

22/2/2011

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
22/2/2011	
DATE	

CASE No: 19577/09

DATE: 22/2/11

In the matter between:

DEMOCRATIC ALLIANCE

APPLICANT

And

THE ACTING NATIONAL DIRECTOR

OF PUBLIC PROSECUTIONS

FIRST RESPONDENT

THE HEAD OF THE DIRECTORATE

OF SPECIAL OPERATIONS

SECOND RESPONDENT

JACOB GEDLEYIHLEKISA ZUMA

THIRD RESPONDENT

And

RICHARD MICHAEL MOBERLY

YOUNG

FIRST INTERVENING PARTY

CCII SYSTEMS (PROPRIETARY)

LIMITED

SECOND INTERVENING PARTY

JUDGMENT

Ranchod J.

Introduction

[1] In April, 2009 the first respondent ('the NDPP') made public his decision ('the decision') to discontinue the criminal prosecution of the third respondent relating to alleged crimes of corruption which had been instituted and contained in an indictment of 27 December, 2007. By the time the NDPP's decision was made, the criminal proceedings in respect of the third respondent had been pending for a long time.

[2] The history of the matter relating to the prosecution of the third respondent has been set out in various affidavits filed in several Court proceedings before the High Court, Supreme Court of Appeal and Constitutional Court and are reflected in, *inter alia*, the following decisions:

- 2.1 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); and
- 2.2 *Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma v National Director of Public Prosecutions and others* 2009 (1) SA (CC).

[3] The Applicant ('the DA') was unhappy about the first respondent's decision to discontinue the criminal prosecution of the third respondent and launched an application in this Court for the review and correcting or setting aside of the decision. The review application is stated to be brought under the

Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and sections 1(c) and 33 of the Constitution of the Republic of South Africa, 1996.

[4] Applicant thereafter requested the 1st and 3rd respondents to deliver to Registrar of this Court, in terms of Rule 53(1) of the Uniform Rules of Court the record of the proceedings (the record) pursuant to which the first respondent's decision was taken.

[5] The first respondent informed the applicant that he could not do so as the record contained written and oral submissions made by or on behalf of third respondent on a confidential as well as "without prejudice" basis. First respondent said he would require third respondent's consent. The State Attorney (acting for the first respondent) wrote to third respondent's legal representatives asking them to state in writing whether the third respondent would be prepared to waive the confidentiality and "without prejudice" conditions, alternatively whether third respondent would be prepared to permit filing of the record subject to suitable written confidentiality undertakings being furnished by the applicant's legal representative. Third respondent refused to waive the conditions nor did he agree to the filing of the record subject to any confidentiality undertakings.

[6] The result is this (one of two) interlocutory application before me in terms of Rule 6(11). It was launched by the applicant on 27 May, 2009. Applicant seeks the following order:

1. Directing the first respondent to dispatch, within such time as this Honourable Court may prescribe, the record of the proceedings relating to the decision of the first respondent which forms the subject of the review application brought by the Applicant under the above case number, excluding the written representations made on behalf of the third respondent to the first respondent and any consequent memorandum, report or the like prepared in response thereto which serves to breach any confidentiality attaching to these representations ('the reduced record');
2. Directing the first respondent to specify, by written notice accompanying the reduced record, the documents or material excluded from the record;
3. Granting the applicant leave, if it requires the first respondent to lodge the full record, to amplify its papers accordingly and to re-enrol this application, any such amplification and re-enrolment to take place not later than ten days after the reduced record has been filed;
4. Giving directions for the further conduct of the main application;
5. Granting the applicant further and/or alternative relief;
6. Directing the first respondent to pay the costs of this application, save in the event of opposition from any of the respondents, in which case costs are to be paid by the first respondent and any other respondent opposing this application, on a joint and several bases."

[7] Two days later, on 29 May, 2009 the first and second intervening parties ('Mr Young' and 'CCII') brought an interlocutory application for leave to intervene as second and third applicants in the review application. I deal with that application later on herein.

[8] This Court (per Legodi J) made an order directing how, *inter alia*, the two interlocutory applications were to be dealt with.

