PSC investors had suffered loss. There was also a knock-on effect in respect of other inter-related companies, one of which was Shawcell Communications Ltd, a company listed on the Johannesburg Stock Exchange. This company was also liquidated. The applicants lay the blame for the failure of these commercial endeavours on the SARS assessment and specifically the persons they believe contrived it.

7. The applicants allege that on advice, Mr. Porritt had laid criminal charges against the SARS Commissioner and the then leader of the audit team that had audited Shawcell. These charges were laid in 2005 at the Sunnyside Police Station in Pretoria.

8. It was averred by Mr. Porritt that, although he regarded the assessments as being fraudulent, because Shawcell was in liquidation, he believed that he was unable to lodge objections to those assessments. When the first meeting of creditors was held, the issue of an objection to the assessments was raised and he believed that the liquidators would do so. When they did not do so, on 15 March 2006, the attorney representing him, lodged those objections. The objections were on the same grounds as those set out in the criminal complaint and did not find any favour with SARS.

9. Thereafter, Mr. Porritt engaged with the director of Public Prosecutions in Pretoria (“DPP”). A letter was sent on 4 August 2006 in which the frustration of the Applicants at the way in which the DPP was dealing with the matter was expressed. Tellingly, in that letter which was quoted by Mr. Porritt in his

founding affidavit, although the letter itself was not attached, he is alleged to have stated:

> *"6. I can only assume from your conduct and that of the State that you have no intention of treating this matter with the priority that it deserves. In fact, the inevitable conclusion that must be drawn is that the State intends to sweep this matter under the carpet in the same manner in which it has treated every other legitimate complaint laid with the SAPS with which I or Sue Bennett is associated.*
>
> *7. I have been advised that such conduct, in which you appear to be participating, is aimed at defeating the ends of justice and is a criminal offence."*

10. Despite the laying of the charges and the follow up on 4 August 2006, somewhat inexplicably, there is neither allegation nor evidence proferred on the part of the applicants that they took any further steps to follow up on the matter. According to them, they focused the case in which they had been charged. It was during the course of this case in early 2016, when they had attempted to have the prosecutors removed, that they had discovered that SARS had been independently advised before levying the assessments on Shawcell.

11. It was alleged by the Mr. Porritt in his founding affidavit, that:

> *"15. There can be no doubt that the NPA has intentionally elected to ignore the Sunnyside case as it does not suit the NPA to accept financial and prosecutorial assistance from SARS in their pursuit of the criminal case against us and, at the same time, prosecute principal members of the prosecution team.*
>
> *16. It is therefore politically convenient for the NPA to let the Sunnyside case slide into prescription.*

> *17. It is respectfully submitted that justice demands that the NPA should have prosecuted the case a long time ago "without fear or favour" as it is required to do."*

12. The intention of the applicants in the bringing of the present application is to *"launch our own private prosecution against the individuals at SARS and Advocate {name omitted}……., who have been jointly instrumental in the commission of the frauds."*

13. On 3 February 2023, some 18 years after the charges were laid, the applicants addressed a letter to the first respondent ("NDPP") requesting the issue of a certificate of *nolle prosequi* by no later than 17 February 2023.

14. Since it was alleged that the demands and thus on the date which the offences had occurred was 17 March 2003, the time within which the private prosecution could be timeously instituted would expire on 16 March 2023.[1] It is for this reason that the present application was said to be urgent because the NDPP did not respond to the letter of 3 February 2023.

15. The respondents for their part, did not place in issue that the SARS assessments had been issued on 17 March 2003 or that the criminal complaint had been made. What the respondents did place in issue, was the timing of the present application.

16. It was averred on the part of the respondents that on 19 November 2009,[2] a decision had been taken in terms of which the NDPP had declined to prosecute. An affidavit was filed by the investigating officer confirming this. She also stated:

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[1] In terms of s 18 Of the CPA the right to prosecute any offence other than those referred to in paras (a) to (j) of the section, lapses 20 years after the offence was committed. In the present instance, the offence said to be committed was fraud which is not one of those referred to in the said paras.

[2] The only document available was a scanned letter on the respondents' computer system dated 19 November 2009 which recorded that a decision had been taken not to prosecute.

"3.4 A decision was made by Adv {name omitted} and Adv {name omitted} of the Specialist Tax Unit at the DPP Pretoria, that they decline to prosecute the matter, a so-called Nolle Prosequi, on 19 November 2009.

