

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO:1174/2016

In the matter between:

THEMBILE LUCAS MGATYELWA

PLAINTIFF

And

MINISTER OF POLICE

1ST DEFENDANT

**MINISTER OF JUSTICE & CORRECTIONAL
SERVICES**

2ND DEFENDANT

JUDGMENT

ZONO AJ:

INTRODUCTION

[1] The plaintiff instituted the instant proceedings on 7 April 2016 against the Minister of Police and the Minister of Justice and Correctional Services. The National Minister of Justice and Correctional Services is sued in his capacity as such and as a Minister vicariously liable for the delicts committed or for omission by the members of the National Prosecuting Authority and employees in the Department of Justice and Correctional Services when performing their duties within the course and scope of their employment with the Minister of Justice and Correctional Services and is cited herein as the second defendant.

[2] Relevant averments in the particulars of claim that seek to connect the Minister of Justice and Correctional Services, the National Prosecuting Authority to the actions of the public prosecutor concerned are couched as follows:

“8.2*The Prosecutor:*

8.2.1 *had a legal duty to read the police docket held under Cas No.33/09/2014 in order to assess the release or otherwise of the plaintiff from police custody,*

8.2.2 *had a legal duty to decide whether to place or not the said criminal case on the criminal court roll if there was no sufficient information in the police docket.”*

[3] The defendants delivered the amended plea in which various contentions are made. The defendants sought to explain the role of public prosecutor, Miss Ndika when the matter first appeared before the lower court with a view to deny pertinent averments made against the public prosecutor in the particulars of claim. The contentions were understood to be assailing plaintiff's failure to join the National Prosecuting Authority as an institution that is responsible for prosecutorial decisions. Anent to that, the plaintiff averred in his amended replication as follows:

“5. *The National Prosecuting Authority has no direct and substantial interest in the determination of this matter and could not be adversely affected by the court order which might be granted by the Honourable Court, therefore, it is denied that there is non-joinder of the National Director of Public Prosecutions in this matter.”*

[4] On 14 December 2021 this court granted an Order separating the issues of special pleas of misjoinder of the second defendant, non-joinder of the National Director of Public Prosecutions and non-joinder of the Magistrate of

Libode Magistrate's Court from the issue of liability and *quantum*. On 11 September 2023 this court postponed the trial for determination of the defendant's special pleas to 11-15 March 2024.

[5] On 11 March 2024 the matter came before this court. The parties sought by consent an Order separating second defendant's special plea of non-joinder of the National Director of Public Prosecutions from the special plea of misjoinder of the second defendant and non-joinder of the Magistrate, Libode with the later special pleas postponed *sine die*, to be adjudicated together with the merits of the plaintiff's case. This Order was granted. The trial proceeded on the second defendant's special plea of non-joinder of the National Director of Public Prosecutions.

[6] The court is called upon to decide whether or not there is non-joinder of National Director of Public Prosecutions as a party in these proceedings. In addition to the pleadings which crystalizes the issue of non-joinder of the National Director of Public Prosecutions, the second defendant called the evidence of the public prosecutor Ms Sikhona Ndika, a prosecutor who attended to the plaintiff's matter before the Magistrates' Court in Libode. In evidence, Ms Ndika testified that at all material times thereto she was employed by the National Prosecuting Authority. In support of that she introduced her contracts of employment. She further testified that she is under the supervision and control of the National Prosecuting Authority. She categorically denied that she is in the employ of the second defendant.

- [7] No objection by the plaintiff to the admission of the contracts in evidence as Exhibit “A”. Accordingly, they were so admitted. The contracts were deemed to have commenced, respectively on 01 November 2013 and stay in effect until and up to 31 October 2014 and 01 November 2014 to 31 October 2015. These contracts identify the parties thereto as follows:

“Agreement entered into between the Government of South Africa in its National Prosecuting Authority (hereinafter called the employer) represented by Mr J.Hayward in his capacity duly authorized as Senior Manager: HRM

And

Sikhona Ndika with ID No.: 850423 0533 088 (hereinafter called the employee).”

- [8] Another relevant clause of the contract is Clause 2 of the one contract ended 31 October 2014 which reads as follows:

“2. Place of employment and capacity:

The employee shall serve the employer as Aspirant Prosecutor at the offices of the National Prosecuting Authority in Mthatha Training Centre and such other place or places as may from time to time be directed by the employer or any other office duly authorized thereto into this regard.”

