



IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MAIN SEAT)

- | | |
|-----|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED. |

08/09 / 2021

DATE

LEGODI JP

SIGNATURE

CASE NUMBER 2292/2020

JACOB MAWEWE SIBIYA

APPLICANT

And

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DIRECTOR OF PUBLIC PROSECUTIONS,
MPUMALANGA
NATIONAL PROSECUTING AUTHORITY
MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES
JACOB MAUNYE MOLESELA**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

JUDGMENT

LEGODI JP

[1] When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order under section 85(2), the Attorney-General or, if a body or a person other than the Attorney-General or his representative, was the prosecutor in the proceedings, then such other person may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, insofar as they are material to the question of law¹.

[2] If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty². An assault and killing of a human being is an action which is *prima facie* unlawful. Once it becomes common cause that the accused has assaulted or killed the deceased or the victim in self-defence, an evidential burden is placed on the accused to rebut the *prima facie* presumption of unlawfulness. In such cases a discharge under section 174 of the Criminal Procedure Act cannot be granted³.

[3] This case is about the discharge of an accused person in terms of section 174 of the Criminal Procedure Act who in an informal way somewhat admitted for having killed the deceased in self-defence. The application herein is about Mpumalanga Deputy Director of Public Prosecutions' refusal to launch an appeal in terms of section 310 of the Criminal Procedure Act against such a discharge after the family of the deceased had made representations to the Deputy Director of Public Prosecutions for

¹ Section 310 (1) of the Criminal Procedure Act No 51 of 1977

² Section 174 of the Criminal Procedure Act

³ S v Manona 2001 (1) SACR 426 (TE). See also State v Johanna Changisa (W/S 15/2011) [2011] ZANHC 16 (11 September 2011) SAFLI

such an appeal to be noted as envisaged on section 310. In the present proceedings, any determination on the main cause of the application has to be preceded by determination on whether or not the applicant exhausted internal remedies available to him. Put differently, whether such refusal is final and if not whether the applicant is obliged to exhaust internal remedies.

[4] The main relief sought is couched as follows: That is, why,

“1.1 the decision of the second respondent taken on or about 11 March 2020 pursuant to the representations made to him by the applicant, in terms of which the second respondent exercised his powers and refused to refer the matter on review or appeal in terms of section 310 of Act 51 of 1977, should not be reviewed and set aside.

1.2 the first and/or second respondents be directed to refer the matter on review or appeal in terms of section 310 of Act 51 of 1977 to the relevant High Court.”

[5] The application has been launched by Mr Jacob Mawewe Sibiya in his capacity as an appointed executor of the estate of the late Saun Loth Sibiya (the deceased) who was killed by Mr Jacob Maunye (the fifth respondent). The deceased was killed on 1 December 2017 at Dwarsloop Mall, Bushbuckridge in Mpumalanga. Subsequent thereto the fifth respondent was charged with the murder of the deceased.

[6] On 16 May 2019 the fifth respondent was discharged at the end of the state case in terms of section 174 of the Criminal Procedure Act. On 4 June 2019 the applicant aggrieved by the discharge of the fifth respondent made representations to the Senior Prosecutor asking the prosecutor to invoke the provisions of section 310 of the Criminal Procedure Act referred to in paragraph [1] of this judgment. On 29 August 2019 the senior prosecutor without taking a decision referred the representations to the Deputy Director of Public Prosecutions Mpumalanga Division who on 13 September 2019 conveyed to Senior Prosecutor that after having ‘carefully perused the public docket, trial transcripts as well as the representations made by DMS

Attorneys concluded that there will be no prospects of success on appeal of the case in terms of section 310A of Act 51 of 1977’.