[9] Pursuant to the order, the first respondent filed an answering affidavit in the interlocutory application for the reduced record and raised certain *in limine* matters. The Applicant thereafter filed a replying affidavit.

[10] In the main application (for review) only the DA (as applicant) has filed its founding affidavit. No answering or replying affidavits have been filed as the interlocutory application was launched when first respondent failed to file the complete record of the proceedings sought to be reviewed. As I said, the interlocutory application is for an order compelling the first respondent to file a reduced record which is to exclude the written and oral representations made by the third respondent. And it is at this stage, in the interlocutory application, that first respondent has raised the points *in limine*.

[11] The *in limine* matters raised by first respondent are the following:

- 11.1. the lack of *locus standi* on the part of the DA, Mr Young and CCII to seek the review and setting aside of the NDPP's decision;
- 11.2. the NDPP's decision does not constitute administrative action that is reviewable under PAJA;
- 11.3. the Court should, even at this stage of the proceedings, exercise its discretion against reviewing and setting aside the NDPP's decision even if it is shown to have been unlawful as the DA contends.

[12] Counsel for the DA submitted that the issue of standing should be raised in the main application as also the issues of reviewability of the first respondent's decision and whether a sitting president may be prosecuted. (I will refer to the review application as the main or review application interchangeably in this judgment.) The latter issue arose because the third respondent, Mr Zuma, has since become the President of South Africa. Mr Rosenberg, who appeared for the Applicant, submitted that a party raising points *in limine* should file a full set of papers and plead over on the merits as well and referred me to *Standard Bank of SA Ltd. v RTS Techniques & Planning (PTY) Ltd* 1992 (1) SA 432 (TPD) at 440. There, Daniels J referred to *Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 136 where Corbett J (as he then was) stated that the practice in application procedure requires a respondent, who wishes to oppose an application on the merits, to place his case on the merits before the Court by way of affidavit.

'Having done so, it is also open to him to take the preliminary point... I do not think that normally it is proper for such a respondent not to file opposing affidavits but merely to take the preliminary point. I say "normally" because situations may arise where this procedure is unexceptionable. For example, a respondent who is suddenly and without much notice confronted with a complex application and who would normally be entitled to a substantial postponement to enable him to frame opposing affidavits might well be permitted there and then to take such a preliminary point.'

Mr Kennedy, who appeared for the first respondent, submitted that the *Standard Bank* case is authority for the point that a litigant who raises *in limine* points without pleading over carries a risk that if the *in limine* points are not upheld he or she may not be allowed to thereafter file an affidavit on the merits. That does not apply here where interlocutory applications are concerned. I agree.

[13] The DA's attorneys were informed at the outset by the State Attorney in a letter dated 24 April, 2009, about the first respondent's concerns regarding the *locus standi* of the DA and whether the first respondent's decision was reviewable.¹ The relevant portion of the letter reads:

"The locus standi of the DA and reviewability of the decision"

15. *The review application has significant implications for the functioning of the NPA. It deals with important and complex*

¹ Annexure "A" to the founding affidavit in the application for the reduced record.

matters which will require extensive work on the part of the parties involved for their proper determination.

16. *The NPA (through the NDPP) intends to dispute the locus standi of the DA to bring the review application and to seek the relief that it seeks, and the reviewability of a decision to discontinue a prosecution. These aspects are quite apart from whether the relief is itself competent given the ground upon which it is sought – which relief the NDPP and the NPA will oppose, on the basis that the decision sought to be reviewed was taken in a lawful, fair and valid manner, in accordance with the Constitution, applicable legislation and the rule of law, and on proper, rational and justifiable grounds.*
17. *It would be convenient for all the parties involved, and serve the interests of justice better, for the Court to be requested to rule on the issue of the DA's locus standi and the reviewability of the decision before extensive work is undertaken and unnecessary costs are incurred (bearing in mind that such costs entail the expenditure of public funds, and that the Public Finance Management Act precludes fruitless and wasteful expenditure).*
18. *If it is found that the DA lacks locus standi, and/or that the decision is not legally susceptible to judicial review, as the NDPP will contend, there will be no need to file the Record. The matter will then come to an end.*
19. *In the circumstances, the NDPP intends to raise the matter of the DA's locus standi and the reviewability of the decision as a*

preliminary matter to be dealt with on an interlocutory basis together with the request to the Court to sanction any confidentiality arrangements that the parties agree upon or to give directions in the event that the parties fail to reach agreement on the arrangements to preserve confidentiality.”

