



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 70192/17

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
<u>15 April 2024</u> DATE	 SIGNATURE

In the matter between:

XOLANI NZUZA	First Applicant
ANELE ZONKE	Second Applicant
SIMPHIWE BOOI	Third Applicant
KHANYILE KAHYISE	Fourth Applicant
MZOXOLO MAGIDIWANA	Fifth Applicant
THOLAKELE DLUNGA	Sixth Applicant
SAMKELO MKHIZE	Seventh Applicant
AMANDA NOGWAZA	Eighth Applicant
THOBILE TYOBENI	Ninth Applicant
MAJEKE NONKONYANA	Tenth Applicant
MZUKISI SOYINI	Eleventh Applicant
BONGILE MPOTYE	Twelfth Applicant
ZAMIKAYA NDUDE	Thirteenth Applicant
STHEMBILE SOHADI	Fourteenth Applicant

LOYISO MTSHEKETHSE	Fifteenth Applicant
ZOLILE HONXO	Sixteenth Applicant
ZWELITSHA MTSHENA	Seventeenth Applicant
MZIWANELE MXINWA	Eighteenth Applicant
MZOKOLO ZUKULU	Nineteenth Applicant
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	Twentieth Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL PROSECUTING AUTHORITY	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
MINISTER OF POLICE	Fourth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent

Heard: 10 October 2023

Delivered: This Judgement was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines and release to SAFLII. The date and time for hand down is deemed to be 10:00 am on 15 April 2024.

Summary: *Jurisdiction – section 21 of the Superior Courts Act 10 of 2013 – high court has jurisdiction over litigant residing in its jurisdiction.*

Review – principle of legality – review launched within reasonable time but not prosecuted to finality expeditiously – abuse of Court process – failure to prosecute application expeditiously for six years without explanation for delay amounts to abuse of Court process.

Review – Principle of legality – decision to institute prosecution only reviewable under principle of legality – separation of powers – section 179(5) of the Constitution of the Republic of South Africa Courts will not easily review decision to prosecute — section 22 of the National Prosecuting Authority Act 32 of 1998 – National Director of Public Prosecutions – refusal to review decision by Director of Public Prosecutions to institute prosecution – prosecutorial independence – decision rationally connected to information placed before National Director of Public Prosecutions.

ORDER

1. The application is dismissed.
 2. Each party is ordered to pay their own costs.
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JUDGMENT

MLAMBO, JP

Introduction

[1] This is a review application that has its origins in the events that took place in Marikana, near Rustenburg, during 9 to 16 August 2012. The applicants, who were all miners on strike at the time, were indicted in the Mahikeng High Court¹ on a number of counts related to some of those events. In this application, they want this Court to declare the continuation of their prosecution as unlawful and to review and set aside the first respondent's decision not to intervene and stop it.

[2] The review application was instituted on 10 October 2017 and was set down to be heard before me on 10 October 2023, i.e., some 6 years later. The first to third respondents oppose the application. Their primary basis is that the prosecutions are lawful and rational.² Beyond the merits, they raise two legal points: that there was undue delay in prosecuting the application; and that this court lacks jurisdiction to hear it.

The Parties

[3] The first to nineteenth applicants are all former miners employed in the Platinum mining area, in Marikana, North West. The twentieth applicant is the Association of Mineworkers and Construction Union (AMCU), a trade union, duly registered in terms of the provisions of the Labour Relations Act.³

¹ Hereafter, "Mahikeng High Court".

² The fourth and fifth respondents do not participate in this matter.

³ 66 of 1995.

[4] The first respondent is the National Director of Public Prosecutions (NDPP), at the time of this application being Advocate Shawn Abrahams. The NDPP is the head of the National Prosecuting Authority (NPA) and has the power “to institute criminal proceedings on behalf of the State”,⁴ and to “carry out any necessary functions incidental to instituting criminal proceedings”.⁵ The second respondent is the NPA, the entity created by statute⁶ to undertake the prosecutorial responsibility and function of the State. The third respondent is the Minister of Justice and Constitutional Development, the Cabinet and National Member of the Executive responsible for the Department of Justice and Constitutional Development and the NPA. The fourth respondent is the Minister of Police, the Cabinet and National Member of the Executive, in charge of the South African Police Services (SAPS). The fifth respondent is the President of the country and is the head of the National Executive. The fourth and fifth respondents did not participate in these proceedings.

Background

[5] The background facts to the events that occurred in Marikana are well documented in the report of the much-publicised investigation colloquially known as the Farlam Commission of Inquiry.⁷ Leading up to August 2012, miners at the Lonmin platinum mine were unhappy with the wages they received, alleging that these were low, especially in light of the dangerous work they were engaged in and the profits their labour generated for the mine owners. They eventually embarked on an unprotected strike the finer details of which are of no relevance in this matter.