[7] DMS Attorneys on 12 December 2019 wrote to both the prosecutor in the case and the senior prosecutor at Magistrate Mhala wherein the transcribed record of proceedings was enclosed. On 3 February 2020 DMS Attorneys having been notified of the 13 September 2019 decision, made further representations, this time, to the Deputy Director of Public Prosecutions and to the Senior Prosecutor at Mhala. At the end of the letter it was stated by DMS Attorneys that their instructions were to approach the high court to compel the Deputy Director of Public Prosecutions and the Senior Prosecutor to proceed in terms of section 310 of the Criminal Procedure Act.

[8] On 11 March 2020 the Deputy Director of Prosecutions revoked her decision dated 13 September 2019 and then substituted reference to section 310A as per her letter of 13 September 2019 with section 310 and then repeated the fact that there were no prospects of success on appeal in terms of section 310.

[9] Aggrieved by the decision of 11 March 2020, the applicant on 29 July 2020 launched the current application citing the National Director of Public Prosecutions, District-Director of Public Prosecutions, Mpumalanga Division, National Prosecuting Authority, Minister of Justice and Correctional Services and Mr Jacob Maunye as the first, second, third, fourth and fifth respondents respectively. The notice of motion is framed in terms of Rule 53 of the Uniform Rules of Court.

[10] The National Prosecuting Authority through its National Director of Public Prosecutions has introduced and adopted its internal remedies referred to as **“Procedure to follow for the review of a decision in a criminal matter”**. In the first bulletin thereof it is stated as follows:

“Where a decision of a lower court prosecutor to prosecute or not to prosecute is the subject matter of the representation, the request for the review must be directed to the Senior Public Prosecutor. When there is dissatisfaction with the decision of the Senior

Public Prosecutor the representations should be escalated to the Chief Prosecutor or the Director of Public Prosecutions”.

[11] Then under the heading: **“The final appeal to the office of the National Director should only be made once a Director of Public Prosecutions had reviewed the decision of the Chief or Senior Public Prosecutions”**, is stated as follows:

“Representations should be in writing and should include all relevant information pertaining to the case such as the police CAS Number, name of the accused or suspect and the name of the court as well as a copy of the correspondence from the Director of Public Prosecutions regarding his or her decision in the matter”.

[12] The above being the third respondent’s (NPA’s) internal remedies on representations, section 7 of PAJA is brought into play. Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted⁴. Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act⁵. A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice⁶.

[13] On behalf of the Deputy Director of Public Prosecutions, as the decision maker, it was initially contended that ‘guided by the provisions of section 7(2)(a) of Promotion of Justice Administrations Act 3 of 2000 (PAJA), a relief sought against first and second respondents can be heard by this Honourable Court after the internal steps are exhausted by the Applicant’. In the light of the inconsiderate and premature prosecution of this application by the applicant, the court cannot proceed to entertain

⁴ Section 7(2)(a) of PAJA

⁵ Section 7(2)(b) of PAJA

⁶ Section 7(2)(c) of PAJA

the application, so was the contention by the the first and second respondents on behalf of the Prosecuting Authority.

[14] I tend to agree. First, whilst the senior prosecutor was approached he or she did not take a decision on the representations as required by the internal remedies set and adopted by the National Prosecuting Authority. Referral by the senior prosecutor of the representations to the Deputy Director of Public Prosecutions can of course be construed as failure by the senior prosecutor to take a decision on the representations seen in the context of section 6(2)(g) which provides that a court or tribunal has the power to judicially review an administrative action if the action concerned consists of failure to take a decision.

[15] The next question is, what was the applicant supposed to do upon such a failure by the senior prosecutor as per the internal remedies available to the applicant before the application for review was instituted in this court? 'When there is dissatisfaction with the decision of the Senior Public Prosecutor, the representations should be escalated to the Chief Prosecutor or the Director of Public Prosecutor'. In the instant case, the Deputy Director of Public Prosecutions took the decision on 13 September 2019 followed by correction thereof on 11 March 2020.