- [9] Clause 2 of the contract that ended on 31 October 2015 reads as follows:

“2. Place of Employment and Capacity

The employee shall serve the employer as District Court Prosecutor – Grade 1 (LP-3) at the National Prosecuting Authority at CPP: Mthatha (Libode) and at such other place or places as may from time to time be directed by the employer or any other officer duly authorized thereto in this regard.”

- [10] Ms Ndika testified that her salary is paid by the National Prosecuting Authority as her employer. In support of that, she introduced her payslips for the year

2014 and 2015. This evidence covered the joinder issues arising from the conduct of Ms Ndika. The oral submissions by both parties fully canvassed the issue of misjoinder of the second defendant and non-joinder of National Prosecuting Authority.

[11] Both parties furnished me with their respective written heads of argument. I thank both parties for insightful heads of argument. In both sets of heads of argument, the respective parties argue their respective cases on the premise that a special plea of misjoinder of the second defendant must be decided, together with the special plea of non-joinder of National Prosecuting Authority. Written submissions fully canvassed both topics. The special pleas of misjoinder and non-joinder referred to above were fully canvassed in trial¹.

[12] The special pleas of misjoinder of the second defendant and non-joinder of the National Director of Public Prosecutions are closely linked and intertwined. It is because of that interwovenness of these issues that the parties elected to argue both issues or special pleas together. It is convenient therefore to deal with both special pleas herein. The legal principles affecting the determination of the special plea of non-joinder are same as those necessary for determination of a special plea of misjoinder.

DISCUSSION

[13] Whether or not there is a non-joinder of the National Director of Public Prosecutions and misjoinder of the second defendant depends on various

¹ See Minister of Safety & Security v Slabbert 2010 (2) ALLSA 474 (SCA).

considerations and legal principles. Same principles are applicable when dealing with an issue of misjoinder and non-joinder².

[14] Non-joinder is the failure of a plaintiff to join a particular defendant with another whom he is suing, in circumstances in which the law requires that both should be sued together or the failure by a plaintiff to join with himself as co-plaintiff another person whom the law requires should be joined when suing a particular defendant or defendants. Misjoinder is the joining of several plaintiffs or defendants in one action in circumstances which the law does not sanction, i.e. the objection is that the wrong plaintiffs are suing or the wrong defendants are being sued³.

(i) Misjoinder

[15] A plea of misjoinder is in respect of the second defendant who is the National Minister of Justice and Correctional Services. The basis for his joinder is that he is vicariously liable for the delict committed by and omission of the members of the National Prosecuting Authority and employees in the Department of Justice and Correctional Services when performing their duties within the course and scope of employment with the second defendant. The claim is intended to be brought against the State⁴.

[16] The first port of call are the provisions of section 2(1) of State Liability Act 20 of 1957 which provides as follows:

² See *van der Lith v Alberts* 1944 TPD 17 at 22; *GB v SB* 2016 (1) SA 47 (WCC) at 53 G-H.

³ See Erasmus: Superior Court Practice 2nd Ed Vol 2 page D1 – 124.

⁴ See Section 1 of the State Liability Act 20 of 1957 as amended.

“In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as a normal department or respondent”.

[17] Section 1 referred to herein provides for actions brought or instituted against the State. The executive authority is defined in section 4A of State Liability Act as follows:

“executive authority”, in relation to—

(a) a national department, means the Cabinet member who is accountable to Parliament for that department; and

(b) a provincial department, means the member of the Executive Council of a province who is accountable to the provincial legislature for that department.”

[18] The provisions of section 2(1) of the State Liability Act are couched in peremptory terms. As a general rule non-compliance with peremptory provisions result in nullity⁵. In actions instituted against the state, executive authority must be cited as a nominal defendant, otherwise the action will be nullity.

[19] Another condition for citation of the executive authority is that the wrong complained of must have been *“committed by servant of the State acting in his capacity as such and within the scope of his authority as such servant.”* The wrong that is the subject matter of the present proceedings was committed by Ms Ndika in her capacity as the prosecutor. A prosecutor is a servant of the State. Undoubtedly Ms Ndika, at all material times when the plaintiff attended court during the first appearance, was acting within the

⁵ See LAWSA, 2nd Ed Vol 25, Port page 339; G.M Cockram: Interpretation of Statutes, 34^r Ed page 161.

course and scope of her authority as servant of the State. The evidence led in this court by Ms Ndika on behalf of the second defendant demonstrated clearly that she is a servant of the State.