[6] The strike lasted roughly eight days from 9 to 16 August, and during that period, 44 persons were killed, with many more injured. The highest number of miners killed was 34, and that was on 16 August. In the period following these incidents of violence, the SAPS arrested hundreds of miners, and the NPA charged them, with amongst others, murder, for the deaths of their fellow miners. However, these charges were later withdrawn. The SAPS then turned their attention to some of the murders that

⁴ Section 20(1)(a) of the National Prosecuting Authority Act 32 of 1998 (NPA Act).

⁵ *Id* section 20(1)(b).

⁶ NPA Act above n 4.

⁷ The full details are comprehensively covered in the report of a Commission of Inquiry enacted in terms of Proclamation No. 50 of 2012 published in Government Gazette No. 35680 of 12 September 2012. The report is titled *Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents At The Lonmin Mine In Marikana, In The North West Province* (Farlam Commission), available at: <https://www.thepresidency.gov.za/download/file/fid/110>.

had occurred in the early days of the strike i.e. before 16 August. In respect of these, SAPS arrested the current individual applicants. The resultant prosecutions were instituted in the Lower Courts in the North West Province and were ultimately consolidated into a single matter where all the applicants are the accused persons. They stand indicted on seven counts of murder, five of attempted murder, four each of robbery and malicious injury to property and three each for unlawful possession of firearms and ammunition.

[7] The applicants, through their lawyers made representations, by letter dated 26 August 2016 to the NDPP requesting him to review the decision to prosecute them taken by the Director of Public Prosecutions (DPP) in the North West province. In that letter from their attorney's, the applicants stated:

"In light of a foregoing, we have been instructed to demand, as we hereby do that as a matter of urgency and on or before the next court appearance:

1. your office should take all the steps necessary to take and duly transmit the decision to withdraw the charges against our clients;
2. alternatively, to furnish us reasons why such a decision cannot be taken; and
3."

[8] The DPP of the North West, who also had possession of the letter from the applicants' lawyers, sent communication to the NDPP, amongst others, stating that in his opinion there was a *prima facie* case against the applicants. On receipt of this communication, the Acting Deputy National Director, sent communication to the DPP North West stating inter alia:

"In order to enable the NDPP to make an informed decision on the representations received from Nkome Incorporated attorneys, you are kindly requested to provide this Office with copies of the relevant dockets, together with accurate summaries of the evidence contained therein. If you intend to rely on any video footage as part of the accumulated evidence against the accused, you are accordingly requested to provide this Office with copies of the same.

You are further requested to provide this Office with a comprehensive report that sets out the reliable and credible evidence that link the 19 accused to the various charges and why it is argued that they acted in common purpose in committing all these offences.

Your report should also comprehensively address the criticism levelled against Mr X's evidence during the Farlam Commission and what impact his evidence has in respect of the intended charges against the accused. This Office would also like to know why you opine that it is not correct to state that Mr X was irretrievably discredited."

[9] The DPP North West responded to the Acting Deputy National Director's request, with all the requested material and also furnished his reasons for his opinion. He also attached an extract from the transcript of the Farlam Commission which contained the Commission's finding on the evidence of Mr X."

[10] Thereafter, the NDPP responded to the applicant's lawyers, per letter dated 30 June 2017, refusing to accede to their demands that he reviews the DPP's decision. He also briefly stated his reasons for refusing to intervene.

[11] The applicants then attempted once more to have the NDPP intervene and halt the prosecution. This was at a meeting with the NDPP and other members of the NPA on 12 September 2017. The applicants' attorneys persisted with their quest to have the NDPP review the North West DPP's decision to prosecute, and set it aside. When this proved futile, they again sought reasons from the NDPP for his decision refusing to intervene to halt the prosecution and not review the continuation of their prosecutions. The minutes of that meeting record the NDPP's reiteration that he was satisfied by the DPP's reasons to proceed with the prosecution. The minutes also record the NDPP's undertaking to provide reasons for his refusal to intervene and discontinue the prosecutions, should these be sought. The request for reasons, basically not dissimilar to their earlier letter, was subsequently sent to his office to which there was no response. The applicants thereafter launched this application on 10 October 2017.

[12] The first to third respondents opposed the application, filing the record on 28 February 2018. The applicants did not file any supplementary founding affidavit and, three years later, the respondents filed their answering affidavit on 13 April 2021. Two years later, the respondents applied for a hearing date on 7 June 2023 and then filed their heads of argument on 11 June 2023. The applicants filed theirs on 19 June 2023.