[16] Whilst internal remedies have not been followed to its full extent, for example, allowing the Chief Prosecutor to reconsider the decision of the senior prosecutor instead of the Deputy Director of Public Prosecutions, I imagine this is not material seen in the light of the wording of the internal remedies as indicated in paragraph [10] of this judgment which allows the decision of the senior prosecutor on representations to be escalated to the Chief Prosecutor or the Director of Public Prosecutions as indicated.

[17] However, the Deputy-Director of Public Prosecutions having taken the decision on 13 September 2019 and slightly altered the decision on 11 March 2020, the applicant was obliged as quoted in paragraph [11] of this judgment to petition as a final appeal to the office of the National Director in writing providing the required information as per the internal remedy requirement and same was supposed to have been sent or forwarded to: Repsadmin@npa.gov.za.

[18] The pre-mature issuing of the present application was drawn to the attention of the applicant's attorney who in the replying affidavit trivialised the point *in limine* as follows:

- "8.1 The applicant has since referred the decision of the second respondent to the first respondent. In this regard, I annex hereto marked "RA1" being cover letter of the referral of the representations and the decision of the second respondent to the first respondent.*
- 8.2 The applicant concedes that to the extent that the first respondent overturns the decision of the second respondent and refers the matter to this court in terms of section 310 of the Criminal Procedure Act 51 of 1977, he would withdraw the application and tender the respondent's wasted costs.*
- 8.3 The applicant and its legal representatives were of the view that the second respondent has consulted with the first respondent in arriving at the decision that the second respondent issued which is the subject of this application"*

[19] Having made the statements with some concession as indicated in the quotation above, the applicant then comes to the conclusion that 'there was sufficient compliance with PAJA' and that 'in any event, the first respondent has enclosed the decision of the second respondent. Any referral of the complaint to the first respondent for the decision will be academic at this stage. In fact, the argument made was that, 'the point taken is lightly technical and academic...', so the argument was made.

[20] I cannot agree with the submission. The legislative peremptory imperative in section 7(2) (a) of PAJA is that no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted. 'In any other law', for the present case is with reference to section 22 (2) (c) of the National Prosecuting Authority Act. In the present case, it was only on 26 August 2020 that the applicant sought to comply with the internal remedy to wit, the final appeal to the office of the National Director of Public Prosecutions taken on 13 September 2019 and corrected on 11 March 2020.

[21] As on 26 August 2020 the horse had already bolted. That is, the present application was already issued on 24 June 2020. Notice of motion and founding papers were served, notice to oppose having been filed on 21 July 2020 and the answering affidavit having been deposed to and served before the letter of 26 August 2020 to the National Director of Public Prosecutions. In the circumstances, this court cannot validly proceed to consider the application and make a final determination. The suggestion that the court if it 'overturns the decision of the second respondent and refers the matter to this court', can also not be done and there is no basis to do so. The concession in paragraph 8.2 of the replying affidavit cannot be cured by withdrawal of the application and tendering of wasted costs. That is not how litigation is run in order to side-step the peremptory imperative in terms of section 7(2)(a) of PAJA.

[22] It boggles one's mind to proceed on the basis that 'the applicant and its legal representatives were of the view that the second respondent has consulted with the first respondent in arriving at the decision the second respondent issued which is the subject of this application'. How could the second respondent have taken the decision in consultation with the appeal authority that has to consider the second respondent's decision on appeal as per the internal remedy process so designed by the PAJA, except for asking for more information.

[23] This case does not concern the decision of the National Director of Public Prosecutions on the representations made by the applicant, but the decision of the Deputy Director of Public Prosecutions which decision should be the subject of a final appeal to the National Director of Public Prosecutions before this court can be approached on review.

[24] The applicant attempts to throw into play paragraph (c) of section 7(2) of PAJA. The provision thereof has been cited on paragraph [12] of this judgment. In seeking to rely on paragraph (c), the applicant in paragraph 8.6 of his replying affidavit takes the view that 'in the light of all the detailed facts appearing in the papers filed in this application... is in the interest of justice that (he) be exempted from the obligation to

exhaust any remaining internal remedy'. This contention in my view, must fall on its dead weight.