3.5 I received the notice and the docket. I cannot recall in this case specifically, but my standard operating procedure is to telephone the complainant and inform them of the decision. As previously stated, I must have spoken to Mr Porritt's spokesperson, because I don't recall ever speaking to Mr Porritt.

3.6 I finalised, closed and filed the docket in early 2010 and have never dealt with it again. I have not received any enquiries regarding the docket, in any shape or form, until {name omitted}, of the Specialist Tax Unit Pretoria, contacted me on 27 February 2023.

3.7 A diligent search of our storage facility revealed that the docket cannot be found and is most likely to have been disposed of due to prescripts on passage of time and constraints of space."

17. The applicants in reply, save for a personal attack on the integrity of the investigating officer and denial of the correctness of inter alia paragraphs 3.4 to 3.6 were unable to place in issue that as a matter of fact, the docket is now no longer available.

18. The respondents for their part opposed the application, firstly on the basis that it was not urgent and lastly that the applicants lack locus *standi* to conduct a private prosecution.

URGENCY

19. On the matter of urgency, it was alleged that the applicants had been dilatory in their pursuit of the matter and that any urgency that there may be was self-created.

20. *In East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* [3] it was held:

> *"An applicant has to set forth specifically the circumstances which he avers that render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at the hearing in due course. The question of whether the matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of . . . substantial redress is an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to weight for the normal course laid down by the rules, it will not obtain substantial redress."*

21. It is incontrovertible that if the right to institute proceedings is time barred and that a hearing in due course will only take place after the bar becomes effective. There is no prospect of any redress at a hearing in due course. [4] This is the case for urgency made out by the applicants. I am satisfied that the application, for this reason is properly brought before the court as an urgent one.

APPLICANTS' LOCUS STANDI

22. In regard to the *locus standi*, the NDPP argued that the applicants lack *locus standi*. In this regard, I was referred to *Moloto Communal Property Association v Tshoane*[5], in which it was held:

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3 2011 JDR 1832 at para 6.

4 *Moyane v Ramaphosa* (2019) 1 ALL SA 718 (GP) at para [33].

5 (2017/86589) (2019) ZAGPPHC 325 (19 February 2019) at para [5].

"As a general rule applicable to locus standi, the applicant must have a direct interest in the subject matter which interest must not be far removed. A mere moral interest is insufficient to ground a right to institute a matter".

23. In *Nundalal v Director of Public Prosecutions KZN and Others*[6] , it was held:

"[19] . . . A certificate is quite simply confirmation that the DPP declines to prosecute, nothing more nothing less. It is not a tarot foretelling that the private prosecutor has 'substantial and peculiar interests' and has been injured personally as a consequence of the offence."

24. In issue in this matter, is not whether the applicants have an interest in the prosecution or for that matter whether they have *locus standi* to successfully establish title to prosecute.[7]

25. The issue of a certificate *nolle prosequi* is an administrative act which results in establishing the first of two jurisdictional facts necessary for the private prosecutor to even be able to establish title and to proceed with such prosecution.

THE ORDER SOUGHT

26. The applicants seek an order that *"The Second Respondent immediately issue a certificate of nolle prosequi in terms of section 7(2)(a) and (b) of the Criminal Procedure Act 51 of 1977, as amended, in respect of Sunnyside CAS No. 945/05/2005."*

27. Section 7 of the CPA provides:

*"7 **Private prosecution on certificate** nolle prosequi*

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[6] (AR723/2014) [2015] ZAKZPHC 25 (8 May 2015) para [19], see also para [8] as to the administrative nature of the decision to issue the certificate.

[7] It was further held in *Nundalal supra at para 21* that *"… Whether the private prosecutor fulfils the jurisdictional requirements is not the DPP's concern. Nor is it her concern what the person requesting the certificate plans to do with it."*

(1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence-

(a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;

(b) a husband, if the said offence was committed in respect of his wife;

(c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or

(d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward, may, subject to the provisions of section 9 and section 59 (2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

(2) (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the attorney-general[8] *that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State. (my underlining)*

[8] The reference to the 'attorney general' must be read as a reference to the National Director of Public Prosecutions in terms of s 45(a) of the National Prosecuting Authority Act 32 of 1998.

(b) The attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).

(c) A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process referred to in paragraph (a) within three months of the date of the certificate.

(d) ….."

