REPORTABLE

KWAZULU-NATAL HIGH COURT,
PIETERMARITZBURG CASE NO.AR.368/09
IN THE HIGH COURT OF SOUTH AFRICA

In the matter between

GAVIN NEVILLE CROOKES **Appellant**

and

BHEKIZITHA SIKHUMBUZO SIBISI **First Respondent**

HLEZIPHI MPUNGOSE **Second Respondent**

FLORENCE ZUMA **Third Respondent**

NTOMBI FLORENCE SIKHAHNE **Fourth Respondent**

GERMAN MNTAMBO **Fifth Respondent**

ZANELE FRIEDA GUMEDE **Sixth Respondent**

FLORENCE MPUNGOSE **Seventh Respondent**

J U D G M E N T

Delivered on 4 May 2010

WALLIS J.

[1] This appeal arises from a private prosecution instituted by the respondents against the appellant on charges of contravening section 23(1) of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The basis for the charges is an allegation that on about 5 October 2002 Mr Crookes caused the prosecutors to be evicted from the farm Camelot without an

order of a competent court. The criminal trial was set down to be heard in the Magistrates' Court for the district of New Hanover on 18 March 2008, but did not proceed on that date because Mr Crookes brought an application for a permanent stay of prosecution. The magistrate dismissed that application on 23 October 2008. The present appeal is with leave granted by this court on 24 July 2009.

[2] Mr Crookes based his application on the following general allegation:

"I am applying to this Honourable Court to grant me a permanent stay of prosecution and put an end to the violation of my constitutional right to a fair and speedy trial, as entrenched in Section 35(3) of the Constitution of the Republic of South Africa Act … I will further demonstrate to the Honourable Court that the conduct of the Private Prosecutor is an abuse of the process of Law."

[3] Mr Crookes explained that the private prosecutors were previously employed by a company, Gaville Farming (Pty) Limited, which is also an accused in the private prosecution, but not a party to the present proceedings. The private prosecutors resided on one of the farms owned by the company but were dismissed on 29 September 1999. A dispute over the fairness of their dismissal ensued and was eventually resolved in favour of the employer. Pending that dispute no steps were taken to evict the private prosecutors from the farm but after that dispute had been determined Mr Crookes claims that they were evicted pursuant to an order for their eviction granted by the Magistrates' Court in New Hanover.

[4] The charges revolve around this last allegation. It is the case on behalf of the private prosecutors that no court order was ever obtained for their eviction from the farm and that the eviction was effected by a private security company. After their eviction they laid criminal charges of

contraventions of section 23(1) of ESTA, theft and malicious injury to property with the police. However the Director of Public Prosecutions decided in December 2002 not to prosecute. On 3 April 2003 the representative of the Director of Public Prosecutions advised the legal representative of the private prosecutors that the reason for the decision not to prosecute was that there appeared to be no reasonable prospect of a successful prosecution.

[5] Mr Crookes complains that summonses to commence private prosecutions were issued and served upon him in 2003, 2004, 2005, 2006 and 2007. The private prosecutors accept that they, and two other persons who are now deceased, instituted a private prosecution against *inter alia* Mr Crookes on the same charges in May 2006, as well as the present criminal proceedings, which were commenced in October 2007. They do not deal pertinently with the allegation that there had been previous summonses issued in 2003, 2004 and 2005 and that each of these was purportedly withdrawn. There is, as part of the papers, a letter dated 24 June 2004 from the legal representatives of the private prosecutors which records that at that stage a private prosecution was being pursued against Mr Crookes. But this can only have been in terms of a summons issued in either 2003 or 2004. On any basis therefore the present criminal proceedings are at least the third such proceedings brought by the private prosecutors against Mr Crookes on the selfsame charges.

[6] It is apparent that throughout the period from 2002 till 2007, albeit intermittently and unsuccessfully, discussions occurred between the legal representatives of the private prosecutors and Mr Crookes' legal representatives aimed at achieving a resolution of the disputes between the parties. It is not possible on the papers to say to what extent these

influenced the decision not to pursue earlier proceedings. Mr Crookes complains that the threat of prosecution is being used in an attempt to obtain money from him and that this is an abuse of process. The private prosecutors dispute this. They say that the previous proceedings were withdrawn provisionally and by consent and that all that they are attempting to do is to vindicate their rights as provided in ESTA.