[14] I am of the view that it is not necessary for all the affidavits to be filed in the main application. The DA has filed its founding affidavit. The issue of *locus standi* and reviewability can be decided without any further evidence. It would otherwise be a duplication of effort. One can compare the issue of the *point in limine* with that of taking an exception where the issue raised on exception is dealt with even before hearing all the evidence.

Mr Kennedy submitted that it would be convenient and in the interests of justice for the *in limine* matters to be determined prior to deciding on the merits of the applications for the reduced record and for intervention. Although in the normal course the *in limine* matters would be decided after the exchange of all affidavits in the main application, the circumstances of this case are unique; there are unlikely to be any further facts that the DA, Mr Young and CCII can adduce that are necessary to determine the matters raised *in limine*. All the relevant facts are before the Court. The Court is in a position to determine the matters raised *in limine* prior to the exchange of all affidavits. Again, I agree. If the DA does not have *locus standi* then clearly it would dispose of the application for a reduced record. If it were to be left for determination in the main application then in effect, if an order for the reduced

record were granted, and the DA's *locus standi* was found to be wanting, then it would be in possession of a record it was not entitled to.

[15] It would, in the circumstances, only be appropriate to determine the issue of *locus standi* even at this preliminary stage. Put another way, if the DA lacks *locus standi*, there would be no need for the first respondent to produce the reduced record. The concomitant factors of not incurring unnecessary costs and of convenience would be obvious.

[16] I conclude accordingly that the preliminary issues should be dealt with at this interlocutory stage.

[17] I deal with both the application for a reduced record and the application for intervention in this one judgment. However, before I do so, another issue raised by the DA's counsel must be dealt with.

[18] The point raised by the DA's counsel, even before the preliminary issues were argued, was that the respondents were in effect seeking a separation of issues and should have made a formal application for that purpose. The DA would then have had the opportunity to oppose it. Mr Rosenberg referred to *Pharmaceutical Society of South Africa and Others v Tshabala-Msimang and Another NNO; New Clicks South Africa (PTY) Ltd v Minister of Health and Another* 2005 (3) SA 283 at 252 paras [15] and [16] in support of his submissions. Mr Kennedy submitted that these cases dealt with separation of issues on a piece-meal basis. They were not relevant here,

again because these matters before me were interlocutory applications and it cannot be said that the main application is being dealt with on a piece-meal basis. *Locus standi* and the other preliminary points raised were not separate issues. They were not confined to the main application but were defences to the interlocutory applications for both the reduced record and intervention by Mr Young and CCII. In my view, it is not necessary for the respondents to seek a formal separation of issues. The DA's submissions in this regard are misplaced.

LOCUS STANDI OF THE APPLICANT

[19] The Applicant bears the onus of proving that it has the necessary standing. It must appear from the allegations in the founding affidavit (*Eagles Landing Body Corporate v Molewa NO and others* 2003 (1) SA 412 (T) para 36.) The Applicant must have sufficient interest in the relief claimed which must be based upon a legally enforceable right.²

[20] The DA's counsel's submissions on the issue of standing were two-pronged, namely, the DA's standing to enforce compliance with the rule of law (a reliance on section 1 (c) of the Constitution which provides for supremacy of the Constitution and the Rule of law) and, in the alternative, the standing of the DA under section 38 of the Constitution. For the latter ground the DA claims to have standing on the following basis:

"16. In bringing this application, the DA acts:

² *Ex parte Van Wyk*, 1996 (1) SA 101 (C), 103 (C) (S.A.).

- 16.1 *In its own interests and the interests of its members and supporters (in terms of sections 38(a) and (e) of the Constitution, who all have an interest in the State acting lawfully and in accordance with the constitutional and statutory requirements; and*
- 16.2 *In the public interest (in terms of section 38(d) of the Constitution)."*

I will revert to this ground for standing later on in this judgment.