The applicant's case

[13] The applicants want this Court to direct and compel the NDPP to discontinue their prosecution, to declare the continuation of their prosecution to be invalid, unlawful and unconstitutional and to review and set aside the decision to continue with the prosecution, as well as costs of suit. Their basis for seeking such relief is, amongst others, that their prosecution has no reasonable prospects of success. Their second ground is that their prosecution has led to emotional and financial toll on their part because their legal bills have run into millions of rands, while the serious charges against them have caused a lingering stigma against them. They also allege that their freedom of movement has been limited, as for some time while out on bail, they had to report to the SAPS whenever they wished to travel outside the North West Province.

[14] Thirdly, they say that their prosecution is tainted by bias as members of the SAPS who were caught on video and implicated by other evidence in the killings on 16 August 2012, have not been charged, despite the recommendations of the Farlam Commission. They also assert that it is absurd that they are charged with the murders of their fellow strikers, in circumstances where it was the police who indiscriminately massacred their fellow strikers. This they contend has added even more grief and trauma for them. Lastly, they point out that the respondents have admitted liability for the deaths of the miners on 16 August 2012. They further state that a civil claim against SAPS for their unlawful arrest and malicious prosecution is ongoing regarding quantum of damages, merits having been settled. From all this, they argue that there is no rational connection between the evidence before the NDPP and his decision to refuse to review and discontinue their prosecution.

The respondent's case

[15] The respondents deny that the applicants' prosecution is invalid, unlawful and unconstitutional and liable to be set aside. As stated above, they raise two preliminary points. Firstly, that there was an undue delay in the prosecution of this matter. They say the applicants not only failed to serve a supplementary founding affidavit after the record was filed, despite reserving their rights to do so, but that they also failed to serve and file a replying affidavit, after the answering affidavit was filed. They argue that this is evidence of delaying tactics that have no purpose but to delay the applicants' prosecution. The second ground is that this Court lacks jurisdiction to hear the matter. The basis advanced for this point is that all the applicants were arrested

and charged in the North West Province, and the events that are at the core of this matter took place in that province. Based on this, they argue that it is the Mahikeng High Court that has jurisdiction to deal with this matter.

[16] As to the merits, they say the applicants are confusing matters because they were not charged with the events of 16 August (i.e. the day of the massacre), but rather for the events that occurred between 10 and 15 August. They refute the assertions that the prosecution has no prospects of success. They argue that the NDPP's decision to refuse to intervene and discontinue the prosecution is rationally connected to the information placed before him because, based on all the evidence collected, there is a *prima facie* case made out by the North West DPP.

Issues

[17] I have already mentioned that the issues requiring determination are whether this Court has jurisdiction to hear this matter; whether there was undue delay in bringing and prosecuting this matter; and lastly whether a case has been made out for the review and setting aside of the NDPP's decision refusing the request to discontinue the prosecution of the individual applicants.

[18] I must however first dispose of a matter raised in the applicants' written argument and also argued briefly in Court. The submission made was that the applicants also seek mandatory relief, directing the respondents to implement the recommendations of the Farlam Commission to initiate the prosecution of the police and members of the Executive who were identified as responsible for the massacre of miners on 16 October 2012. This issue was mentioned not in so many words, by the applicants in their founding affidavit, the basis being to make the point that the decision to prosecute them was biased as the members of SAPS who were involved in the massacre have not been charged.

[19] However, nowhere in the founding affidavit do the applicants make out a case that this Court should issue an order that the SAPS members and members of the Executive allegedly found, by the Farlam Commission, to have been culpable for the massacre, should be prosecuted. Notably, no specific relief, premised on this basis, is foreshadowed in the notice of motion.

[20] Our law is clear that substantive relief of this nature may only be considered and possibly granted when a proper foundation has been laid out in the papers.⁸ The only substantive case advanced in the applicants' founding affidavit is that the NDPP's decision refusing to intervene and discontinue their prosecution should be reviewed and set aside. This is also the relief foreshadowed in the notice of motion. In fact, the Farlam Commission's report or the relevant part thereof, evincing the recommendations relied on, was not substantively canvassed in the founding affidavit nor was it attached to the papers. It must follow that this point is ill-fated and falls to be rejected.

Does this Court have jurisdiction to hear the matter?

