THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 062/04

In the matter between:

YOSHEN NAIDOO	1st Appellant
THANASELVAN KISTA PILLAY	2nd Appellant
JAYESH VINOED LALLOO	3rd Appellant
RAVINDREN NAIDOO	4th Appellant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	1st Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS, CAPE OF GOOD HOPE PROVINCIAL DIVISION	2nd Respondent
A LE GRANGE ESQ	3rd Respondent

Coram: *Mpati DP, Zulman, Navsa, Ponnan JJA et Comrie AJA*

Date of hearing: **28 February 2005**

Date of delivery: **29 March 2005**

Summary: Order in terms of s 342A(3)(*c*) of the Criminal Procedure Act 51 of 1977 that prosecution not be resumed or instituted *de novo* without written instruction of attorney-general – written authorisation by prosecutor not valid – provisions of National Prosecuting Authority Act 32 of 1998 considered – Directors of prosecutions at the seat of a High court authorised to issue such instruction.

JUDGMENT

NAVSA JA:

[1] The crisp issue in this appeal is whether the resumption or institution *de novo* of the prosecution against the four appellants in the Regional Court, Bellville was properly authorised by a written instruction, dated 20 November 2000, issued by Ms Susanna Galloway purportedly on behalf of the second respondent. At that time Ms Galloway was a senior State advocate in the second respondent's office. I will hereafter, for the sake of convenience, refer to that written instruction as 'the certificate'.

[2] The appeal is against a judgment of the Cape High Court (Desai and HJ Erasmus JJ) which, in refusing an application by the appellants for an order, inter alia, reviewing and setting aside the certificate, held that it was valid.

[3] The first respondent is the National Director of Public Prosecutions (the NDPP), appointed in terms of s 179(1)(*a*) of the Constitution as head of the National Office of the prosecuting authority, established in terms of s 5 of the National Prosecuting Authority Act 32 of 1998 (the NPAA).

[4] The second respondent is the Director of Public Prosecutions, Cape of Good Hope Provincial Division, appointed in terms of s 13, read with s 6(2), of the NPAA.

[5] The third respondent is Mr A La Grange, a Regional Magistrate at the Bellville Magistrates' Court, whose role in the matter is described in para 11 below.

[6] In the court below only the second respondent opposed the application, the other two respondents choosing to abide the decision of that court. Before us the first and third respondents adopted the same passive position.

[7] The four appellants had been arrested during November 1997 and were charged with several counts of robbery of motor vehicles. Their criminal trial was pending in the Regional Court at Parow and, later, at Bellville. Almost two years thereafter, on 24 August 2000, Mr Botes, a Regional Magistrate at the Bellville court, after concluding an investigation into the delay in the completion of proceedings in terms of s 342A(1) of the Criminal Procedure Act (the CPA), struck the matter from the roll pursuant to s 342A(3)(*c*) of the CPA and made an order as envisaged in that subsection, namely, that the prosecution against the appellants not be resumed or instituted *de novo* without the written instruction of the attorney-general. Mr Botes found that the State was to blame for the unreasonable

delay in the completion of the proceedings. For reasons that will become apparent, it is not necessary to consider the correctness of that conclusion.

[8] On 20 November 2000 Ms Galloway issued the certificate. The second respondent has always maintained that the certificate qualifies as the written instruction of the attorney-general.

[9] The certificate requires closer scrutiny. It is contained in a document bearing the title 'THE DIRECTOR OF PUBLIC PROSECUTIONS' and is addressed to the Senior State prosecutor, Private Bag X10, Bellville. It purports to be dispatched from 'Die Direkteur van Openbare Vervolgings, Kaap die Goeie Hoop, Privaatsak 9003, Kaapstad'.