[21] In paragraph 13 of its founding affidavit in the review application the DA contends that the NDPP's decision can be reviewed for non-compliance with section 1(c) of the Constitution. The first respondent accepts the contention but, he says, the DA, Mr Young and CCII lack standing to bring such a review based on section 1(c) in the circumstances of this case. Furthermore, says first respondent, on the facts of this case, the Court should exercise its discretion against granting the remedy of review even in terms of section 1(c) of the Constitution.

[22] The DA says the third respondent's alleged crimes of corruption are crimes against the public. He is alleged to have provided political patronage and protection for financial reward. Every South African would accordingly be entitled to enforce compliance with the rule of law since every South African is affected by crimes of this kind. This is in itself sufficient to confer standing on the applicant.

[23] The DA further contends that because it made submissions to the first respondent regarding the possible decision to discontinue the prosecution of the third respondent it has a direct and personal interest in the outcome of those representations.

[24] On the first ground it was submitted that in *Kruger v President of the Republic of South Africa and others* 2009 (1) SA 417 (cc) at par [22] and [23] it was held by the Constitutional Court that a generous approach should be adopted to the determination of an applicant's standing in matters where compliance with the rule of law is sought to be enforced. In that case the Constitutional Court held section 38 of the Constitution did not apply because the case did not concern a challenge based on a fundamental right in Chapter 2 of the Constitution (*Kruger*: par 23 at 428c). The Court then went on to say it must adopt a generous approach to standing, and then clarified what this generous approach meant. It said, at para 24 that it meant '*an expanded understanding of what constitutes a direct and personal interest* (emphasis added).' The DA's submissions overlook the latter aspect that Skweyiya J was referring to. That decision did not, in my respectful view, do away with the requirement for showing a 'direct and personal interest'.

[25] First respondent's counsel submits that as a political party the DA does not have a direct and personal interest in the NDPP's decision not to prosecute President Zuma. I agree. Whatever general interest it might have is no different from that of any member of the public in South Africa. It would

be wrong on legal principle to contend that all members of the public in South Africa have a direct and personal interest sufficient to clothe them with standing to seek the review and setting aside of the NDPP's decision. I do not think every member of the public in South Africa can demonstrate, on the facts of this case, that the decision to discontinue the prosecution of President Zuma has a direct effect on any of their rights – even in the expanded sense in which the Constitutional Court construed direct and personal interest in the *Kruger* case.

[26] The DA's counsel accepted in their written heads of argument that the DA did not make its representations in terms of section 179(5)(d) of the Constitution. The sub-section provides –

“The National Director of Public Prosecutions –

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

- (i) The accused person.*
- (ii) The complainant.*
- (iii) Any other person or party whom the National Director considers to be relevant.”*

The representations were, in the circumstances, not made pursuant to any legislative or constitutional entitlement on the part of the DA to make them.

STANDING UNDER PAJA

[27] As I said earlier, the DA says it brings the main Application in terms of PAJA³ as well as sections 1(c) and 33 of the Constitution.

[28] Section 6(1) of PAJA provides that 'any person may institute proceedings in a court or a tribunal for the judicial review of administrative action.

[29] The phrase 'any person' in section 6(1) of PAJA does not mean that any person may challenge any unlawful administrative action purely as a member of the public – even if such a person is completely unconnected with the administrative action and unaffected by it in his or her rights. More is required.

[30] The DA says in its founding affidavit:

"Even if the NDPP's decision is not "administrative action" as defined in PAJA it is administrative action as contemplated in section 33 of the Constitution." In my respectful view, for purposes of a review under PAJA the legal standing of the DA to review the NDPP's decision must be established in terms of PAJA and not in terms of section 33 of the Constitution. The Constitutional Court has held that PAJA covers the

³ Promotion of Administrative Justice Act 3 of 2000

field and litigants cannot rely directly on the provisions of section 33 of the Constitution and thereby avoid PAJA.⁴

[31] As I said, the DA would only have standing if it can prove that it has a direct and sufficient interest in the prosecution of the third respondent or some legally enforceable right to assert in respect of the prosecution, and thus the NDPP's decision.⁵ The Court set out the common law test as follows in *Jacobs en 'n Ander v Waks en Andere*⁶:

*“Die weg is nou gebaan vir 'n oorweging van die locus standi van die applikante. In die algemeen beteken die vereiste van locus standi dat iemand wat aanspraak maak op regshulp 'n voldoende belang moet hê by die onderwerp van die geding om die hof te laat oordeel dat sy eis in behandeling geneem behoort te word. Dit is nie 'n tegniese begrip met vas omlýnde grense nie. Die gebruiklikste manier waarop die vereise beskryf word, is om te sê dat 'n eiser of applikant 'n direkte belang by die aangevraagde regshulp moet hê (dit moet nie te ver verwyderd wees nie); andersins word daar ook gesê, na gelang van die samehang van die feite, dat daar 'n werklike belang moet wees (nie abstrak of akademies nie), of dat dit 'n teenwoordige belang moet wees (nie hipoteties nie) – sien, in die algemeen, *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) op 387J-388H, 398I-390A, en die vorige beslissings wat*

⁴ *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others* (Treatment Action Campaign and Another as *Amici Curiae* 2006 (2) SA 311 (CC) paras 96 and 97

⁵ *Trakman NO v Livshitz and Others* 1995 (1) SA 282 (A) at 287E/F.

⁶ 1992 (1) SA 521 (A) at 533J-534E

bespreek word (sommige waarvan hieronder genoem sal word). In die omstandighede van die huidige saak is dit veral die vereiste van 'n direkte belang wat op die voorgrond staan. Wat dit betref, is die beoordeling van die vraag of 'n litigant se belang by die geding kwalifiseer as 'n direkte belang, dan wel of dit te ver verwyderd is, altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reëls kan neergelê word vir die beantwoording van die vraag nie (sien bv *Dalrymple and Others v Colonial Treasurer* 1910 TS 372 per Wessels R op 390 in fine, en vgl *Director of Education, Transvaal v McCagie and Others* 1918 AD 616 per Juta Wn AR op 627). Vorige beslissings kan behulpsume algemene riglyne vir bepaalde soort gevalle aandui, maar meestal het dit weinig nut om die besondere feite van een geval te vergelyk met dié van 'n ander. Met dit in gedagte benader ek die feite van die onderhawige saak.”

[32] PAJA has not altered the common law requirements for standing to review administrative action (except to the extent that PAJA has imposed the additional requirement that a review applicant must show that its rights have been materially and adversely affected by the impugned administrative action).⁷ In *Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape*⁸ the Court said the following in relation to section 24 of the Interim constitution⁹ (the right to lawful administrative action):

⁷ PAJA s 6(1), read with the definition of “administrative action”.

⁸ 2000 (4) SA 681 (C) at 694D-F.

⁹ Constitution of the Republic of South Africa, 1993.

*"Mr Grobler argues that this provision, more particularly s 24(a) and (d), confers locus standi on the applicant, even if he did not enjoy it before. Now, it seems clear to me that, in enacting this provision, the framers of the Constitution did not intend to clothe all and sundry with locus stani to demand lawful, procedurally fair, justifiable administrative action, or to demand reasons for it: in each case the right to demand these things is confined to those persons variously whose 'rights', 'interests' or 'legitimate expectations' are 'affected or threatened', as the case may be, by the administrative action concerned, slightly different formulations being used for the different categories of entitlement. The Legislature is generally presumed to be familiar with the existing law as interpreted and applied in the decisions of the superior courts of the Country, and to wish to alter it as little as possible: see Steyn Die uitleg van Wette 5th ed at 97 – 8, 132. To hold the converse would be to create a morass of uncertainty where there was previously certainty: so that the framers of the Constitution must be taken to have been aware of the authorities to which I have referred and to have sought to bring about as few changes to the existing law as possible as regards the locus standi of persons aggrieved by administrative action. ..."*¹⁰

[33] The reasoning of the Court in *Vandenhende* in relation to section 24 of the Interim Constitution remains, in my respectful view, correct for purposes of section 6(1) of PAJA, which gives effect to s 33 of the current Constitution. A

¹⁰ *McDonald and others v Minister of Minerals and Energy and others* 2007 (5) SA 642 (C) para 27: an applicant must show that the decision has adverse effects on its rights.

person seeking the review of administrative action has to show that his or her rights, interests or legitimate expectations have been materially and adversely affected by the administrative action. The allegations made by the DA in its founding affidavit (which I have mentioned earlier) do not show that its rights, nor that of its members have been materially or adversely affected, let alone that of the broader public.