[7] The allegation that the purpose underlying the criminal proceedings instituted by the private prosecutors is to extort money from Mr Crookes is dealt with extremely tersely in the papers. Other than making this assertion Mr Crookes does not provide chapter and verse of the monetary claims made against him and correspondingly the private prosecutors do not deal with such claims or the purported justification for them. No detail is given of either the demands or the offers made as part of the negotiating process. Viewing the evidence as a whole I do not think that there is a sufficient basis for a finding, as a matter of fact, that the dominant motive of the respondents in instituting and pursuing criminal proceedings is one of extortion or oppression rather than a desire to have justice done in respect of an alleged criminal offence. The mere fact that they might have been willing to entertain proposals for compensation that, as a *quid pro quo,* would have resulted in the criminal charges being abandoned, does not suffice to show that the criminal charges are being pursued for an improper purpose. Whilst I accept that such an improper purpose would justify a contention that a prosecution constituted an abuse of process[1] I do not think that Mr Crookes succeeded in making such a case on the papers.

[8] The broad thrust of the complaints made by Mr Crookes and described under the heading of "prejudice to applicant" is that six years have passed

[1] *Phillips v Botha* 1999 (2) SA 555 (SCA) at 565 E-566B. That was a far stronger case for alleging abuse of process but the court held that such an abuse was not established.

since the incident giving rise to the criminal complaint and that that lapse of time has occasioned prejudice in a variety of respects. Primarily he contends that witnesses have gone astray, documents are no longer available and the passage of time has dimmed memory. These are the allegations that form the foundation for his contention that his constitutional rights in terms of section 35(3) of the Constitution have been infringed. However, since the application was prepared the Constitutional Court has comprehensively reviewed our jurisprudence in this regard in its judgment in *Bothma v Els*.[2] In the light of that judgment it is apparent that the delay in this case, which is less than two years and portion of which was undoubtedly occasioned by Mr Crookes and his legal representatives, is not such as to infringe his constitutional rights in regard to a speedy trial. As Sachs J pointed out in *Bothma v Els* there may be a further point which is whether the passage of time from the date when the incident giving rise to the charges occurred to the date of a trial will preclude a fair trial. However it is clear that a court will only reach that conclusion in an extreme case[3] and there is nothing extreme in the facts of the present case that serves to distinguish it from many that come before our courts on a regular basis.

[9] In my view the prejudice of which Mr Crookes complains is not so extreme as to deny him a fair trial. His primary complaint is that as a result of the destruction of court records he can no longer obtain the court file and the order of court in terms of which the evictions occurred. However, as the onus of proving that the evictions were unlawful rests upon the private prosecutors it is for them to prove that no such order was obtained. In the face of the secondary evidence that Mr Crookes should be capable of

[2] 2010 (2) SA 622 (CC)
[3] *McCarthy v Additional Magistrate, Johannesburg* [2000] 4 All SA 561 (SCA); *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA)

leading from himself and his legal representative at the time, the prejudice seems, if anything, to lie on the side of the private prosecutors. All in all it is insufficient at this stage to justify the extreme remedy of a stay of prosecution.

[10] That leaves only one point which is the effect of the fact that on at least two previous occasions the private prosecutors have issued summonses and then purported to withdraw them. In his founding affidavit Mr Crookes alleged that a private prosecutor does not have the authority to withdraw a charge and then reinstate it at a later stage. This contention is simply not dealt with in the answering affidavit nor is it dealt with in the magistrate's judgment. It did however feature as one of the points raised in the application for leave to appeal, although it does not appear to have been referred to in the argument before the magistrate on the application for leave to appeal. Be that as it may it is a legal issue properly raised on the papers that must be decided. The basic contention is that a private prosecutor is only entitled to institute a private prosecution once and must then either pursue the prosecution to finality or abandon it. For it to institute proceedings and abandon them and then institute fresh proceedings as has happened in the present case, is impermissible and therefore amounts to an abuse of process that justifies the court's interference.