[21] With the background set out above, the convenient starting point is to consider the argument that this Court lacks jurisdiction to hear the matter. The basis of the argument is that the offences were allegedly committed in the North West and that it is the North West DPP that has indicted the applicants. In view of this, so the argument goes, it is the Mahikeng High Court that has jurisdiction over the matter and not this Court. This argument is clearly misconceived and must be rejected forthwith. The main respondents against whom relief is sought, the NDPP and the offices in which he or she is based fall under the jurisdiction of this Court. For what it is worth, I refer to the provisions of section 21 of the Superior Courts Act,⁹ which deal with the jurisdiction of the High Courts. The relevant parts provide that:

“(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance ...

...

(2) A division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.”

Was there undue delay in prosecuting this application?

⁸ *Damons v City of Cape Town* [2022] ZACC 13 at paras 117-118; [2022] 7 BLLR 585 (CC); (2022) 43 ILJ 1549 (CC); 2022 (10) BCLR 1202 (CC) *Strohmenger v Victor* [2022] ZASCA 45 at para 10; *Ras v Road Accident Fund* [2022] ZAGPPHC 383 at paras 14-16.

⁹ 10 of 2013.

[22] The respondents argue that the applicants have caused an undue delay in the prosecution of the matter by failing to take timeous and necessary steps to prosecute it, which has occasioned a delay of some six (6) years. The facts on which this argument is based are common cause and I deal with them in the following paragraphs.

[23] The first relevant date relating to the applicants' prosecution is 18 April 2016 when they appeared in the Mahikeng High Court and stated that they had not yet made representations to the NDPP. Their matter was then remanded to 29 August 2016. On 24 August 2016, the applicants made representations to the NDPP to have their prosecutions set aside. On the return date of 29 August 2016, it then emerged that the NDPP had not received the representations.

[24] On 13 September 2016, the DPP North West wrote to the NDPP informing him of the representations his office received from the applicants. The Acting Deputy National Director thereafter wrote to the applicants' attorneys, informing them that his office had received their representations and that further information was requested from the DPP North West, before a decision would be communicated to them. The NDPP finally wrote to the applicants' attorneys on 30 June 2017 where he refused to review the decision to prosecute.

[25] On 31 August 2017, the applicants appeared in the Mahikeng High Court and were granted an opportunity to launch these proceedings. They were given a deadline of 29 September 2017 and to report back to the Court on 13 October 2017.

[26] During that time, on 12 September 2017, a meeting between the applicants and the NPA respondents took place in Tshwane, with a view of reaching an amicable settlement of the matter. The following day, on 13 September 2017, the applicants wrote a letter to the NDPP asking for his reasons for refusing to review the DPP's decision to prosecute them. The NDPP did not respond.

[27] On 10 October 2017 this application was launched. On 30 October 2017, the NPA respondents filed a notice of intention to oppose and on 28 February 2018, they filed the record. Following the filing of this record, no further steps were taken by the

applicants. This caused the NPA respondents to file their answering affidavit on 12 April 2021, having waited for an indication from the applicants since February 2018 on whether their papers would be supplemented.

[28] After the filing of the answering affidavit, the applicants did not file a replying affidavit. Then on 16 February 2023, the parties were invited by the Deputy Judge President of this Division to a pre-trial conference but it was postponed because there was no appearance on behalf of the applicants. The meeting was reconvened to a later date and the applicants requested certain documents which the respondent furnished even though these were already in the Rule 53 record. Citing further delays from the applicants, the respondents filed their heads of argument on 11 June 2023, and the applicants filed theirs on 19 June 2023. On 26 June 2023, the matter was then set down for hearing on 10 October 2023.

[29] I have already mentioned that the point regarding the delay in the prosecution of this matter was only raised by the respondents in their written argument. The applicants were therefore aware of this point when they subsequently filed their own written argument. The applicants did not deal in any way with this point in their written argument. It would be futile of course to look for any indication of what their attitude is to the point in the founding affidavit as this was filed years before this point was raised by the respondents. It was only during oral argument that the applicants counsel sought to respond to that point. The applicants' counsel initially argued that the explanation for the delay in the prosecution of this matter was to be found in their founding affidavit. This was however abandoned as this was not dealt with in the founding affidavit.

[30] The applicants' counsel then argued that there was no undue delay as the applicants initiated these proceedings not long after they were granted this indulgence by the Mahikeng High Court. Counsel for the applicants advanced the argument that what was before this court was dilatoriness in prosecuting the matter and at worst an abuse of process which is not the same as an undue delay.

[31] He contrasted this to reviews under the Promotion of Administrative Justice Act¹⁰ and those under the principle of legality. He argued that, under PAJA, once an applicant becomes aware of the reasons for a decision or he or she is reasonably expected to have been aware of them, he or she has 180 days in which to institute their review.¹¹ Under the principle of legality, such a review should be instituted within a reasonable time.¹² In this instance, he argued that the applicants did institute the review within a reasonable time¹³ and in his view, the principles relating to undue delay do not apply. He argued that as no undue delay is at issue, the only aspect that the court need to concern itself with is whether the applicants are guilty of being dilatory in prosecuting this matter and whether there's any case made out that there was any abuse of process on their part. He argued that no such case had been made out and that the respondents point based on undue delay should be dismissed.