The material part of the certificate reads as follows:

'Ek gelas dat die vervolging in terme van artikel 342A(3)(*c*) van Wet 51 van 1977 heringestel word teen die beskuldigdes

1. YOSHEN NAIDOO
2. JASHMENDREN NAIDOO
3. THANASELVAN PILLAY
4. YAMESH VINOED LALLOO
5. RAVINDREN NAIDOO; en
6. GONASAREN MOODLEY

op 7 aanklagte van gewapende roof in die Streekhof.

Die beskuldigdes moet gedagvaar word vir verskyning op ‘n datum wat hulle regsverteenwoordigers pas en was op (*sic*) die verhoor begin/afgehandel kan word.’

Below a signature at the bottom of the page the following appears in typeface:

‘DIREKTEUR VAN OPENBARE VERVOLGINGS: KAAP DIE GOEIE HOOP’.

It is unclear who signed the certificate.

[10] During April 2001 the State, relying on the certificate, resumed the prosecution against the four appellants or instituted it *de novo* by way of summons. Thereafter, during 2001, the appellants appeared periodically in the Regional Court, Bellville, with the State and the defence involved in skirmishes concerning further particulars and objections to the charge.

[11] On 13 August 2001, the third respondent, before whom the four appellants had appeared during 2001 and whom they had attempted to persuade that the certificate was invalid because it was not a written instruction by the NDPP or his properly authorised delegate, ruled against them on that question.

[12] On 3 April 2002 the appellants, repeating their contention that only the NDPP or his properly authorised delegate could issue the written

instruction contemplated in s 342A(3)(*c*), launched the application in the court below. It is common cause that the NDPP had not delegated specific authority in this regard to the second respondent or to anyone else.

[13] The court below reasoned that since s 20(3) of the NPAA provides that a director, such as the second respondent, has within his or her area of jurisdiction the overall powers ascribed to a prosecuting authority in terms of s 179(2) of the Constitution, he or she has the authority to issue the written instruction contemplated in s 342A(3)(*c*) of the CPA. After considering the factual background, the court held that, in deciding to issue the certificate, Ms Galloway acted under the direct supervision of the second respondent and that the latter had thus, in effect, issued the certificate. On that basis it found that the certificate was properly authorised.

[14] An application for leave to appeal was refused by the court below.

[15] The appellants were subsequently granted leave to appeal by this Court, such leave being limited to the following issues:

‘(a) Whether the court *a quo* erred in deciding that the second respondent is empowered to resume or institute *de novo* a prosecution by virtue of s 342A(3)(*c*) of Act 51 of 1977 read with s 45(*a*) of Act 32 of 1998.

(b) Whether, if the second respondent was so empowered, the second respondent did give the "written instruction" to which s 342A(3)(*c*) refers;

(c) Whether, if he did not and the written instruction was given by **Ms Galloway and/or Mr Niehaus**, they or either of them had the power to do so.'

(Emphasis added.)

[16] It is necessary at this stage to explain the respective roles played by Ms Galloway and Mr Niehaus in the history of the matter.

[17] Ms Gesina Erasmus was the prosecutor in the appellants' trial during 1999. Mr Strydom, who was the prosecutor at the time that proceedings were launched in the court below, succeeded her. As stated earlier, at the time that the certificate was issued, Ms Galloway was a senior State advocate in the second respondent's office. At that time Mr Jacobus Niehaus was one of a number of deputy directors of public prosecutions in the office of the second respondent, having been appointed as such in terms of s 15(1)(*b*) of the NPAA. Ms Galloway had been appointed a prosecutor in terms of s 16 of the NPAA and acted in that capacity at all material times.

[18] In her affidavit in support of the second respondent's case, Ms Galloway stated that she had only become involved with the appellants in

the institution of the prosecution *de novo* and not before. She had no independent recollection of the case:

'3. Ek kan nie onthou hoe dit gebeur het dat ek die eerste keer van die saak bewus geword het nie, maar uit die inhoud van korrespondensie wat oor hierdie saak op lêer is, sowel as my kantoordagboek, blyk dit dat ek die onderhawige saak op 21.8.2000 met adv Niehaus bespreek het. Ek neem aan dat dit as gevolg van die feit dat die verdediging die Staat se aansoek om uistel op 23.[8].2000 sou opponeer en die Streeklanddros aangedui het dat hy die aansoek om uitstel in terme van artikel 342A van Wet 51 van 1977 sou ondersoek.'

