IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Review case no: AR 517/2013

In the matter between:

THEMBA MICHAEL MASINGA **APPLICANT**

And

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **FIRST RESPONDENT**

THE REGIONAL MAGISTRATE DURBAN **SECOND RESPONDENT**

JUDGMENT

PLOOS VAN AMSTEL J

[1] This is an application for the review of criminal proceedings in the Durban Regional Court which resulted in the applicant being found guilty of attempted murder and sentenced to ten years' imprisonment. The first respondent is the National Director of Public Prosecutions (NDPP) and the second respondent the

magistrate who presided over the trial. The applicant appeared before us in person and the first respondent was represented by counsel from the office of the Director of Public Prosecutions (DPP).

[2] It is not alleged that the magistrate misconducted himself in any way or that he was a party to any irregularity, and he took no part in the proceedings before us. The applicant's complaint is that the prosecution was irregular in that it was instituted and proceeded with without the written authorisation or instruction of the DPP. He says such authorisation was required in terms of the prosecution policy issued in terms of section 21(1) (b) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act), as he was a magistrate at the time. Section 21(1) (b) refers to policy directives issued by the NDPP, while section 21(1) (a) refers to prosecution policy determined by the NDPP. It seems clear that the applicant meant to rely on the policy directives. The deponent to the first respondent's answering affidavit confirms that the requirement referred to by the applicant is contained in the policy directives and not in the prosecution policy.

[3] The policy directive relied upon by the applicant reads as follows:[1]

> 'In addition to instances where statutory provisions require prior authorisation from the National Director or DPP for the institution of a prosecution, there are certain categories of persons in respect of whom prosecutors may not institute and proceed with prosecutions without the written authorisation or instruction of the DPP or a person authorised thereto in writing by the National Director or DPP (either in general terms or in any particular case or category of cases). This general rule is subject to the exceptions set out in paragraph 3 below.'

[4] The categories of persons in respect of whom written authorisation or instruction is required include magistrates.[2] None of the exceptions referred to are relevant for present purposes.

[5] The statutory context of the policy directives are as follows. Section 179(5) of the Constitution[3] provides that the NDPP must determine prosecution policy and

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[1] Paragraph 1 of Part 8.
[2] Paragraph 2 (f) of Part 8.

issue policy directives, all of which must be observed in the prosecution process. Sub-section (5) (c) provides that the NDPP may intervene in the prosecution process when policy directives are not complied with. These provisions are echoed in sections 21 and 22 of the NPA Act.

[6] It is not disputed that the written authorisation of the DPP was not obtained. The prosecutor who handled the prosecution, Ms LN Dlamini, however says in her affidavit that she obtained oral authorisation from the then acting DPP, Mr CS Mlotshwa, to proceed with the prosecution. He also instructed her to be the prosecutor in the matter. She says this happened before the applicant's second appearance in the district court on 14 April 2009. She was at the time a senior public prosecutor at the Durban Magistrates' Court. Her duties included the supervision and management of the Family Section, which included the Domestic Violence, Maintenance, Child Justice and Sexual Offences Sections. It was also part of her duties to screen dockets and to bring high-profile matters to the attention of the Chief Prosecutor and the DPP. It should be noted that in terms of the policy directives[4] the written authorisation of the DPP is not required for the arrest and first appearance in court of persons mentioned in the categories which include magistrates.

[7] Ms Dlamini says it was her decision to charge the appellant with attempted murder. The statements in the docket indicated that the applicant had repeatedly struck his wife on the head with an axe, shouting 'Are you not dead yet, dog'. She sustained deep wounds on her head, which had to be sutured, injuries on her face which were consistent with the use of the blunt side of an axe, and multiple lacerations and bruises. Ms Dlamini discussed the case with the acting DPP and informed him of the evidence in the docket. He agreed with her that the appropriate charge would be attempted murder and authorised her to proceed with the prosecution.

[8] Ms Dlamini knew that she required authorisation by the DPP and says she did not ignore the policy directive. She apparently overlooked the requirement that the

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[3] Constitution of the Republic of South Africa, 1996.
[4] Paragraph 5 of Part 8.

authorisation had to be in writing. It is somewhat surprising that the acting DPP also overlooked that requirement.

[9] Counsel for the first respondent conceded that the absence of written authorisation constituted an irregularity. He submitted however that the irregularity was not so fundamental that it per se amounted to a failure of justice, that the applicant was not prejudiced by the irregularity and that accordingly there was no failure of justice.

[10] I agree that the failure to obtain written authorisation from the DPP constituted an irregularity. Written authorisation was required by the policy directives, and both section 179(5) of the Constitution and section 21(1) of the NPA Act provide that the policy directives must be observed in the prosecution process.