[11] It is necessary to examine the provisions governing this private prosecution. Section 23(4) of ESTA empowers occupiers of property protected under that Act, who complain that they have been evicted other than on the authority of an order of a competent court, to institute a private prosecution against the alleged offender. Section 23(5) provides that:

"The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 19077) shall apply to a private prosecution in terms of this Act: provided that if:-

(a) the person prosecuting privately does so through a person entitled to practise as an advocate or an attorney in the Republic;

(b) the person prosecuting privately has given written notice to the public prosecutor with jurisdiction that he or she intends to do so; and

(c) the public prosecutor has not, within 14 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence:-

Then

(i) the person prosecuting privately shall not be required to produce a certificate issued by the Attorney-General stating that he or she has refused to prosecute the accused;

(ii) the person prosecuting privately shall not be required to provide security for such action;

(iii) the accused shall be entitled to an order for costs against the person prosecuting privately, if:

(aa) the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal; and

(bb) the court finds that such prosecution was unfounded or vexatious; and

(iv) the Attorney-General shall be barred from prosecuting except with the leave of the court concerned."

Subject only to the variations introduced by the provisions of this section a private prosecution in respect of an offence under s 23(1) of ESTA is governed by the provisions of the Criminal Procedure Act 51 of 1977 (CPA).

[12] Under s 179(1) of the Constitution there is a single national prosecuting authority in the Republic structured in terms of an act of Parliament and consisting of a national director of public prosecutions, directors of public prosecutions and prosecutors as determined by that Act. The prosecuting authority has the power to institute criminal proceedings

on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings.[4] These constitutional provisions and the national legislation that flows from them are designed to preserve what has long been the position in South Africa, namely that the right to prosecute in criminal matters is vested in the State, acting on behalf of the community at large. The right is granted to private individuals only where the State has refused to prosecute or, in the case of ESTA, not responded to a notice of intention to prosecute by a putative private prosecutor.[5] It is for this reason that the right to pursue a private prosecution has always been limited to cases in which the prosecuting authorities have declined to prosecute a case.

[13] The requirement that the private prosecutor must have a direct interest in the outcome of the proceedings[6] serves the same purpose. The object, as van den Heever AJP pointed out:

'… was clearly to prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public; to curb, in other words, the activities of those who would otherwise constitute themselves public busybodies.'[7]

All this has caused courts to conclude that the purpose of the legislature in granting the right of private prosecution is to operate as a safety valve in society and to reduce the temptation that would otherwise be offered to an aggrieved person to take the law into his or her own hands if they consider

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[4] S 179(2).

[5] *Ellis v Visser* 1954 (2) SA 431 (T) at 434 E-G; *Nedcor Bank Limited and Another v Gcilitshana and Others* 2004 (1) SA 232 (SE) para [28].

[6] S 7(1)(a) of the CPA limits those who may bring a private prosecution to a husband, in respect of his wife; a wife or child or the next-of-kin of any deceased person where the death of that person is alleged to have been caused by the offence; the legal guardian or curator of a minor or lunatic if the offence was committed against the ward and generally 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 alleged offence. ESTA preserves this principle in that the right to pursue a private prosecution is limited to the person unlawfully evicted.

[7] *Attorney-General v Van der Merwe and Bornman* 1946 OPD 197 at 201.

themselves injured by a criminal act and the prosecuting authorities will not take up their case.[8]

[14] The question of withdrawing charges or stopping prosecutions is dealt with in s 6 of the CPA. That provides that:

"An Attorney-General or any person conducting a prosecution at the instance of the State or anybody or person conducting a prosecution under section 8 may:-

(a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;

(b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: provided that where a prosecution is conducted by a person other than an attorney-general or body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorised thereto by the attorney-general, whether in general or in any particular case has consented thereto."

Section 6(a) provides expressly for the power to withdraw a charge before an accused is called upon to plead. It also provides for the consequences of such withdrawal namely that the accused is not entitled to a verdict of acquittal in respect of that charge.