[19] After Mr Botes had made the order referred to earlier, Ms Galloway made arrangements for a transcript of the proceedings to be placed before her to determine the reasons for the delay in the completion of proceedings. Upon receipt of the transcript, together with the investigation dockets, she considered what further steps to take.

[20] The following parts of Ms Galloway's affidavit are of particular importance:

'11. Op 17.11.2000 ontvang ek die betrokke oorkonde en word 'n opdrag . . . gedateer 20.11.2000 uitgereik nadat ek die aangeleentheid met adv Niehaus bespreek het . . .

12. Hoewel ek na 17.11.2000 die saak met adv Erasmus en Mnr Strydom bespreek het, het ek self nie weer 'n beslissing in die saak gemaak nie.

. . .

18.3 Dit word dus ontken dat **ek buite my magtiging gegaan het toe ek die sertifikaat van herinstelling van die vervolging uitgereik het**.

. . .

19.3 Dit word dus ontken dat **ek nie al die feite behoorlik oorweeg het nie**, en dit word verder ontken dat **ek onbillik of onredelik opgetree het**.

19.4 Dit word ontken dat ek die nadeel (“prejudice”) wat die Applikante gelei het nie in aanmerking geneem het nie. **Ek herhaal dat ek van mening was** dat hulle ook tot ‘n groot mate tot hulle eie nadeel bygedra het. Dit moet verder genoem word dat **ek die Staat se benadeling ook in gedagte moes hou**, en aangesien **ek van mening was** dat die Staat nie uitsluitlik vir die vertraging verantwoordelik was nie, het gesonde regspleging geverg dat die vervolging heringestel word.’

(Emphasis added.)

[21] It is clear from the parts of Ms Galloway’s affidavit referred to above that she had two discussions with Mr Niehaus before she made the decision to issue the certificate. The first was before the order by Mr Botes and the second was before she made the decision to issue the certificate. It is evident from the remainder of Ms Galloway’s affidavit that she considered her authority to issue the certificate on behalf of the second respondent to be found in the provisions of the NPAA that deal with powers

delegated to a prosecutor. This appears even more clearly from her supplementary affidavit. I will consider those provisions in due course.

[22] In Mr Niehaus' affidavit he does no more than confirm the contents of Ms Galloway's affidavit insofar as it refers to his 'betrokkenheid of . . . medewete of goedkeuring . . .'.

[23] At the relevant time the second respondent was Mr Frank Kahn. In his affidavit he stated that his power to re-institute a prosecution amounted to a repetition of his original power to institute a prosecution. He pointed out that historically his powers derived from the Attorney-General Act 92 of 1992 (the AGA), which was repealed on 16 October 1998 and replaced by the NPAA. Mr Kahn considered that at the time the certificate was issued his powers derived from ss 20(1) and 20(3) of the NPAA and that those provisions authorised him to issue the written instruction referred to in s 342A(3)(*c*). In response to the appellants' assertions to the effect that he had failed to apply his mind to the matter when the certificate was issued, he merely referred to the affidavits of Ms Galloway and Mr Niehaus and stated that they had both worked under his direct control and supervision. Mr Kahn does not say that he was personally involved in the decision to issue the certificate. It is clear that he, like Ms Galloway, considered that

the provisions of the NPAA dealing with the delegation of powers to prosecutors, authorised Ms Galloway, acting with Mr Niehaus, to issue the certificate in his stead. This is all the more apparent from his supplementary affidavit.