[32] The respondents' counsel countered by arguing that the proposition advanced by the applicants' counsel amounted to "different sides of the same coin" and that at the very least, there should have been a condonation application. As this was not present, he persisted that the applicants' conduct cried out for a definitive view by this court frowning on such conduct and to dismiss the application on that basis.

Discussion

[33] Unquestionably, the point raised by the respondents has nothing to do with delaying the institution of legal proceedings. It has much to do with delay in the prosecution of the application after its institution. The SCA has considered this proposition and found that such conduct is an abuse of the Courts' process that the Constitution in section 173 gives Courts the power to regulate their processes in a way that does not infringe section 34 of the Constitution. It said:

"The high court has the inherent power, both at common law and in terms of the Constitution (s 173), to regulate its own process. This includes the right to prevent an abuse of its process in the form of frivolous or vexatious

¹⁰ 2 of 2000 as amended (PAJA).

¹¹ Section 7(1) of the PAJA.

¹² *Transnet SOC Ltd v Tipp-Con (Pty) Ltd and Others* [2024] ZASCA 12 at para 40.

¹³ This is a legality review as section 1(b)(ff) of the PAJA excludes decisions to institute or continue prosecutions from the definition of administrative action, see in this regard *Sampson v Department of Justice and Constitutional Development and Others* [2023] ZAGPPHC 654 at para 145; *Stanfield and Others v National Director of Public Prosecutions Advocate Abrahams N.O and Another* [2019] ZAGPPHC 429; 2020 (1) SACR 232 (GP) at para 10.

litigation. Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing, but a limitation of the protected right is permissible provided that such limitation is reasonable and justifiable.”¹⁴

[34] The Court then went on to consider the type of discretion available to a Court in whether to allow a matter with an inordinate delay to proceed, or to be dismissed. It said:

“An inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action. There are no hard and fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable and, third, the defendant must be seriously prejudiced thereby. Ultimately the enquiry will involve a close and careful examination of all the relevant circumstances, including, the period of the delay, the reasons therefore and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant’s inactivity and failure to avail itself of remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial.”¹⁵ (Citations omitted.)

[35] In considering whether a dismissal of the application would violate the section 34 rights of a party, this Court in *Naude v Breda N.O and Others*,¹⁶ emphasised the need for a full explanation when it said:

“In exercising [the] discretion in terms of S173 of the Constitution, a consideration of the interest of justice also plays a vital role. This court has an inherent jurisdiction to control its own proceedings and as such has power to dismiss a summons or an action on account of the delay or want of prosecution. The dismissal of a matter, in this instance, the action proceedings against Naude, should be ordered in clear circumstances as it has an impact on the constitutional right of the plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. The court will exercise such power in circumstances where there has been a clear abuse of the process of court. It is common cause that there has been an inordinate delay on the part of the respondents. The respondents are well aware that condonation is not granted merely at a request of a party. A full detailed and accurate account of the reasons for the delay is required.”¹⁷

¹⁴ *Cassimjee v Minister of Finance* [2012] ZASCA 101; 2014 (3) SA 198 (SCA) at para 9.

¹⁵ *Id* at paras 10-11.

¹⁶ [2022] ZAGPPHC 855.

¹⁷ *Id* at paras 22-24.

[36] In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*,¹⁸ the majority of the Constitutional Court laid out a number of principles that a Court should consider in condoning a delay. While some of these relate to state organs instituting self-reviews, the following apply more generally to all litigants:

“[T]he first step in the *Khumalo* test, the reasonableness of the delay, must be assessed on, among others, the explanation offered for the delay. Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay. But, as was held in *Gijima*, where there is no explanation for the delay, the delay will necessarily be unreasonable.”¹⁹

[37] The majority went on to say that the discretion in deciding whether the explanation was reasonable was a flexible one and depended on the nature of the decision sought to be challenged. It said:

“Even if the unreasonableness of the delay has been established, it cannot be “evaluated in a vacuum” and the next leg of the test is whether the delay ought to be overlooked. This is the third principle applicable to assessing delay under legality. Courts have the power in a legality review to refuse an application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available factors.”²⁰

[38] The issue is therefore whether it can be found that the delay in the prosecution of this application by the applicants was so unreasonable as to invite its dismissal on that basis. In motion proceedings, as we have here, the applicants are *dominus litis*, and it is their responsibility to move the process along. As *dominus litis*, nothing was done by them to ensure that the matter is prosecuted expeditiously. It is correct that the respondents also did nothing to move the matter along. In fact, they filed their answering affidavit three years after filing the record.