STANDING UNDER SECTION 38 OF THE CONSTITUTION

[34] The DA says it also relies on the broad standing provisions of section 38 of the Constitution in respect of its challenge based on section 1(c) of the Constitution. Section 38 of the Constitution provides as follows:

“38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

[35] It is clear from the provisions of section 38 that it applies only in the case of an enforcement of fundamental rights in the Bill of Rights. The DA's submission that it is entitled to rely on section 38, because it has alleged that sections 9 and 33 of the Constitution were violated by the decision cannot be sustained. Firstly, it is not what the DA alleges in its founding affidavit¹¹ where it sets out section 38 as the basis for its allegation that it has standing to bring the application for review. Section 9 deals with the right to equality while section 33 provides for just administrative action. Both sections state that national legislation must be enacted to give effect to those provisions. That has been done by the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and PAJA respectively. The Constitutional Court has held that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right.¹² A litigant is required to vindicate his or her rights to lawful administrative action by recourse to PAJA. It is impermissible in my view for a party to rely directly on the provisions of section 33 to establish standing to vindicate its rights under PAJA.¹³ The same can be said in general about the DA's reliance on section 9 of the Constitution. Its reliance on the equality provisions are set out in the DA's founding affidavit as follows:

"11.4 The right to equality enjoyed by all South Africans is infringed (or will be infringed) when and if a powerful and influential State official or prominent figure in public life such as Mr Zuma is

¹¹ Founding affidavit, review application para 16 p15 at seq.

¹² See MEC for Education, Kwazulu-Natal, and Others v Pillay 2008(1) SA 474 CC at 488 para [40] and Mazibuko and Others v City of Johannesburg BCLR 239 CC

¹³ New Clicks case *supra*

shown to have avoided prosecution by reason of his prominence, position and influence.”

First respondent's counsel says this is a “general and bald allegation [and] is by no means a valid and serious allegation of any infringement or threatened infringement of any particular individual's right under section 9 of the Constitution.”¹⁴ I agree. The main application is not concerned with the enforcement of rights but the review of administrative action on the grounds set out in section 6 of PAJA, or on the grounds of legality in terms of section 1(c) of the Constitution. In its heads of argument the DA makes it clear that the review application concerns compliance with the rule of law.¹⁵

[36] For purposes of standing, the enforcement of section 1(c) of the Constitution is to be treated in the same way as challenges to the constitutional validity of legislation brought on the basis that, as an abstract and objective proposition, the legislation in question is inconsistent with the Constitution – as opposed to challenges based on infringements or threatened infringements of rights in the Bill of Rights. A person bringing such a constitutional challenge has to show that he or she is directly affected by the unconstitutional legislation. This was confirmed by Ackermann J and Chaskalson P in *Ferreira v Levin and Others*.¹⁶ They both concluded that an applicant in such circumstances has to prove that he or she is directly affected by the unconstitutional legislation.¹⁷

¹⁴ First respondent's heads of argument p 19 para 45.5.

¹⁵ Heads of Argument para 42

¹⁶ 1996 (1) SA 984 (CC).

¹⁷ At paras 31 *et seq* and 166-168

[37] In all the circumstances, I am of the view that the DA has failed to make out a case for *locus standi*.

THE APPLICATION FOR INTERVENTION

[38] I turn then to the application for intervention by Mr Young and CCII, the first and second intervening parties respectively. Their counsel (who also appeared for the DA) submitted at page 3 in the written heads of argument that:

- “2. ... the Intervention Application should be approached on the basis that it only calls for a decision on whether the Intervening Parties have standing to challenge the First Respondent's decision in review proceedings. If so, they should be allowed to intervene.
3. In this regard, we submit that the Intervening Parties are in the same position as the Applicant in that:
 - 3.1 They are members of the public who would be affected by the crimes of political patronage and protection for financial reward allegedly committed by the Third Respondent.
 - 3.2 They also made representations regarding the decision (footnote omitted)”. (Emphasis added.)

