IN THE HIGH COURT OF SOUTH AFRICA
NATAL PROVINCIAL DIVISION

REPORTABLE

CASE NO AR189\07

IN THE MATTER BETWEEN

SAROJINI MOODLEY	**FIRST APPLICANT**
SHUNMUGAM JAMES MOODLEY	**SECOND APPLICANT**
SHAWN BEHARIE	**THIRD APPLICANT**

AND

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS; KWAZULU-NATAL	**SECOND RESPONDENT**
INVESTIGATING DIRECTOR, DIRECTORATE OF SPECIAL OPERATIONS	**THIRD RESPONDENT**
HANSRAJ CHEETANLALL	**FOURTH RESPONDENT**
SITHEMBISO MAPHUMULO NO	**FIFTH RESPONDENT**

J U D G M E N T

NICHOLSON J

History and background

1. This is a review brought by the applicants of the decision by the Fifth

Respondent, a regional magistrate, refusing an application by the applicants to declare certain charges brought against them unlawful and setting them aside. In order to properly understand this long and convoluted matter it is necessary to set out the background. The applicants handed in a chronology and it accurately sets out what has transpired over the last three and a half years.

2. On 2 December 2003 the second and third Applicants appeared before Magistrate Fourie. The matter was adjourned to 10 December 2003 and on that date the charge sheet was handed to the Applicants' attorney by Capt van der Westhuizen. The two mentioned applicants were formally charged with a number of counts, including racketeering, under the provisions of section 2(1) of the Prevention of Organised Crime Act, no 3 of 1998 (POCA).

3. On 12 December 2003 the charge sheet was served on the Applicants' attorney. On 15 December 2003 the First Applicant was arrested and thereafter released on bail on 18 December 2003. On 16 January 2004 the Second Applicant renewed his application for bail before Magistrate A Singh, which was refused on 30 January 2004. On 1 March 2004 the Fourth Respondent wrote to the Applicants' attorney and informed him that authority had been obtained to prosecute the First Applicant for

racketeering charges.

4. On 24 March 2004 a letter was provided which purports to contain the National Director's authorisation for the institution of a prosecution in terms of section 2(1) of POCA against the Applicants. On 29 March 2004 the Second Applicant's appeal against the refusal of bail was heard by the Swain J.

5. On 11 May 2004 the Applicants' attorney wrote a letter to the Fourth Respondent, requesting him to provide the Applicants' attorney with a copy of the National Director's written authorisation in terms of s 2(4) of POCA. On 17 May 2004 the Fourth Respondent furnished the Applicants' attorney with a copy of the National Director's written authorisation.

6. On 1 June 2004 an application for the Fourth Respondent's recusal commenced before the Fifth Respondent. On 19 August 2005 the Applicants instituted the application for the setting aside of the POCA charges under NPD Case No 5121\2005. On 20 October 2005 the State Attorney addressed a letter to the Applicants' attorney stating that the State proposed to withdraw Counts 1, 2 and 3 being charges in terms of POCA.

7. On 27 October 2005 the State Attorney delivered a Notice of Withdrawal of Opposition to NPD Case No 5121\2005 and at the same time the State Attorney addressed a letter to the Applicants' attorney acknowledging receipt of the Notice of Set Down of NPD Case No 5121\2005, on the unopposed roll on 3 November 2005 and further stating it would be endeavoured to withdraw the POCA charges before 3 November 2005.

8. On 3 November 2005 NPD Case Bo 5121\2005 was adjourned by Hurt J. On 11 November 2005 the State Attorney filed a Notice to abide in NPD Case No 5121\05. On 16 November 2005 NPD Case No 5121\05 was re-enrolled for hearing on 24 November 2005. On 24 November 2005 NPD Case No 5121\05 was postponed by Patel J.