[39] The issue, however, is not that it was the respondents’ responsibility to move this matter along. It was actually the applicants who prevailed on the Mahikeng High Court not to prosecute their criminal trial until they have had a chance at persuading

¹⁸ [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC).

¹⁹ *Id* at para 52.

²⁰ *Id* at para 53.

the NDPP to intervene and discontinue their prosecution and failing that to initiate proceedings to review and set aside the decision not to intervene. Whichever way one considers the matter, the initiators of this litigation are the applicants, and the proverbial buck stops with them.

[40] The applicants launched the review proceedings but lay supine for six years. If they were serious about this matter proceeding expeditiously one asks the question, why, after the filing of the record by the respondents, they did nothing by way of filing a supplementary founding affidavit as they intimated in their founding affidavit. Of course, there's no compulsion on them to do so but the respondents state that they wrote to them to indicate if they intended supplementing, but they did not respond. The matter did not end there. After the filing of the record the applicants simply remained supine for the next three years, which was interrupted by the respondents when they filed their answering affidavit. A litigant in the position of the applicants, who was desirous of an expeditious prosecution of their matter, would and should have called for the answering affidavit to be filed timeously or alternatively to set the matter down for an expedited hearing. In any event, the applicants simply did nothing further, either by way of filing a replying affidavit or seeking the enrolment of the matter. The matter remained *in limbo* until the Deputy Judge President of this Court intervened out of his own accord and convened a pre-hearing engagement with the parties to ensure that the matter became hearing ready.

[41] It is not disputed that the first meeting initiated by the Deputy Judge President did not take place in that the applicants' legal representatives did not show up. They only showed up in the second meeting and that's when the parties took steps leading to this matter being provided with a hearing date in October 2023. In fact, it was the respondents who filed their written argument first. In the normal course it is the applicants who should have filed first but this did not happen in this matter.

[42] The upshot of all of this is that the last interaction that the applicant had with this matter was on 10 October 2017 when they launched the application. They did nothing else thereafter until June 2023 when they filed their written argument. That was, as I pointed earlier, some six years later. It is the respondents that have raised the argument that this application should be dismissed on this basis as the applicants

showed no seriousness in expediting its prosecution. This is not a case where one should also find culpability on the side of the respondents to move the case along. They have been brought to this Court by the applicants who seek the discontinuation of their prosecution. In my view the applicants had the responsibility to ensure that this matter is prosecuted expeditiously. This did not happen. I must also mention that their criminal trial, after being postponed several times in the Mahikeng High Court, was eventually struck off the roll as nothing was happening in these proceedings.²¹

[43] The ineluctable consequence of failing to prosecute this review was the striking off, of the criminal trial from the roll in the Mahikeng High Court. The applicants' inactivity amounts to abuse of process when considered from all conceivable angles. An important consideration is that nowhere do the applicants explain their dilatory treatment or rather their failure to ensure that the matter was expeditiously prosecuted. Clearly their conduct is unreasonable. Failing to take any action to move this application along put brakes on everything that hinged on this application for over six years. The one major casualty of the dilatoriness by the applicants was the criminal trial in which they are facing various serious charges, which are at the centre of this review application. The other casualty must be the administration of justice which has been prejudiced markedly. It is not a factor that can easily be ignored, that there must be consequences for litigants who simply file papers and then forget about the matter. As I have sought to point out above, it is not in the interests of the administration of justice that Court proceedings, especially criminal cases, should end up being sacrificed and abandoned simply because the accused in those matters, who were given an indulgence to challenge their prosecutions with a view to setting aside their indictments, simply did nothing to pursue their challenge. It is inimical to the administration of justice that litigants can stymie Court proceedings by simply issuing proceedings and then doing nothing further.

[44] My view is that the conduct of the applicants indicates that they did nothing to prosecute their review because they were not interested in seeing these proceedings through to their ultimate conclusion. This, in my view is abuse of Court process. As the judiciary, it is in our interest to protect our processes and to guard against conduct

²¹ *S v Zonke and Others* [2023] ZANWHC 31.

by litigants such as we have here. The length of time that has elapsed since the applicants launched the application is a period of over six years and this to me is so unreasonable as to warrant the strongest censure from this Court. To make matters worse, the applicants have proffered no explanation whatsoever for their dilatory conduct in their prosecution of this matter.