[39] Rule 12 of the Uniform Rules of Court provides:

'Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet.'

[40] Rule 12 is made applicable to applications, *mutatis mutandis*, by rule 6(14).

[41] Mr Rosenberg for the intervening parties submits that not only do the intervening parties have a 'sufficient interest' but that there is also an overwhelming public interest in the outcome of the matter and that intervention will not result in additional costs or delays or any other form of prejudice to the respondents.

[42] As is the case with the DA, Mr Young and CCII must show that they have a direct and substantial legal interest in the outcome of the review application in order to succeed with their application for intervention.¹⁸ It must transcend a mere financial interest. The intervening parties say in their founding affidavit (page 7):

"6. Applicant disputes the contention on behalf of First Respondent that it lacks standing in the main application, as will be confirmed by it in an affidavit of Mr Selfe which will be delivered together with this

¹⁸ National Director of Public Prosecutions v Zuma 2009(2) SA 277 at 308 par [85].

affidavit. Nevertheless, in order to obviate any possible difficulties in this regard, CCII Systems and I seek to intervene as Second and Third Applicants. ... (footnote omitted)” (Emphasis added)

[43] I accept the submissions of first respondent’s counsel that an application for intervention is to be treated as a facet of joinder.¹⁹ It must be clear that the real reason for the application is to permit the applicant to air serious and real issues that cannot be resolved by the Court without hearing him or her. This is not the case here. The only real reason here is to attempt to cure any lack of standing of the DA to bring the application for review. What the intervening parties are in effect saying is that they are only intervening in case the DA’s standing is found to be wanting. This ground fails to disclose a direct and substantial interest and consequently fails to meet the test for intervention. Indeed, it is not permissible, in my view, to rely on such a ground to be admitted as a party to the proceedings and the issues of public interest, costs and prejudice do not arise.

[44] However, Mr Young alleges he does have an interest in this matter. It arises out of the South African Government’s Strategic Defence Packages (“SDPs”) armaments acquisition programme, more commonly known as the “Arms Deal”. His company, CCII (the second intervening party of which he is a major shareholder and sole director) was selected by the Armaments Corporation of South Africa (Armcor) to provide a database for the SA Navy’s then new patrol corvettes. At some point CCII was “deselected” and a

¹⁹ Erasmus Superior Court Practice at B1-101

German consortium was selected to provide the specialised software though his company was highly recommended by the Navy itself. He complained on behalf of CCII to the Public Protector, the Special Investigative Unit, the Office of the Auditor-General and the Investigating Directorate for Serious Economic Offences. He says several letters from the Public Protector confirmed receipt of the complaints and served to confirm his status as complainant. CCII is a co-applicant with him to pre-empt any contention by one or more of the respondents that the complaint he lodged was not his but that of his company, CCII. He concedes that CCII was the legal entity whose interests may have been directly affected by the de-selection of the specialized software. There is an implicit acceptance that he does not have any direct and substantial interest in the prosecution of third respondent and the NDPP's decision.²⁰ He implicitly accepts that it is in reality only CCII that may arguably claim some kind of connection to the investigation and prosecution of third respondent. But even that connection with regard to CCII is not sufficient for purposes of the intervention application. The fact that CCII is a separate legal entity on whose behalf he acted, Mr Young cannot, in my view, claim to have any legal standing in this matter. Mr Young's assertion²¹ that he was the original complainant and for that reason has a corresponding right to the duty of a prosecutor to prosecute a matter to its conclusion where there is merit in the charge is without substance.

[45] As far as CCII is concerned, the nub of the factual allegations made by Mr Young and CCII in support of the intervention application is that CCII was

²⁰ FA (Intervention application) paras 18 and 29 pp 11 and 14-15.