28. In *National Director of Public Prosecutions v King*[9] it was stated that:

> *"[1] Police dockets, forming a prosecutor's brief, consist normally of three sections. Section A contains statements of witnesses, expert reports and documentary evidence. Section B contains internal reports and memoranda, and Section C the investigation diary."*

29. The decision to prosecute or not is made on the entirety of the contents of the docket and hinges essentially upon the question of whether the persons in respect of whom the complaint is made can be successfully prosecuted.

30. The docket is also important for the private prosecutor – he does not have the resources of the state with which to investigate or prosecute and is unlikely to do so in the face of evidence that there is no prospect of a successful prosecution. It is for this reason that the NDPP's consideration of "*statements or affidavits on which the charge is based"* – in other words the evidence in Section A of the docket is so important.

31. Before turning to the provisions of s 7 it is important to consider the sequence of events leading up to the request for a certificate *nolle prosequi*. These are:

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[9] 2010 (2) SACR 146 (SCA) at 210C referring to Shabalala and Others v Attorney-General of Transvaal and Another 1996 (1) SA 725 (CC) para 10.

31.1 An offence must have been committed or at least there must be the apprehension that an offence has been committed;

31.2 A charge is laid with the SAPS and a statement under oath in which the knowledge of the complainant as to the offence and of the alleged perpetrators are set out.

31.3 The SAPS conduct an investigation of the complaint;

31.4 The docket, which is the full record of the complaint and the investigations is then submitted to the DPP for a decision on whether or not the state will prosecute.

32. If the DPP declines to prosecute, as occurred in the present case, it is only then that a certificate of *nolle prosequi* can be requested. Put differently, the certificate can only ever be requested once the DPP has decided not to prosecute – until then, a complainant or any other party has no legal right to request the issue of the certificate.

33. Once the decision not to prosecute has been made and the certificate has been requested, then the provisions of s7(1) read together with s 7(2)(b) and subject to s 7(2)(a) become operative. The DPP must then issue the certificate.

34. S7(2)(a) deals with the issue of the certificate. The requirements of this section are peremptory. The person who is to assume the role of private prosecutor is prohibited from proceeding with such prosecution without the certificate. It is a pre-requisite for the issue of the certificate that it is *"a certificate signed by the attorney general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the state."*

35. So, once the office of the DPP has made a decision not to prosecute and a certificate is then requested, the docket must then be resubmitted to the NDPP for reconsideration of its contents and confirmation that the state will not proceed with a prosecution.

36. This is an important step in the process of private criminal prosecution and ensures that in matters in respect of which the DPP has declined to prosecute, the decision is subjected to the scrutiny of the NDPP before it is confirmed and a certificate *nolle prosequi* issued.

37. Once the certificate is issued, the private prosecutor may then proceed to obtain the process of a court and to initiate proceedings. These proceedings are not civil proceedings – they are criminal proceedings.

38. In the present instance, the DPP declined to prosecute 19 November 2009. In consequence of this, a certificate could have been requested at any time from then.

39. The docket is no longer available. There is no suggestion that this was deliberate on the part of either the NDPP or the SAPS, the party tasked with safe custody.

40. It is simply not possible for the NDPP to issue a certificate without having consideration of the contents of the docket. If a certificate was issued without the NDPP having regard thereto, the certificate would not comply with s 7(2)(a) and would not confer lawful title to prosecute upon the private prosecutor.

41. The issue of the certificate is in consequence of two separate and sequential administrative decisions.[10] Each of the decisions variously affect the rights[11] of

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[10] The decision to issue a certificate nolle prosequi in terms of s 7(2)(a) of the CPA is not a decision to *"institute or continue a prosecution"* as provided for in s 1 (ff) and which is excluded from the ambit of PAJA.

[11] See s 33(1) of the Constitution of the Republic of South Africa 1996; see also s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The decision to issue a certificate nolle prosequi in terms of s 7(2)(a) of the CPA is not a decision to "institute or continue a prosecution" as provided for in s 1 (ff) and which is excluded from the ambit of PAJA.

the person requesting the certificate, the person/s named in the complaint as well as the private prosecutor.

42. The issue of the certificate sets the law in motion against the person/s named in the complaint and it is self-evident that they too are entitled to expect that a fair and just procedure has been followed with the process before the private prosecutor can act to set the law upon them.

43. In the present matter, the failure of the applicants to request the issue of a certificate until now:

43.1 1 month short of 20 years after the offence is said to have occurred.