[45] I can find no mitigation for the conduct of the applicants. The sanction that I can fathom is that the application be dismissed on this basis. In fact, to condone this kind of behaviour is to imperil Court processes in general. Section 173 of the Constitution grants us the latitude to protect our processes especially against abusive conduct of the nature we have here.

[46] Despite my finding on the abuse of process point, I deem it important that I also consider the other point raised by the applicants, regarding the NDPP's refusal to review and set aside the DPP's decision to prosecute them. This is to avoid determining the matter in piecemeal fashion.²² Before I consider the parties' arguments in this regard it is necessary that I briefly set out the regulatory framework governing prosecutions in this country.

[47] Pursuant to section 21 of the NPA Act, a National Prosecution Policy document is in place, and it has the purpose of "set[ting] out, with due regard to the law, the way in which the Prosecuting Authority and individual prosecutors should exercise their discretion."

[48] Chapter 4 of the Policy covers the criteria governing a decision to prosecute. It emphasises the "profound consequences" a decision whether or not to prosecute can have on society at large, from victims to accused persons. The overarching decision should be based on whether there is "sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution". It also notes that this is a question that should continuously be asked as the trial goes on because of different facts coming to light which may provide a different answer to it. Importantly, despite all this, it states that where a prosecution would not be in the public interest, it should not be continued with because a rule requiring all cases to be prosecuted "would be too harsh

²² *African National Congress v Electoral Commission of South Africa and Others* [2024] ZAEC 3 at para 11.

and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice”.

[49] The effect of all these provisions goes to the central issue in this case, prosecutorial independence and the discretion to institute or discontinue prosecutions.

[50] Section 22(c) of the NPA Act read with section 179(5) of the Constitution gives the NDPP the power to review a decision to institute a prosecution. This is a public power that must be exercised rationally and lawfully.²³ An improper exercise of the discretion in reaching the decision can be reviewed and set aside by a Court if it is irrational,²⁴ taken for ulterior purposes,²⁵ *mala fide*²⁶ or otherwise unlawful.²⁷ This similarly applies to the decision itself.²⁸

[51] The procedural requirements to be met are that the NDPP should first consult the relevant DPP, in this case, the North West Province DPP, secondly, they should take representations from the accused person(s), the complainants and any other persons or party the NDPP considers to be relevant. If these are not met, the decision will fail the rationality test for failure to comply with mandatory provisions.²⁹ If these are met, then the next step is to consider whether the decision reached by the NDPP was a rational one. The test for this is now trite and requires the decision maker to take into consideration all relevant factors and to reach a decision that is objectively justifiable from the information before them.³⁰

[52] The applicants challenge to the rationality of the decision by saying it has no reasonable prospects of success, not being related to the overarching legal framework

²³ *Panday v National Director of Public Prosecutions* [2020] ZAKZPHC 52; [2020] 4 All SA 544 (KZP); 2021 (1) SACR 18 (KZP) at para 11 (“*Panday*”).

²⁴ *S v Zuma and Another* [2019] ZAKZDHC 19; [2019] 4 All SA 845 (KZD); 2020 (2) BCLR 153 (KZD) at paras 176-180; *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

²⁵ *Becker v Minister of Mineral Resources and Energy and Others* [2023] ZAWCHC 5; [2023] 2 All SA 73 (WCC); [2023] 4 BLLR 329 (WCC).

²⁶ *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 at para 82.

²⁷ *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others* [2023] ZASCA 98; [2023] 3 All SA 323 (SCA).

²⁸ *e.tv (Pty) Limited v Minister of Communications and Digital Technologies and Others; Media Monitoring Africa and Another v e.tv (Pty) Limited and Others* [2022] ZACC 22; 2022 (9) BCLR 1055 (CC); 2023 (3) SA 1 (CC) at para 61.

²⁹ *Afriforum NPC v Minister of International Relations and Co-operation and Others* [2023] ZAGPPHC 1797.

³⁰ *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) at para 39.

while tainted by bias as the police have not been prosecuted, that the NDPP did not apply his mind to the facts before him, and lastly that the prosecution is not in the public interest.

[53] Due to the separation of powers doctrine, a Court will not lightly interfere with a decision made by the NPA to institute a prosecution. The circumstances in which this will happen are limited. A non-exhaustive list includes: prosecutions for ulterior purposes; where the prosecutors gave an undertaking not to prosecute; where there were representations made for a plea in exchange for co-operation; and otherwise unlawful prosecutions.