[20] The second defendant is the executive authority of the Department of Justice and Correctional Services. Reference in section 2(1) of State Liability Act to department is reference to National and Provincial department. Therefore, the second defendant is executive authority of the National Department of Justice and Correctional Services. The executive authority is cited as nominal defendant only when proceedings are instituted against the National and Provincial Department. By mere citation of the second defendant it is ascertainable that those proceedings are brought against the National Department of Justice and Correctional Services. The section seemingly does not apply to local government⁶.

[21] Section 179(6) of the Constitution provides that:

“The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.”

The National Legislation contemplated in section 179(3), (4) and (7) is National Prosecuting Authority Act 32 of 1998. In giving effect to the provisions of 179 of the Constitution, section 33(1) confers power upon the Minister to exercise final responsibility over the prosecuting authority. The Minister is defined in the Act to mean *“the cabinet member responsible for administration of justice*. The cabinet member referred to in the National Prosecuting Authority Act is the second defendant. It is therefore plain from

⁶ See *Jayiya v MEC for Welfare, EC & Another* 2006 (2) SA 611 SCA para 5.

these provisions that the second defendant is not an outsider in the affairs of National Prosecuting Authority. It puts paid to the second defendant joinder as the relevant executive authority.

[22] The question that must be answered in this matter, regard being had to definition of the concept of misjoinder outlined in paragraph 13 above, is whether or not the joinder of the second defendant is sanctioned by law. The purposive and contextual interpretation of the above legal prescripts directs me to find that the second defendant's joinder is sanctioned by law⁷.

[23] Section 179(5)(a) thereof provides that:

“The National Director of Public Prosecutions – must determine, with the concurrence of the cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, Prosecution policy which must be observed in the prosecution process.”

The prosecution policy concurred to by the cabinet member responsible for administration of justice is an implementation tool in the prosecution process which starts with the decision to prosecute.

[24] With regard to prosecution policy referred to in section 179(5) of the Constitution, section 21(1) of the National Prosecuting Authority Act provides as follows:

“(1) The National Director shall, in accordance with section 179(5)(a) and (b) and any other relevant section of the Constitution—

(a) with the concurrence of the Minister and after consulting the Directors, determine prosecution policy; and

⁷ See *Cool Ideas 1186 CC v Hubbard & Another* 2014 (4) SA 479 para 28.

- (b) *issue policy directives, which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in this Act or any other law.”*

The second defendant influences the prosecution process which begins with the power or decision contemplated in section 20(1) of the Act⁸, by means of prosecution policy, to which he must concur, which must be observed at all stages of prosecution process. It is not without significance that the prosecution policy determines circumstances under which prosecution must be instituted in the court of first instance in respect of certain offences⁹. It is therefore uppermost that the prosecution policy regulates the conduct of prosecution.

[25] In ***Natal Joint Municipal Pension Fund v Endumeni Municipality***¹⁰ it was held that:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in

⁸ See Power to institute and conduct criminal proceedings on behalf of the State; Power to carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and power to discontinue criminal proceedings.

⁹ See section 21(3) of National Prosecuting Authority Act.

¹⁰ ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** 2012 (4) SA 593 (SCA) para 18.

context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[26] It was never an intention of the National Prosecuting Authority Act and the Constitution to exclude the National Prosecuting Authority from the Ministry of Justice and Correctional Services. The executive authority responsible for National Prosecuting Authority is the second defendant. Section 179 of the Constitution and provisions of the National Prosecuting Authority Act make it plain that the second defendant is responsible in a way, for prosecutorial decisions by mere implementation of prosecutorial policy referred to above. The Constitution and National Prosecuting Authority Act preponderantly refer to and confer the role on the second defendant in the affairs of the National Prosecuting Authority.