²¹ Founding Affidavit, intervention application, para 42.

the original complainant whose complaint led to the investigations concerning the arms deal. They allege that these investigations resulted in the prosecution of Mr. Schabir Shaik. Further investigations resulted in the prosecution of third respondent.²²

[46] Except for making the allegations at this level, there is no allegation which indicates the manner in which the prosecution of third respondent would vindicate any rights of Mr Young or CCII, or how it would directly affect their legal rights. Once this is the position, the decision to discontinue the prosecution of third respondent could not directly affect any of their legal rights.

[47] Furthermore, it is common cause that any complaint of a civil nature concerning CCII and its tendering in the arms deal was settled between CCII and the relevant government agencies. No legal rights that could be affected by the NDPP's decision remain in this regard.

[48] If Mr Young and CCII were allowed to intervene on the basis that they were complainants would mean that every complainant in the thousands of cases that are withdrawn each year for various reasons would have a right to challenge the decision of the NDPP. This would be an untenable situation, as I said earlier. In this regard the first respondent says:

"12. *The NPA alone has power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions*

²² FA (Intervention application) paras 34-30 pp 13-15.

incidental to instituting criminal proceedings in terms of section 179(2) of the Constitution. In this regard section 20 of the National Prosecuting Authority Act, 32 of 1998 ('the NPA Act') provides that the power, which is exercised on behalf of the Republic, vests in the NPA to:

12.1 institute and conduct criminal proceedings on behalf of the State;

12.2 carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

12.3 discontinue criminal proceedings.

13. South Africa does not, in principle, follow a system of compulsory prosecution. The NPA has the discretion whether or not to institute and conduct criminal proceedings or whether to discontinue them. It is not compelled to institute criminal proceedings in respect of all matters brought to its attention irrespective of their merits, or to continue criminal proceedings which are instituted to their finality. The NPA sometimes declines to prosecute in what it considers to be minor matters because of limited resources and so as to prioritise other matters."

[49] As regards representation made by Mr Young to the first respondent, the same conclusions made in relation to the DA apply. The making of any representations did not create any legal rights on the part of Mr Young or CCII that would be directly affected by the NDPP's decision.

[50] An applicant for intervention must also show that it has a *prima facie* case that it wants the Court to determine – which serves to demonstrate that the application is seriously made.²³ In this case Mr Young and CCII do not even attempt to demonstrate how it is that there is a *prima facie* case on review. They must fail on this ground as well.

LOCUS STANDI OF THE INTERVENING PARTIES

[51] Mr Young accepts that if he and CCII do not have *locus standi*, they would not be entitled to intervene as applicants. He says:

“7. I accept that the locus standi of myself and CCII – as opposed to the locus standi of the applicant – is a relevant question to be determined at this stage. If we lack locus standi, it would follow that we are not entitled to intervene as applicants.”

[52] The application then falls to be dismissed also for lack of standing on the part of Mr Young and CCII. The lack of standing stems from the same basis of a lack of any direct interest in the review and setting aside of the NDPP’s decision.

[53] Mr Young and CCII do not purport to rely for their standing on section 38 of the Constitution. In any event, such reliance would fail for substantially the same reasons as apply to the DA.

²³ Erasmus Superior Court Practice at B1-103

[54] In view of the conclusion I have arrived at regarding standing of the DA and the application for intervention I do not deem it necessary deal with question whether the NDPP's decision constitutes administrative action that is reviewable under PAJA; nor whether the Court should, even at this stage of the proceedings, exercise its discretion against reviewing and setting aside the NDPP's decision even if it is shown to have been unlawful as the DA contends.

[55] I make the following order:

55.1 The application for a reduced record by the DA is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel;

55.2 The application for intervention by the intervening parties is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.



RANCHOB J

Applicants Attorneys: Edelstein Bosman Inc.

Applicant's Counsel: Mr S P Rosenberg SC

Mr H J De Waal

First Respondent's Attorneys: The State Attorney

First Respondent's Counsel: Mr P Kennedy SC

Mr M Chaskalson SC

Mr N H Maenetje

No appearance for Second Respondent

Third Respondent's Attorneys: Hulley & Associates

Third Respondent's Counsel: Mr K J Kemp SC

Ms A A Gabriel