[24] Before us the appellants submitted that by requiring in s 342A(3)(*c*) of the CPA that a prosecution could only be resumed or instituted *de novo* on the written instruction of the attorney-general, the legislature intended to ensure, in the interest of a fair trial and justice, that a decision to do so would be taken at the highest level. It was submitted that this was done to prevent abuse on the part of prosecutors, who on occasion are themselves the cause of unreasonable delays in the completion of proceedings. It was contended that the attorney-general, who was the head of a regional prosecution authority under the AGA, was supplanted by the first respondent who is now the head of a single national prosecuting authority and that he or she alone could issue the written instruction. This position, so it was submitted, was preserved by s 45 of the NPAA and it followed that, since the first respondent had never been personally involved in the decision to resume the prosecution or to institute it *de novo*, the certificate was irregularly issued and fell to be set aside.

[25] The appellants submitted further that, even assuming that the provisions of the NPAA enabled directors of public prosecutions, such as the second respondent, to issue the written instruction referred to in s 342A(3)(*c*), it was clear that in the present case the only person who considered and decided to resume or institute the prosecution *de novo* was Ms Galloway, who had no power to do so. The certificate was therefore irregularly issued.

[26] Section 45 of the NPAA provides:

'Any reference in any law to –

(a) an attorney-general shall, **unless the context indicates otherwise**, be construed as a reference to the *National Director*; and

(b) an attorney-general or deputy attorney-general in respect of the area of jurisdiction of a High Court, shall be construed as a reference to a *Director* or *Deputy Director* appointed in terms of *this Act*, for the area of jurisdiction of that Court.'

(Emphasis added.)

[27] The first question is whether, within the context of s 342A(3)(*c*), the second respondent was entitled to issue the certificate.

[28] The NPAA repealed the whole of the AGA. It is, however, useful to consider the provisions of the AGA as it is clear that the designation ‘attorney-general’, as it appears in s 342A(3)(*c*), derived from that Act.

[29] In terms of s 2 of the AGA an attorney-general was appointed by the State President in respect of the area of jurisdiction of each provincial division and of the Witwatersrand Local Division of the Supreme Court (now High Court). In terms of s 2(2) deputy attorneys-general were appointed by the Minister of Justice for each area for which an attorney-general had been appointed. Section 5 set out the duties and powers of attorneys-general which included the general power to prosecute on behalf of the State in criminal proceedings in any area of that attorney-general’s jurisdiction. It also included the power to prosecute appeals. In terms of s 5(2) an attorney-general was empowered to perform all duties and exercise all powers imposed or conferred under the CPA and any other law consonant with the AGA. Section 6 provided for a delegation to others, including prosecutors, subject to the control and direction of the attorney-general, of the authority to conduct prosecutions in criminal proceedings in the Supreme Court and in lower courts and to prosecute appeals. Other powers were not stated to be delegable.

[30] Section 179(1) of the Constitution ushered in a new regime and provided for a single national prosecuting authority to be structured in terms of an Act of Parliament, consisting of the NDPP as its head and Directors of Public Prosecutions and prosecutors to be determined by the envisaged legislation.

[31] The NPAA is the legislation envisaged by s 179 of the Constitution. In terms of s 3 of the NPAA the single national prosecuting authority consists of the office of the NDPP and the offices of the prosecuting authority at the High Courts, established by s 6.

[32] Section 5 of the NPAA established the National Office of the prosecuting authority which consists of the National Director, Deputy National Directors, Investigating and Special Directors, other members assigned or appointed to the office, special investigators and administrative staff.

[33] Section 6 established an office for the prosecuting authority at the seat of each High Court which consists of:

(a) the head of the office who shall be either a Director or a Deputy Director who shall control the office;

(b) Deputy Directors;

(c) prosecutors;

(d) persons engaged on behalf of the State to perform services in specific cases;

(e) administrative staff.