[27] In her evidence, the public prosecutor, Ms Ndika testified that her employer is the National Prosecuting Authority. She said that being supported by her contracts of employment referred to above. In support of that, Ms Ndika testified that the salary is paid by the National Prosecuting Authority. Salary advices were used in support of that assertion. That is not the end, if regard is had to the provisions of section 18(1) of the National Prosecuting Authority Act which provides as follows:

“Subject to the provisions of this section, any Deputy Director or prosecutor shall be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the Minister after consultation with the National Director and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the Gazette.”

It is discernible from this that the second defendant plays a crucial role in the payment of prosecutor’s salaries as he is ceased with power to determine the

scale of salaries for the ranks and grades of the prosecutors. There is no doubt in my mind that without a determination of salary scales by the Minister, no salary payments may be made to the prosecutors. That determination of salary scales makes the second defendant an integral part of the prosecutor's salary payment.

[28] The second defendant's department plays a crucial role in the expenditure of the National Prosecuting Authority. I find solace for this provision in section 36 of the National Prosecuting Authority Act, which provides as follows:

“36 Expenditure of prosecuting authority

36. (1) The expenses incurred in connection with—

- (a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the prosecuting authority; and*
- (b) the remuneration and other conditions of service of members of the prosecuting authority, shall be defrayed out of monies appropriated by Parliament for that purpose.*

(2) The Department of Justice must, in consultation with the National Director, prepare the necessary estimate of revenue and expenditure of the prosecuting authority.

(3) The Director-General: Justice shall, subject to the Exchequer Act, 1975 (Act No. 66 of 1975)—

- (a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the prosecuting authority;*
- (b) cause the necessary accounting and other related records to be kept. (4) The records referred to in subsection (3)(b) shall be audited by the Auditor-General.”*

It is not without significance that the Director-General of the second defendant's department is the accounting officer charged with the responsibility of accounting for state monies received or paid out for or

on account of the prosecuting authority. He has an impact on the accounting record keeping of the National Prosecuting Authority.

[29] With regard to accountability, it is correct that the National Prosecuting Authority is accountable to parliament¹¹. However, section 35(2) of the National Prosecuting Authority Act provides as follows:

- “(2) (a) *The National Director must submit annually, not later than the first day of June, to the Minister a report referred to in section 22(4)(g), which report must be tabled in Parliament by the Minister within 14 days, if Parliament is then in session, or if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.*
- (b) *The National Director may, at any time, submit a report to the Minister or Parliament with regard to any matter relating to the prosecuting authority, if he or she deems it necessary.”*

This demonstrates the interconnection and interwovenness between the Minister and the National Prosecuting Authority.

[30] If the National Prosecuting Authority is the prosecutor’s employer in terms of the employment contract, the second defendant is prosecutor’s employer in terms of the law outlined above. It is not unthinkable that prosecutors have two principals. There is dual principalship in this regard. National Prosecuting Authority is not the sole principal or employer of the prosecutors.

¹¹ See Section 35 (1) of the National Prosecuting Authority Act.

- [31] In ***Nohour & Another v Minister of Justice and Constitutional Development***¹² it was held that prosecutors when they are at work they act within the course and scope of their employment with the Department of Justice and Constitutional Development which is now the second defendant's department. I am constrained by the doctrine of precedent to follow this judgment. Doctrine of precedent requires courts to follow the decision of coordinate and higher courts in the judicial hierarchy¹³.
- [32] It is unimaginable that the judgment of *Nohour* might have been referring to a different kind of prosecutors, to which category Ms Ndika does not belong. It is so because there is a single National Prosecuting Authority in the Republic structured in terms of an Act of parliament¹⁴. The act of parliament referred to above is the National Prosecuting Authority Act.
- [33] In ***Minister of Justice and Constitutional Development v X***¹⁵ the Western Cape High Court found the Minister liable for negligent conduct of the public prosecutor who failed to put all relevant information before court in a bail application. The judgment of the Western Cape High Court was confirmed against the Minister of Justice and Constitutional Development by the Supreme Court of Appeal.

¹² *Nohour & Another v Minister of Justice and Constitutional Development* 2020 (2) SACR 229 (SCA) para 3.

¹³ See *True Motives 84 (Pty) Ltd v Matidi* 2009 (4) SA 153 (SCA) para 100 – 101; *Makhanya v The University of Zululand* 2010 (1) SA 62 (SCA) para 6.

¹⁴ See section 179(1) of the Constitution; Section 2 of the National Prosecuting Authority Act.