[54] The first step in this process is to identify the material placed before the NDPP. On 24 August 2016, the Applicants made a demand with representations as to why the charges should be withdrawn. They were received by the DPP in the North West, who then sent a letter to the NDPP with the representations as well as his response as to why he believed there was a *prima facie* case against the applicants, and refuting claims that a certain Mr X was not a credible witness. The Acting Deputy National Director responded and requested more information with credible evidence linking the Applicants under the common purpose doctrine, in the commission of the crimes. Additionally, he wanted a response to the criticisms against Mr X's evidence. The DPP then sent copies of the docket, video footage, reasons for his opinion and a copy of an extract from the Farlam Commission containing its findings regarding the evidence of Mr X.

[55] All this was presented before the NDPP, who, on 30 June 2017 decided that he would not review the decision to prosecute and communicated his decision to the applicants. In fact, the separation of powers principle prevents this Court, in the context of these proceedings, from second guessing the veracity of that evidence. This does not however, preclude this Court from determining whether there is a rational connection between the evidence and the decision reached. At face value, the information before the NDPP was enough for him to make an informed decision.

[56] The applicants' basis for seeking that relief hinges on two bases. The one basis is that the prosecution has no prospects of success as it is reliant on the evidence of

one witness known as Mr X. The applicants state that Mr X's testimony was totally discredited during the Farlam Commission. This assertion is disputed by the respondents, who point out that they have attached a list with many witnesses, who will testify in the trial. They have also included this list and the statements obtained from these witnesses who they intend to call in the criminal trial. Our Courts have stated that prosecutorial independence is important and should not be trifled with.³¹ The material placed before the NDPP and purely considering the respondents answering affidavit as well as the material included in the rule 53 record, I find no basis for this Court to review the decision to prosecute and set it aside.

[57] The other basis on which the review is premised is the NDPP's failure to provide reasons for his decision. The applicants base this challenge on the NDPP's failure to respond to the request for reasons after the 12 September 2017 meeting with him. The simple fact of the matter is that whilst the NDPP failed to respond to that request, it was actually the second such request. The NDPP responded and provided his reasons for his decision after he received the first request, sent to him in August 2017. The second request sent to the NDPP traverse the same ground and in my view, was actually the same request sent twice. For completeness' sake I repeat the NDPP's reasons in response to the first request:

"REPRESENTATIONS: THE STATE v ANELE ZONKE AND 18 OTHERS

Your correspondence dated 24 August 2016 that was e-mailed to our Ms H Zwart on 25 August 2016 has reference

Please be advised that, having considered your representations, I remain unpersuaded that the Director of Public Prosecutions Mmabatho, has acted outside the scope of permitted by the law and the Prosecution Policy with the said prosecution against the 19 accused persons.

I am further confident that if your concerns are raised in court, the court would in its consideration of the matter make an appropriate decision in the normal course.

I trust you find this to be in order.

Yours faithfully
Adv S K Abrahams

³¹ *Panday* above n 23 at para 32; *Patel v National Director of Public Prosecutions and Others* [2018] ZAKZDHC 17; 2018 (2) SACR 420 (KZD) at paras 22-24; *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*; *Nxasana v Corruption Watch NPC and Others* [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC).

[58] It is therefore misleading to follow the applicants’ argument that no reasons were ever provided. The question is what had changed if anything from the first request for reasons to the second. The answer must be nothing, as the only notable occurrence after the first request, was the meeting between the applicants’ legal representatives and the NDPP and his staffers.

[59] The failure to respond to the second request cannot be understood to mean that no reasons were ever provided by the NDPP for his decision to refuse to review and set aside the North West DPP’s decision to prosecute. The applicants have not referred to the reasons provided in response to the first request. Those reasons actually explain, even though somewhat terse, that the NDPP had considered the documents that served before the North West DPP before he decided to continue with the applicants’ prosecution. In any event, the NDPP has, in the answering affidavit, fully substantiated his reasons for refusing to review and discontinue the prosecution. The applicants have had sight of the answering affidavit and chose not to file a replying affidavit and respond to the case made out.

[60] It is therefore my conclusion that even on this basis, the applicants have failed to make out a case that the NDPP’s decision falls to be reviewed and set aside and that their prosecution should consequently be set aside as being invalid, unlawful and unconstitutional.

[61] With regards to costs, the appropriate order under the circumstances is that each party is to pay their own costs.

[62] In the result the following order is made:

Order

1. The application is dismissed.
2. Each party is ordered to pay their own costs.



D MLAMBO
Judge President
Gauteng Division of the High Court

Appearances

For the Applicant:

D Mpofu SC; T Seboko and M Qofa
Lebakeng instructed by Nkome Inc

For the Respondent:

Z Matebese SC and V Mashele instructed
by State Attorney, Pretoria

Date of hearing: 10 October 2023

Date of judgment: 15 April 2024