[15] There is no provision corresponding to s 6(a) in relation to the conduct of a private prosecution. There the CPA provides that the putative private prosecutor will first obtain a certificate, referred to as a *nolle prosequi*, from the DPP declining to prosecute for the alleged offence (s 7(1)). In the case of a prosecution under ESTA this requirement is replaced by the giving of notice and the failure of the DPP thereafter to indicate that the State will prosecute the alleged offence. Section 7(2)(c) clearly contemplates that a private prosecution must proceed expeditiously because a certificate issued under section 7(1) lapses unless proceedings in

[8] *Solomon v Magistrate, Pretoria and Another* 1950 (3) SA 603 (T) at 609 G-H.

respect of the offence are instituted within three months of the date of the certificate. Under section 10 the private prosecution is initiated and conducted in the name of the private prosecutor. If the private prosecutor does not appear on the day set down for the appearance of the accused in the Magistrates' Court or for the trial of the accused then in terms of s 11(1) the charge against the accused shall be dismissed unless the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his control. A dismissal of the charges under s 11(1) has the result that no further private prosecution may be pursued in respect of that charge, although the NDPP may at the instance of the State prosecute the accused in respect of that charge.

[16] Section 12(1) is also material to the present issue. It provides that:

"A private prosecution shall, subject to the provisions of this Act, be proceeded with in the same manner as if it were a prosecution at the instance of the State …"

A prosecution by the State is conducted in terms of the provisions of the CPA, including s 6(a), which is the only section dealing with the withdrawal of criminal charges once instituted. It provides for the public prosecuting authority and for an authority prosecuting in terms of s 8 of the CPA to withdraw those charges at any stage before plea. It does not provide for a private prosecutor to do the same. In those circumstances the appellant contends that a private prosecutor may only commence proceedings once and may not withdraw them once commenced. In other words he argues that a person against whom a private prosecution is brought is entitled to have the proceedings taken to finality resulting in either a conviction or an acquittal. They cannot once commenced be withdrawn and subsequently recommenced.

[17] On the assumption that this is correct the appellant submits that the issue of this summons to institute criminal proceedings for the third time against him constitutes an abuse of process. The argument is that as the Act only permits a private prosecutor to institute a private prosecution once it must follow that the institution of a second or third prosecution in respect of the same charges by the same private prosecutor against the same person is not permitted and constitutes an abuse of the process of the court. Accordingly it is submitted that the court should intervene to prevent that abuse.

[18] In support of the proposition that a private prosecutor may only commence proceedings once and must then pursue them to finality our attention was drawn to s 7(5) of the CPA which requires a private prosecutor to commence proceedings within two months of receiving a certificate from the DPP declining to prosecute. When taken together with the fact that the right to institute a private prosecution operates as a safety valve, but one that must be pursued expeditiously once the State declines to prosecute, it is submitted that this supports a construction of the CPA that precludes a private prosecutor from withdrawing a prosecution once commenced.

[19] The argument has a superficial attraction but in my view it cannot be sustained. Whilst it is correct that a person wishing to bring a private prosecution must do so within two months of the DPP declining to prosecute, the force of that point is diminished once it is recognised that there is no time constraint operating on the putative private prosecutor to compel them to seek a *nolle prosequi* from the DPP. As *Bothma v Els*, *supra,* demonstrates there may be a very considerable lapse of time between the events giving rise to the private prosecution and the person

concerned seeking a *nolle prosequi* from the DPP. Once that is recognised the provisions of s 7(5) of the CPA provide no support for the appellant's argument.

[20] The principal difficulty with the argument is that it seeks to infer from the absence of a positive provision governing the withdrawal of criminal charges by a private prosecutor a prohibition on the private prosecutor withdrawing such charges once commenced. However, such a prohibition creates its own difficulties. What is to happen if the private prosecutor seeks legal advice and following upon that advice is persuaded that the prosecution has no prospects of success? It would be absurd to say that they cannot withdraw the prosecution, but must simply leave it hanging in the air. What is more the accused would have no means of removing the charge hanging over his or her head because an accused person has no means for securing the set down of a criminal case. That is not a palatable conclusion.

