

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 19577/09

DEMOCRATIC ALLIANCE

Applicant

and

**THE ACTING NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS**

First Respondent

**THE HEAD OF THE DIRECTORATE
OF SPECIAL OPERATIONS**

Second Respondent

JACOB GEDL'EYIHLKISA ZUMA

Third Respondent

SUMMARY OF THE JUDGMENT

MATHOPO J:

Pursuant to charges that were brought against him in March 2009, the 3rd respondent (the President of RSA, Mr. Zuma) made representations on the basis of confidentiality and on a without prejudice basis to the 1st respondent (the NDPP). Following those representations, the 1st respondent publicly withdrew the charges against him. On 6 April 2009 the 1st respondent issued a statement announcing its decision to withdraw the charges against the 3rd respondent on the basis that there was abuse of process relating to telephone conversations between certain members of the NPA.

The applicant approached the North High Court on review and in terms of rule 6(11) seeking an order compelling the 1st respondent to provide the reduced record of its decision not to prosecute the 3rd respondent. Such record was to exclude the written and oral

representations and any memorandum report or minutes in connection thereto. The court per Ranchod J, dealt with the matter and made certain orders which were taken on appeal

The application was subsequently dealt with on appeal in the SCA which directed the 1st respondent to produce the record; this record was to exclude written representations made on his behalf and any consequent memorandum or report in response thereto if production thereof would not breach any confidentiality attaching to the representations. In April 2012 the 1st respondent delivered certain documents to the applicant but did not furnish copies of the recordings and transcripts and the memorandum, reports or minutes of meetings dealing with the contents of the recordings. It contended that the outstanding documents were protected by privilege and confidentiality as prescribed in the SCA order.

The applicant launched the current proceedings after being frustrated by what it perceived as blatant disregard of the SCA order. Three issues were before the court, first, whether the 1st respondent should hand over to the applicant the electronic recordings and transcript. The second was whether 1st respondent should be ordered to produce internal NPA memoranda, reports or minutes of meetings dealing with the contents of the recordings and transcripts insofar as these documents do not directly refer to the 3rd respondent. Thirdly, whether the 1st respondent is in contempt of the SCA order.

The 3rd respondent did not file any affidavit opposing the relief sought, instead, he filed a notice raising a point of law in terms of rule 6(5)(d)(iii), namely that in terms of the SCA order, the material in issue do not form part of the qualified record of the proceedings.

The 3rd respondent's contention regarding the transcripts is that confidentiality applies to all the documents that were placed before the NDPP as part of his representations. That on a proper interpretation of the SCA order, the transcripts formed part and parcel of the order and are protected on the basis of privilege or confidentiality. The applicant, on the other hand, argues that there is no legal impediment to the disclosure since the transcripts were not submitted as part of the representations. The transcripts were given to the 1st respondent by the National Intelligence Agency after enquiries were made by the 1st respondent following the representations by the 3rd respondent.

Essentially, the applicant argued that the transcripts are not protected by privilege. In any event, the transcripts were more or less public knowledge and in the public domain.

The respondent elected not to plead. It is settled law that a bare or unsubstantiated denial does not create a genuine dispute of fact.

The court was of the view that since both the applicant and 3rd respondent had different interpretations of the SCA order; more was required from the 3rd respondent to clarify his

position instead of seeking refuge in a point of law. That he imperilled his own position by not explaining his entitlement to confidentiality.

Further, the court was of the view that since the NDPP came to the conclusion, after assessing the transcripts, that the integrity of the prosecution was compromised leading to it quashing the charges against the 3rd respondent, it was desirable that the transcripts be produced to test and properly contextualise whether the decision to withdraw the charges were rational or not. Also, the production of the transcript will complete the picture and give full meaning to that decision.

Regarding the memoranda, minutes, notes and the 1st respondent's position is that the internal memoranda and notes were generated for the decision making process were conveyed in confidence. That the contents of the memoranda relate to the representations as well as recordings, both are inextricably linked. The 1st respondent further contended that it has the professional responsibility to respect the right to privacy of those make representations to it. And as such the information cannot be revealed without the consent of the representor (being the 3rd respondent).

The court rejected these submissions and agreed with the applicant's argument that the 1st respondent, as an organ of state has a duty to prosecute without fear or favour. The 1st respondent has a duty to explain to the citizenry who and how Mr Mpshe arrived at the decision to withdraw the charges against Mr. Zuma. The court observed that without such explanation, the public would lose confidence in the office of the NDPP.

The order of the SCA does not contain a blanket prohibition on disclosure. Rather, the order excludes matters that the 3rd respondent may consider confidential or privileged. Since the 3rd respondent proffered no explanation of why the documents were privileged, he could not be protected by privilege or confidentiality.

Turning to the contempt application, the court did not find that the 1st respondent was in wilful and *mala fide* disregard of the SCA order. The court agreed with the 1st respondent's explanation that the delay was caused by the 3rd respondent's legal representatives who were considering whether to object or not.

For the reasons set out above the court ordered that the 1st respondent comply with the SCA order.