¹⁵ *Minister of Justice and Constitutional Development v X* 2015 (1) SA 187 (SCA).

[34] On the conspectus of the above I find that the second defendant is correctly joined herein in his capacity as the executive authority referred to in section 2(1) of the State Liability Act 20 of 1957. The second defendant is the executive authority charged with final responsibility over the National Prosecuting Authority. Ms Ndika is a member of the National Prosecuting Authority.

[35] Whilst it is correct that Ms Ndika is employed in terms of her contracts of employment by the National Prosecuting Authority, but it is equally true that she is employed within the Department of Justice and Correctional Services. It is that department through, its Director-General, that is charged with responsibility of accounting for State monies including expenses incurred in connection with the remuneration and other conditions of service of members of the prosecuting authority¹⁶. Secondly, the second defendant is charged with responsibility to determine the scale of salaries of the prosecutors¹⁷. The responsibilities outlined above are akin to the responsibilities of an employer. The second defendant and his department are quintessentially employers of the prosecutors, hence finding that, in cases of the prosecutors, there is dual principalship. It cannot be imagined that the National Prosecuting Authority, in the light of the legislative provisions adumbrated above, can be regarded as the sole principal or employer of the prosecutors.

¹⁶ See Section 36(1) and (2) of the National Prosecuting Authority Act 32 of 1998.

¹⁷ See Section 18(1) of the National Prosecuting Authority Act 32 of 1998.

[36] Finally on this topic, much store has been put on the independence of the National Prosecuting Authority. The submission on behalf of the second defendant was to the effect that the National Prosecuting Authority enjoys independence that may be threatened or compromised if the National Prosecuting Authority were to have a political head or Minister charged with responsibility over it. The principle of independence is rooted from the provisions of section 179(4) of the Constitution which require that the National Prosecuting Authority exercises its functions without fear, favour or prejudice.

[37] Powers of the second defendant, juxtaposed with those of the National Prosecuting Authority, are legislatively circumscribed. There is no threat that there may be an overreach because of the blurred lines. There are no blurred lines. The second defendant and the National Prosecuting Authority are endowed with their respective powers that enable them to co-exist.

[38] In ***Glenister v President of the Republic of South Africa***¹⁸ the Constitutional Court grappled with the principle of independence and the majority held that:

“The question, therefore, is not whether the DPCI is fully independent, but whether it enjoys an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms designed to ensure that it “discharges its responsibilities effectively”, as required by the Constitution.”

[39] In the same judgment the Chief Justice added:

“Ultimately therefore, the question is whether the anti-corruption agency enjoys sufficient structural and operational autonomy so as shield it from undue political influence.”

¹⁸ ***Glenister v President of the Republic of South Africa*** 2011 (3) SA 347 (CC) para 125.

[40] It is not complete and absolute independence that is required. Adequate or sufficient structural and operational autonomy is required, which is duly secured by legal mechanisms like the Constitution and the National Prosecuting Authority Act. The powers conferred upon the second defendant as an executive authority cannot result in an impermissible political management of the National Prosecuting Authority by him¹⁹.

[41] In the light of the above, I accordingly cannot uphold second defendant's special plea of misjoinder.

(ii) Non-joinder

[42] The second defendant argued that the National Director of Public Prosecutions, the Head of National Prosecuting Authority in her capacity as such has direct and substantial interest in the matter.

[43] The question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of suit but upon the manner in which and extent to which the court's order may affect the interest of third parties²⁰. The test is whether or not a party has a direct and substantial interest in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court²¹.

¹⁹ *McBride v Minister of Police & Another* 2016 (2) SACR 585 (CC) para 35 & 38.

²⁰ See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 627 (A) at 657.

²¹ See *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 168-70.

[44] The rule is that any person is a necessary party and should be joined if such a person has a direct and substantial interest in any order the court might take or if such an order cannot be sustained or carried out into effect without prejudicing that party²².

[45] In the light of the fact that the contract of employment of Ms Ndika reflects and positions the National Prosecuting Authority as an employer and Ms Ndika as an employee, the common law principle of vicarious liability applies. The omission complained of that the public prosecutor, Ms Ndika failed to advise the Magistrate of the insufficiency of information on the docket and her failure to read the docket, occurred when she was acting within the course and scope of the employment as the employee of the National Prosecuting Authority. It is trite that under this principle it is the employer that is liable and not the employee. Accordingly, I find that the National Prosecuting Authority has a direct and substantial interest in the matter in the manner outlined above.