9. On 28 November 2005 the application for the setting aside of Counts 1, 2 and 3 of the charges against the Applicants being the POCA charges, before the Fifth Respondent was delivered to the Clerk of the Court. On 2 December 2005 the application for the setting aside of the racketeering charges against the Applicants, was first heard by the Fifth Respondent and the matter was postponed to 27 and 28 February 2006. The Fifth Respondent granted an order setting out directives for the parties to exchange affidavits. On 10 February 2006 the Fourth Respondent delivered a Notice of Opposition *in limine* and on 27 February 2006 the

application for the setting aside of the racketeering charges before the Fifth Respondent was argued. On 3 April 2006 the Fifth Respondent delivered judgment in the application before her.

10. On 15 June 2006 the Applicants' case in the recusal application was closed. On 18 July 2006 Capt Paul deposed to an affidavit in which she says all the accused are facing racketeering charges. On 21 September 2006 the review application under NPD Case No 6708\06 (AR 189\07) the present matter was instituted. On 29 November 2006 the State Attorney wrote to the Applicants' attorney stating that the Applicants' attorney should receive the Respondents' answering affidavit in the first week of December 2006. On 1 December 2006 the Fourth Respondent applied to the Fifth Respondent for the matter to be set down for trial.

11. On 7 December 2006 the Fifth Respondent remanded the matter to 6 April 2007 and on 28 March 2007 the Applicants instituted an application in the Regional Court for a permanent stay of the proceedings against the Applicants. On 11 & 13 April 2007 the Applicants' attorney again wrote to the State Attorney asking for the Respondents' answering affidavits.

12. On 16 April 2007 the State Attorney wrote to the Applicants' attorney saying that if he felt that the Applicants' rights were being prejudiced the

application could be set down for hearing. On 26 April 2007 the matter in the Regional Court, including the permanent stay application was postponed to 25 and 26 June 2007. During May 2007 this application was enrolled for hearing on 19 June 2007. On 12 June 2007 the Fourth Respondent delivered an opposing affidavit. On 15 June 2007 the Applicants deliver a replying affidavit.

Was the authorization valid?

13. As I have indicated the applicants were formally charged with racketeering under the provisions of section 2(1) of POCA on 10 December 2003.

14. Section 2 (4) of POCA provides that 'a person shall only be charged with committing an offence contemplated in subsection (1) if a prosecution is authorized in writing by the National Director.'

15. It is common cause that such 'authorization' was granted in writing on 24 March 2004 by the National Director. The authorization reads as follows:

'AUTHORIZATION IN TERMS OF SECTION 2(4) OF THE PREVENTION OF ORGANIZED CRIME ACT, NO 121 OF

1998.

THE STATE versus

1. **SAROJINI MOODLEY**
2. **SHUNMUGAM MOODLEY**
3. **NADRAJEN MOODLEY**
4. **SHAWN BEHARIE**
5. **DILLION NAIDOO**

I, BULELANI THANDABANTU NGCUKA, the National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with section 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorize the institution of prosecution I respect of a contravention of section 2(1)(e), 2(1)(f) and 2(g) of the Prevention of Organised Crime Act, No 121 of 1998, against the above accused.

GIVEN UNDER MY HAND AT PRETORIA on this 24 day of March 2004.

BULELANI THANDABANTU NGCUKA
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS.'

16. Section 2(1) provides as follows:

'Any person who—

(a) (i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity; and

(ii) knows or ought reasonably to have known that such property is so derived; and

(iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;

(b) (i) receives or retains any property, directly or indirectly, on behalf of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(c) (i) uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(d) acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;

(e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;

(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly

or indirectly, of such enterprise's affairs through a pattern of racketeering activity; or

(g) conspires or attempts to violate any of the provisions of paragraphs (a), (b), (c), (d), (e) or (f),within the Republic or elsewhere, shall be guilty of an offence.'

17. The National Director authorized a prosecution in terms of section 2(1)(e),

(f) and (g) which provide as follows:

'Any person who—

(e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;

(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity; or

(g) conspires or attempts to violate any of the provisions of paragraphs (a), (b), (c), (d), (e) or (f), within the Republic or elsewhere, shall be guilty of an offence.'