[34] Section 20(1) provides that the power as contemplated in s 179(2) of the Constitution, to institute and conduct criminal proceedings on behalf of the State and to discontinue criminal proceedings, vests in the prosecuting authority. Section 20(2) provides that any Deputy National Director shall exercise those powers subject to the control and directions of the NDPP. Section 20(3) provides that any Director shall, in respect of his or her area of jurisdiction, exercise those powers subject to the control and directions of the NDPP. Section 20(4) provides that Deputy Directors shall, within their area of jurisdiction, exercise those powers subject to the control and directions of the Director.

[35] Section 24(1)(*a*) of the NPAA provides that a Director has the power, within his or her area of jurisdiction, to institute and conduct criminal proceedings and to carry out functions incidental thereto. Section 24(1)(*b*) provides, significantly for our purposes, that a Director has the power to supervise, direct and coordinate the work and activities of all Deputy Directors and prosecutors in the office of which he or she is the head.

Section 16(2) provides that prosecutors may be appointed to the office of the NDPP, to offices of Directors established at the seats of High Courts, to Investigating Directorates and to lower courts.

[36] Section 24(4)(*d*) provides that a Director shall, subject to the directions of the NDPP, be responsible for the day to day management of the Deputy Directors and prosecutors under his or her control. Section 24(9) provides:

'(a) Subject to section 20(4) and the control and directions of a *Director*, a *Deputy Director* at the Office of *Director* referred to in section 13(1), has all the powers , duties and functions of a *Director*.

(b) A power, duty or function which is exercised, carried out or performed by a *Deputy Director* is construed, for the purposes of *this Act*, to have been exercised, carried out or performed by the *Director* concerned.'

[37] As is clear from what is set out above, the NPAA provides that the NDPP has overall control and maintains an oversight role in relation to all prosecutions nationally. However, as was the position under the AGA, the heads of prosecution authority offices at the seats of the High Courts mentioned above are responsible for and manage prosecutions within their areas of jurisdiction. They have comprehensive powers which, by necessary implication, must include the power to reinstitute prosecutions

subject only to oversight by the NDPP. Directors such as the second respondent are the equivalent of the erstwhile attorneys-general.

[38] It is clear that, having regard to the Constitution, particularly the rights of accused persons to a fair trial ─ including the right (in terms of s 35(1)(*d*)) to have their trial begin and conclude without unreasonable delay ─ that a decision to resume or institute *de novo* a prosecution in circumstances where a court has already determined that there has been an unreasonable delay in the completion of proceedings is not one to be taken lightly. The interests of the accused, the State and witnesses are all to be taken into account. I agree with the submission on behalf of the appellants that it was a decision meant to be taken at a higher level of authority. In my view, the legislature chose, in enacting s 342A(3)(*c*) of the CPA, to reserve the exercise of the power to issue the written instruction referred to therein to attorneys-general at the seats of High Courts and, under the present statutory regime, Directors such as the second respondent have that power. It is not necessary to decide whether that power extends to Deputy Directors, for the reasons set out in para 44 below.

[39] I consider it necessary to point out that, in terms of s 179(5)(*c*) of the Constitution, the NDPP maintains oversight in relation to the re-institution of

prosecutions in that he or she may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations from an accused and any other person whom he or she considers necessary. This power is mirrored in s 22(2)(*c*) of the NPAA.

[40] The court below was thus correct in holding, after considering the historical position of attorneys-general and the powers of Directors as stipulated in the provisions of the NPAA, that the second respondent was authorised to issue the written instruction contemplated in s 342A(3)(*c*) of the CPA.