[46] The role of National Prosecuting Authority as the employer of Ms Ndika is not shifted by the finding that in the case of prosecutors there is dual principalship, instead it is strengthened by the fact that the National Prosecuting Authority, too, is the employer of the prosecutors.

²² See *Kethel v Kethels' Estate* 1949 (3) SA 598 (A) at 610.

[47] Paragraph 8 and 9 hereof set out verbatim the contents of paragraph 2 of each contract of employment between the National Prosecuting Authority and Ms Ndika. It is apparent therefrom that the National Prosecuting Authority exercised control over Ms Ndika. In addition, Clause 11 of the respective contract clearly demonstrate that the National Prosecuting Authority exercised not only control over Ms Ndika but also supervision. The clause provides as follows:

“11 GENERAL

- 11.1 The EMPLOYEE shall faithfully and diligently devote the whole of his/her time to the service of the EMPLOYER and shall undertake such duties as the EMPLOYER or any officer duly authorized thereto in this respect shall require of him/her and she/he shall comply with the rules and orders governing the particular office, post or institution, at or in which such EMPLOYEE may be stationed or employed.*
- 11.2 The EMPLOYEE shall not, without the express prior written consent of the accounting officer under which the EMPLOYEE’S office falls, perform or undertake to perform remunerative work outside the EMPLOYER’S service, whether within or outside official working hours.*
- 11.3 The EMPLOYEE shall, at such intervals as the EMPLOYER may direct, report fully on the results obtained and knowledge acquired by him/her in any research work done by him/her, both during and outside official working hours.*
- 11.4 The EMPLOYEE undertakes not to communicate to any person outside the EMPLOYER’S service or to publish either during the duration of this agreement, or after the termination thereof, any results so obtained by him/her, in the course of his/her duties, without the written consent of the EMPLOYER to such communication or publication.”*

[48] The actual payment of salary of Ms Ndika is clearly indicated to be by National Prosecuting Authority, in the contracts. In fact, even in her oral testimony, Ms Ndika tendered a uncontroverted evidence that she receives

her salary from the National Prosecuting Authority and she supported her evidence by her payslips. I therefore find that Ms Ndika acted at all material times in furtherance of National Prosecuting Authority's interest.

[49] Jurisprudence has developed that where a matter involves a decision taken by a member of the National Prosecuting Authority, the National Prosecuting Authority through the National Director of Public Prosecutions is cited and becomes a party. That happens even in those cases where a matter is not for recovery of damages or a claim for a debt²³. Accordingly, I find that the National Prosecuting Authority is a necessary party to be joined in these proceedings.

COSTS

[50] The general rule is that costs must follow the result. A successful party must be awarded costs. In this case, two special pleas were argued and decided in favour of both respective parties. The second defendant won in respect of the special plea of non-joinder whereas the plaintiff won in respect of the special plea of misjoinder. Similarly, both parties lost. The second defendant lost in respect of the special plea of misjoinder whereas the plaintiff lost in respect of special plea of non-joinder. Accordingly, no party is entitled to costs.

²³ See *Zuma v Democratic Alliance & Others; Acting National Director of Public Prosecutions & Another v Democratic Alliance & Another* 2018 (1) SA 200 (SCA) para 1.

ORDER

[51] In the result, I make the following Order:

51.1 The second defendant's special plea of misjoinder of the second defendant is hereby dismissed.

51.2 The second defendant's special plea of non-joinder of the National Prosecuting Authority is hereby upheld.

51.3 The plaintiff is hereby granted leave to join the National Director of Public Prosecutions, if so advised, within fifteen (15) days hereof.

51.4 There shall be no order as to costs.

A.S. ZONO

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the PLAINTIFF : ADV VAN DE LINDE SC

Instructed by : CAPS PANGWA & ASSOCIATES

33 CALLAWAY

MTHATHA

REF: PANGWA

For the 2ND DEFENDANT : ADV BODLANI SC

Instructed by : THE STATE ATTORNEY
BROADCAST HOUSE
NO.94 SISSION STREET
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REF: 622/16-A6N

DATE HEARD : 11TH MARCH 2024

DATE DELIVERED : 19th MARCH 2024