18. A "pattern of racketeering activity" is defined to mean

'the planned, ongoing, continuous or repeated participation or involvement

> in any offence referred to in Schedule I and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1…'

19. An "enterprise" is defined to

> 'include any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity…'

20. The question which arises is the adequacy of the above authorization. As is transparent from the wording of it there is a total failure to mention any dates, or places at which the offences were committed. The charge sheet which was handed to the applicants is a lengthy document. It runs to 21 pages and sets out the 14 counts and has sections including one describing what the 'pattern of racketeering activity' relates to.

21. There is also included a section entitled 'General Preamble to Charge.' The preamble deals with the enterprise and the objects and methods thereof and the activities of it. It concludes with a statement to the effect that the at all material times the accused acted with common purpose.

22. In the charge sheet a detailed account of each count is given including dates and places, including an annexure with 10 acts of racketeering.

23. It is apparent that the authorization of the National Director is incredibly wide and was described by Mr Hartzenburg SC who appeared for the applicants, with Mr Skeltema SC, as a blank cheque. Mr Naidu who appeared for the respondent conceded that the point was fairly taken in the papers as the authorization in its entirety had been put up and there was nothing that could be added to it.

The ordinary prosecution process

24. In its present form the authorization covers any act or omission of the applicants prior to the date mentioned in the notice. In fact the authorization does not expressly prohibit offences committed after its issue though that might be the necessary implication thereof. The only limitation is that certain sections and sub-sections are set out. It would lead to abuse for such an authorization to be permissible.

25. When an ordinary prosecutor institutes a prosecution in any court in South Africa he acts under a delegated authority from the Director of Public Prosecutions. When he contemplates bringing charges against an accused he studies the police docket containing the sworn statements of the witnesses and makes a decision as to what offences have been

committed.

26. The public prosecutor in question then drafts the charge sheet or indictment with the charges that the accused must face in court. In so doing he is performing an important public and administrative task which can have very important repercussions for the public at large and especially for the accused.

27. The charge is the formulation of the offence alleged against the accused, stating the time when, the place where, and if appropriate, the person against whom and the goods in regard to which the offence is alleged to have been committed. The particulars must be sufficient to inform the accused of the case to be made out against him or her, but it need not state details which do not constitute elements of the offence.

28. A charge must set forth the offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge. Matter which need not be proved need not be averred. If some particulars are unknown to the prosecutor, he or she may say so in the

charge. The description of a statutory offence in the words of the law creating the offence, or in similar words, is sufficient.

29. All the above principles emanate from the Criminal Procedure Act 51 of 1977 and the common law.

30. If the prosecutor brings charges when the evidence on the sworn statements does not justify such charges he, and the State as his employer, may be liable for malicious prosecution. If the statements are false then the blame will lie with the mendacious deponents to those sworn statements.

Validity of authorization

31. In matters such as the present one parliament has decided that the ordinary decision of a public prosecutor, acting on his delegated authority, is not sufficient, given the importance and complexity of these sorts of charges. The authorization of the National Director is required before a prosecution is instituted.

32. The corollary of authorizing a prosecution, is being given immunity from prosecution, such as that given an accomplice in terms of section 204 of

the Criminal Procedure Act. When a witness is compelled to answer questions in terms of section 205 before the provisions of section 204 are invoked, an offence must be specified. See the series of cases including *S v Bosman, S v Kleinschmidt* 1980 (1) SA 852 (A), *S v Bosman; S v Kleinschmidt* 1979 (1) SA 277, *S v Waite* 1978 (3) SA 899; *S v Bosman and Another* 1978 (3) SA 905.

33. Usually an accomplice is warned that he may incriminate himself on the offences with which the accused stand charged, together with any competent verdicts. The accomplice is thus in a very good position to assess what he stands in jeopardy of should he give false testimony.

34. The facts in the Bosman case involved questions concerning a contravention of s 11 (h) of Act 44 of 1950, ie attending a meeting, on 5 August 1977 at Brandfort, prohibited in terms of a notice which was served upon one Winnie Mandela in terms of s 9 (1) (b) of Act 44 of 1950. The nature of the information sought at the examination in regard to both cases is stated in an annexure to each subpoena and specified ‘all the facts concerning her visit to and meeting with Mrs Winnie Mandela at Brandfort... on 5 August 1977.’ The witnesses were informed that they would be indemnified from a contravention of the mentioned section and also from charges relating to attempts, incitement and conspiracy to

commit the said offence.