[41] Section 20(5) of the NPAA provides that any prosecutor shall be competent to exercise the powers referred to in subsection (1), to the extent that he or she has been authorised thereto in writing by the National Director or by a person designated by the National Director. Even though powers can be delegated by the Director to prosecutors it would defeat the purpose of s 342A(3)(*c*) of the CPA, ie of reserving the power to re-institute a prosecution to be exercised by a higher office to ensure proper oversight and justice, for that power to be so delegated. In practice it would mean that a defaulting prosecutor who caused delays in a prosecution could thereafter issue a written instruction authorising the resumption or

institution *de novo* of a prosecution, thereby frustrating the purpose of s 342A(3)(*c*). The reasoning of the court below referred to in para 13 above, namely, that since the second respondent had the authority to issue the certificate and since Mr Niehaus and Ms Galloway worked under his supervision, they were entitled to act in his stead and that the certificate issued by Ms Galloway was therefore properly authorised and valid, does not take proper account of the purpose of s 342A(3)(*c*).

[42] It is clear on the facts that Ms Galloway, a prosecutor, took the decision during November 2000 to issue the instruction to resume or institute *de novo* the prosecutions involving the appellants. The suggestion that Mr Niehaus, a Deputy Director, in fact approved of or authorised the decision to issue the written instruction is without foundation. Ms Galloway's affidavit refers in vague terms to two discussions with Mr Niehaus. At best for the second respondent it is unclear what Mr Niehaus' role in the decision had been. If he *had* made the decision or authorised it in some or other manner, it would have been easy for him to say so. More importantly, Ms Galloway states emphatically that *she* made the decision.

[43] Mr Kahn and Ms Galloway both filed supplementary affidavits. At the time that this occurred it was clear that Ms Galloway's authority to issue the

certificate was a critical issue. Neither used this second opportunity to state that Mr Niehaus in fact authorised the certificate. It would have been a simple matter to do so. Indeed, it would have been even simpler for Mr Niehaus himself to have said so. Mr Kahn in his supplementary affidavit stated in vague terms that although he could not recall the appellants' case he agreed with the issue of the certificate. He does not say that he considered the case and took all the relevant factors into account in 'agreeing' to the issue of the certificate.

[44] In the light of the preceding discussion it is plain that the answer to the second question posed, when leave to appeal to this Court was granted, is that the second respondent did not issue the certificate.

[45] The third question required us to consider whether, if Ms Galloway and/or Mr Niehaus issued the certificate, either had the power to do so. It is clear from the facts that Ms Galloway made the decision to issue the certificate and it is equally clear from the preceding discussion that she did not have the necessary authority to do so. It is therefore not necessary to address the question relating to the authority of Mr Niehaus.

[46] It was submitted by counsel representing the second respondent that a conclusion to the effect that only higher authority could resume or

institute a prosecution *de novo* would place too great a burden on Directors at the seat of each High Court, because cases are frequently struck off the roll in Magistrates' courts. In his supplementary affidavit, Mr Kahn once again stated in general and vague terms that matters are struck off the roll in Magistrates' courts on a daily basis. He did not tell us on what basis this was done — no detail is supplied. In any event, the rights of an accused person as provided for in s 35 of the Constitution, the interests of other parties to a case, and in general, the constitutional norms of accountability and transparency, dictate that delays of the kind resulting in an order in terms of s 342A(3)(*c*) should be the exception rather than the rule.

[47] In my view, this means simply that prosecution authorities should take greater care in conducting prosecutions and should do so in accordance with constitutional norms.

[48] In my view, for the reasons set out above, the appeal should succeed and the finding of the court below that the certificate was properly issued and the order that the matter be referred back to the Regional Court for trial should be set aside.

[49] The following order is made:

1. The appeal is upheld.

2. The finding of the court below that the certificate dated 20 November 2000 was properly issued is set aside and is replaced by the following:

'The written instruction dated 20 November 2000 in terms of which the prosecution of the appellants was resumed or instituted *de novo* is held to have been issued without the requisite authority and is therefore set aside.'

3. The order referring the matter back to the Regional Court for trial is set aside.

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MS NAVSA
JUDGE OF APPEAL

CONCUR:

MPATI DP
ZULMAN JA
PONNAN JA
COMRIE AJA