43.2 18 years after the complaint was made,

43.3 17 years after there had been correspondence by Mr. Porritt requesting that the prosecution be pursued,

43.4 12 years after Mr. Porritt in applying for the removal of the prosecutors in his own case, pertinently objected to the fact that there had been no prosecution in the present matter;[12] and

43.5 7 years after Mr. Porritt in a further application for a permanent stay of the criminal case against him and again for the removal of the prosecutors again objected to the fact that there had been no prosecution.[13]

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[12] In paragraph 23.1 of the replying affidavit, the applicants referred to affidavits filed in other proceedings by Mr. Porritt. The full affidavits were not made available in these proceedings but only selective quotes. The pertinent paragraph of the affidavit of 18 May 2011, which was quoted, reads:
"*318. The NPA has done absolutely nothing about such complaint and and (sic), despite the terms of its Service Charter, they have persistently failed to respond to any enquiries from me pertaining to this matter. It is the applicants' view that this is due to the relationship between SARS and the NPA in the criminal proceedings."*

[13] In paragraph 23.3 of the replying affidavit, the applicants referred to affidavits filed in other proceedings by Mr. Porritt. The full affidavits were not made available in these proceedings but only selective quotes. The pertinent paragraph of the affidavit of 23 January 2016, which was quoted, reads:

Is not indicative of a serious desire to pursue the matter. The dilatoriness of the applicants does not however absolve the respondents from the obligation to issue a certificate within the time allowed by law. It does however have a bearing on their request in the present case.

44. While the first jurisdictional requirement for the issue of a certificate has been met, it is simply not possible for the second to be met. The docket cannot be found and so the NDPP is not able to meet the precondition of having "seen" the affidavits and statements contained in the docket before the issue of the certificate.

45. Accordingly, although the applicants have the right to apply for the issue of a certificate, in consequence of the non-availability of the docket, the NDPP is not able as a matter of law,[14] to issue the certificate.

46. The general principle is aptly stated in *Van Zyl N.O v Road Accident Fund* [15] as follows:

> *"[54] For a law to be applied as law, compliance must be possible. Conversely and my necessary implication, a law which is impossible to comply with cannot be applied as law. It is this which sets the impossibility principle apart from other principles of the common law."*

47. The circumstances of the present matter are unique. Ordinarily, it would be expected that a complainant would be more diligent in engaging with the DPP to

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"*355. On the advice of counsel, a formal complaint of fraud was lodged by Porritt in May 2005 with the police under Sunnyside CAS 945/05/2005, citing {names omitted}, as the offenders.*

356. As with the EuroPoint criminal case, again nothing was done. The matter was assigned to Advocate {name omitted} at the NPA who, <u>contrary to the NPA's Service Charter</u>, failed to respond to telephone calls and letters. Letters written to the various NDPPs also produced no response." (My emphasis)"

[14] *Lex non cogit ad impossibilia* – the law does not expect the impossible. See Van Zyl N.O v RAF *infra.*

[15] 2022 (3) SA 45 (CC) at para [54].

ascertain when a decision was made to prosecute or not and to thereafter seek the issue of a certificate.

48. The fact that a docket has become unavailable does not in and of itself mean that it would be the end of the matter. Dockets can be reconstructed and then resubmitted for consideration. What distinguishes the present matter is that with less than 2 weeks to go before the right to prosecute lapses, the ineluctable inference to be drawn is that it is simply not possible to reconstruct the docket.

49. In the present matter there was a 4-year investigation conducted before the decision not to prosecute was made and it is not known what the contents of the docket were when the decision was made. Were it not for the effluxion of time the impossibility now faced by the NDPP could have been obviated.

50. The order sought by Mr. Porritt and Ms. Bennett is for the issue of a certificate *nolle prosequi* so that they may set the law in motion.

51. It is not possible for the reasons set out above for the NDPP to issue a certificate which complies with s7(2)(a) and accordingly the application must fail.

52. On consideration of the matter as a whole, I am of the view that the applicants and respondents respectively should bear their own costs.

53. In the circumstances, it is ordered:

53.1 The application is dismissed.

53.2 There is no order for costs.

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A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	3 MARCH 2023
JUDGMENT DELIVERED ON:	6 MARCH 2023
THE APPLICANTS:	MRS H BENNETT IN PERSON
COUNSEL FOR THE RESPONDENTS:	ADV. D MTSWENI
INSTRUCTED BY:	THE STATE ATTORNEY PRETORIA
REFERENCE:	0679/23/Z42