35. In Bosman's case the witness knew that she would not be prosecuted for the cited offences arising out of the meeting with Winnie Mandela on 5 August 1977. See also *S v Maunye and Others* 2002(1) SACR 266 (T) at 273 C – 275 D.

36. If an accomplice were given an indemnity and the offence was specified with no details as to the dates, times and personalities involved, that would seem to me to be an invalid indemnity.

37. It seems to me that the National Director has to apply himself to the sworn statements in the docket and the particular charges that emerge therefrom before issuing his authorization. Otherwise it could never be said that he applied his mind to the question of whether the prosecution should be authorized. It seems to me that the authorization was too broad and lacked the necessary specificity required. It is therefore invalid.

38. The next question is whether the applicants were entitled to bring a review before conviction and sentence.

A review in medias res

39. Under the common law the High Court possesses a power of review in respect of quasi-judicial bodies. It also has review powers in respect of lower courts, regulated by statute, and this exposition relates exclusively to review of the proceedings of lower courts in criminal matters.

40. Even where an irregularity has been committed, it is the duty of the court to make an inquiry in order to ascertain whether it is of sufficient magnitude and has caused or may cause serious prejudice to the accused in his or her trial. *S v Nokwe* 1961 4 SA 684 (T). It seems to me that a review *in media res* is justified in the circumstances of this application.

41. Subsection 304 (4) provides the procedure for review but it clearly refers to the situation after sentence has been imposed. Section 304A provides for a review of proceedings before sentence but it refers in terms to the fact that a conviction has taken place.

42. As is apparent from the above statutory provisions the situation *in casu* is not accommodated as the review has been sent before conviction. The only avenue for such a special review seems to me to be the general

power of review by the High Court, which may be invoked where none of the other procedures is apposite. This is in terms of the High Court Act 59 of 1959 more especially section 24. This review is brought in accordance with rule 53 of the Uniform Rules of Court.

43. It is possible in certain exceptional and limited circumstances to have proceedings in a lower court interrupted in order to have an irregularity in the proceedings corrected on review. See *Wahlhaus v Additional Magistrate Johannesburg* 1959 3 SA 113 (A); *Bonadei v Magistrate of Otjiwarongo* 1985 3 SA 92 (SWA).

44. There are situations where the court will intervene in unterminated proceedings but it will only do so in cases where grave injustice might otherwise result: *S v Burns* 1988 3 SA 366 (C). See also *Nourse v Van Heerden* 1999 2 SACR 198 (W); *S v The Attorney-General of the Western Cape, S v The Regional Magistrate, Wynberg* 1999 2 SACR 13 (C).

45. The reasons for this strict procedure are self evident. Any accused is always entitled to wait for the conclusion of the trial, and if there is a conviction, to take the point on appeal or review. The power exists in limited and exceptional circumstances to prevent illegalities in lower courts which could severely prejudice the accused.

46. It seems to me that taking into account all the circumstances set out above a review is justified prior to conviction.

Conclusion

The Court makes the following order :-

a) the authorization issued by the National Director of Public Prosecutions dated 24 March 2004, purporting to authorize charges against the three applicants in terms of section 2(4) of the Prevention of Organised Crime Act, No 121 of 1998, is declared to be invalid and of no force and effect,

b) Counts 1, 2 and 3 of the charges brought against the three applicants before the Regional Court, Pietermaritzburg under Case No RC 430\04 are declared to have been invalidly instituted and are set aside,

c) The respondents are ordered to pay the costs of this application jointly and severally, the one paying, the other to be absolved,

d) The costs set out in paragraph (c) above shall include those

consequent upon the employment of two Counsel.

NTSHANGASE J : I agree.

Counsel for the Applicants : C J Hartzenberg SC and G P Scheltema Sc
(instructed by Chetty, Asmall and Maharaj)
Counsel for the Respondents : R Naidu (instructed by the State Attorney)
Date of hearing : 19th June 2007

Date of judgment : 31st August 2007