[21] Furthermore it appears to be recognised that the parties to a private prosecution can settle their differences. Obvious examples where a settlement might be sought and achieved would be a charge of fraud or theft where the accused person offered monetary compensation in return for the criminal charges being dropped. Such a situation was discussed in *Phillips v Botha*[9] without it ever being suggested by the court that had an agreement been reached it would have had no effect on the prosecution. Nor is there any good reason why a private prosecutor whose ire is assuaged by the receipt of compensation should not be entitled to retire gracefully from the field of battle. After all the purpose of conferring the right of private prosecution is to enable the prosecutor to vindicate the

[9] 1999 (2) SA 555 (SCA).

injury they have suffered at the hands of the accused. If they have adequately achieved that purpose they should be entitled to withdraw the proceedings.

[22] Although a private prosecution is directed at securing the conviction of the accused person on a criminal charge van den Heever AJP said in *Bornman v van der Merwe, supra,* at 195:

"… essentially private prosecutions are in the nature of private litigation. The parties take their courage in both hands and institute and defend to gain their private ends. Since the State has made ample provision for the prosecution of offenders at the public instance, it seems equitable that the parties who desire to exercise their very special rights should do so at their own peril of being mulcted in costs."

That statement has been approved by the then Appellate Division.[10] It follows that like any other private litigation the prosecutor is *dominis litis* and should be able to withdraw the proceedings if he or she wishes. This conclusion recognises and gives effect to the fact that a private prosecution involves a private dispute between private parties. In many instances the nature of the dispute is such that the prosecutor will also be entitled to pursue civil remedies against the accused. If a resolution of the dispute can be achieved that will put an end to the right to pursue civil remedies and any civil proceedings instituted will have to be withdrawn. I can see no reason of principle why the same should not apply to criminal proceedings.

[23] A possible objection is that this exposes a person to the possibility of criminal proceedings being instituted and withdrawn repeatedly in order to harass them and induce them to agree to a more generous settlement than would otherwise by the case. In other words the criminal proceedings are used to enhance the bargaining position of the putative private prosecutors rather than being instituted for the purpose of having criminal justice done.

[10] *Buchanan v Marais NO and Others* 1991 (2) SA 679 (A) at 685 B-C.

However, the answer to that is that such an approach constitutes an abuse of process that the court, in the exercise of its inherent powers, will constrain. That is so whether the proceedings are civil or criminal in nature. However it is a power that is exercised with great caution and only in a clear case.[11]

[24] Apart from the situation where the private prosecutor decides that the prosecution will fail or where a compromise is reached, the entitlement to withdraw criminal proceedings may facilitate the resolution of disputes. Thus a person charged with a criminal offence by a private prosecutor may make it a condition of entering into negotiations with a view to compromising the dispute that the prosecution be withdrawn. One can readily imagine situations where such a condition might be demanded as a mark of good faith on the part of the private prosecutor before commencing negotiations. In view of the public interest in the resolution of disputes and in circumstances where the DPP has determined that there is no public interest in pursing a prosecution, it is undesirable that the CPA be construed in a way that might hinder the achievement of a resolution of the dispute between the private prosecutor and the accused.

[25] The present case provides an example of just such a situation. It is clear that when the previous prosecution was withdrawn on the 23 August 2006, the parties were engaged in attempts to settle their disputes. Those attempts failed. It was only thereafter that the current prosecution was instituted and it would have been pursued had the present application for a permanent stay not been brought. I accordingly conclude that the contention that a private prosecutor may not withdraw the criminal charges before the accused is required to plead is incorrect. It follows that the

[11] *Phillips v Botha, supra,* 566 D-G.

withdrawal of the previous charges and the institution of fresh proceedings did not constitute an abuse of the process of the court.

[26] For those reasons the appeal must fail. As regards costs it was submitted that because Mr Crookes is merely trying to vindicate his constitutional rights no order for costs should be made. However, as already mentioned, a private prosecution is of the nature of civil litigation and the purpose in bringing the application for a stay was to put an end to the proceedings without the need for going into the merits. That attempt failed in the Magistrates' Court and Mr Crookes elected to pursue it by way of an appeal. The appeal has been unsuccessful and it seems to me that justice and fairness require that he should bear the costs occasioned by that lack of success.

[27] The appeal is dismissed with costs.

BUTHELEZI AJ : I agree

DATE OF HEARING	15 APRIL 2010
DATE OF JUDGMENT	4 MAY 2010
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