[11] In *Toubie v S*[5] Heher JA said an irregularity in proceedings does not automatically result in a failure of justice or an unfair trial. Section 322(1) of the Criminal Procedure Act provides that no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

[12] Some irregularities are so fundamental that they per se amount to a failure of justice. In *S v Mkhise; S v Mosia; S v Jones; S v Le Roux*[6] Kumleben JA said at 871F that it is a well-established principle that an irregularity in the conduct of a criminal trial may be of such an order as to amount *per se* to a failure of justice, which vitiates the trial. On the other hand, less serious and less fundamental irregularities do not necessarily have that effect. At 872F he said the enquiry in each case is whether the irregularity is of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred. In such a case one does not even consider whether the accused had been prejudiced by the irregularity. Also

[5] [2012] 4 All SA 290 (SCA) para 40.
[6] 1988 (2) SA 868 (A).

see the discussion in this regard by Holmes JA in *The State v Moodie.*[7] The position is not altered by the fact that compliance with the policy directives is required by the Constitution. In *S v Shikunga and another*[8] Mahomed CJ said that the test proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. This statement was approved by the Supreme Court of Appeal in *S v Smile and another*.[9]

[13] The applicant submitted that we should not accept Ms Dlamini's evidence that she had obtained oral authorisation from the DPP. He pointed out that Mr Mlotshwa was not able to confirm the discussion with Ms Dlamini, and said he could not remember it. This is hardly surprising as he deposed to his affidavit some four years later. There is no reason not to accept Ms Dlamini's uncontradicted evidence as to her discussion with the acting DPP.

[14] I do not consider that the irregularity in this case was of such a nature that it per se amounted to a failure of justice. There was oral authorisation by the acting DPP, who was informed of the evidence against the applicant and agreed that he should be charged with the attempted murder of his wife. The applicant did not protest before or during the trial that the prosecution had not been authorised in writing. He raised the point for the first time on appeal. To hold that the absence of written authorisation in those circumstances per se amounted to a failure of justice, irrespective of whether the applicant was prejudiced thereby, would be contrary to the public interest and will bring the administration of justice in disrepute. The position may be different where a prosecution against a magistrate was instituted and proceeded with without the knowledge or consent of the DPP, or contrary to his instructions.

[15] I proceed therefore to consider whether in all the circumstances of the case the irregularity in any event resulted in a failure of justice. This involves an enquiry as to whether the applicant was prejudiced by the irregularity.

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[7] 1961 (4) SA 752 (A) at 756E and further.
[8] 1997 (2) SACR 470 (NmS) at 484c
[9] 1998 (1) SACR 688 (SCA) at 691F-J.

[16] In *Toubie* Heher JA referred to a statement by Cameron JA in *S v Legoa*,[10] who said:

> 'Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances.'

Heher JA said this approach enables a balance to be struck between prejudice to the accused and the interest of the public in knowing that justice has been served.

[17] In *Hlantlalala and Others v Dyanti NO and Another*[11] Mpati AJA said no failure of justice will result if there is no prejudice to an accused and, by the same token, there will be no prejudice if the accused would in any event have been convicted, irrespective of the irregularity.

[18] The applicant's complaint is that if the DPP's written authorisation had been sought he may well have decided to charge him with assault with intent to do grievous bodily harm, instead of attempted murder. There is no merit in this complaint. In the first place, the evidence in the docket clearly supported a charge of attempted murder, in that the applicant was alleged to have struck his wife several times on the head with an axe while he exclaimed that she was not dead yet. Secondly, the acting DPP, in discussion with the senior prosecutor, agreed with her that the appropriate charge was attempted murder and authorised her to proceed with the prosecution. Thirdly, the regional magistrate agreed that the applicant was guilty of attempted murder and convicted him on that charge. This was not a case where a disgruntled litigant had laid a frivolous charge against a magistrate and the DPP had not authorised the prosecution. It was a case where a husband had viciously attacked his wife with an axe, inflicted serious injuries to her head and uttered words which indicated that he wanted to kill her. I think it can safely be accepted that the DPP who authorised the prosecution orally would also have done so in writing. In those circumstances it cannot be said that the applicant was prejudiced by the irregularity, and it did not result in a failure of justice.

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[10] 2003 (1) SACR 13 (SCA) para 21.
[11] 1999 (2) SACR 541 (SCA) para 9.

[19] The application can therefore not succeed. There is no need for a costs order as the respondents were represented by the DPP. The application is dismissed.

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PLOOS VAN AMSTEL J

_____ I agree.

NKOSI J

Appearances:

For the Applicant	:	In Person
Instructed by	:	
For the 1st & 2nd Respondents	:	Adv. J Du Toit
Instructed by	:	The National Director of Public Prosecutions Pietermaritzburg
Date of Hearing	:	28 April 2015
Date of Judgment	:	07 May 2015