[25] Look at it this way: For one to get an exemption as envisaged in paragraph (c), not only exceptional circumstances must be shown, such exceptional circumstances must be shown "on application by the person concerned". No formal application had been filed for this court to invoke the provisions of paragraph (c) of section 7(2).

[26] Granting an exemption from the obligation to exhaust any internal remedy in the interest of justice will also be guided by the merits of the main review application. In this case, the state's key witness in the court *a quo* was the girlfriend to the deceased. They stopped and parked at Dwarsloop Mall from Mbombela. It was in the evening at about 21h00. The fifth respondent was the accused in the court *a quo*. Two security officials (the fifth respondent being one of them), approached the deceased's vehicle and knocked at the window.

[27] The deceased was requested to leave the area as time to stay or to remain at the mall had lapsed or expired. The deceased did not understand or agree to leave. The deceased and the fifth respondent started to argue with each other. The deceased got angered by the fact that he was told to leave the area. The deceased then alighted from the vehicle in a rush and it was the first time for the witness (girlfriend to the deceased) to have seen the deceased being so angry. On previous occasions when he was angry, the witness was able to cool him down. As he alighted from the vehicle, the witness reprimanded him, but the deceased did not listen and as a result she was not able to cool him down. The deceased was uncontrollable, so the witness testified.

[28] The deceased then followed the fifth respondent who had a fire-arm on his waist. The deceased then grabbed the fifth respondent on his waist. The two then started to struggle with each other. As they were struggling with each other, the witness heard a sound of a gunshot. At that time, she could not observe who was shot and who was the shooter. She then saw the deceased falling down. The witness further testified that:

“He grabbed him your worship and the fight was about to ensue, if you grab a person on the waist harshly or by force it means that you are in the fight”.

[29] These are the material facts which were placed before the court *a quo*. In addition to the evidence of the deceased’s girlfriend, in cross-examination of the other security officer who was answering a phone when everything happened and did not see how the incident unfolded, it was put to him that when the deceased followed or approached the fifth respondent, the deceased indicated that he was going to smash the fifth respondent’s head. This could not be denied.

[30] I have deliberately set out the facts of the case presented in the court *a quo*. Initially and relying on the argument that was presented during hearing as alluded to in preceding paragraphs, I thought it was not necessary to pronounce oneself on the merits and other issues that are dealt with hereunder because the matter was argued on the basis that PAJA was applicable to the proceedings. At the time, the issue was whether the applicant had exhausted the internal remedies and if not whether a case has been made to exempt the applicant from exhausting internal remedies in terms of PAJA.

[31] However, on 18 August 2021 that is, eight days after the judgment was reserved, the applicant’s attorneys drew the court’s attention and that of the opposing parties to the case of **National Director of Public Prosecutions v Freedom Under the Law 2014 (4) SA 298 (SCA) at paras 27 and [28]**, wherein **Brand JA** found that although decisions not to prosecute are in the same way as decisions to prosecute subject to judicial review, it does not extend to a review of administrative action on the wider basis of PAJA, but is limited to the judicial review on the basis of legality and rationality and that the legality principle has by now become a well-established in our law as an alternative pathway to judicial review where PAJA finds no application.

[32] On Monday 23 August 2021 and on the direction of this court, certain questions were posed to the parties and the parties were directed as follows:

“1. The prosecution having charged the fifth respondent on a charge of murder,

having caused him to plead to the charge, having led evidence against the fifth respondent in the court a quo and the fifth respondent having been discharged at the end of the state case in terms of section 174 of the Criminal Procedure Act, the parties are hereby directed to file supplementary written heads of argument to deal with the following questions:

- 1.1 Does a refusal to appeal as contemplated in section 310 of the Criminal Procedure Act tantamount to refusal to institute and conduct criminal proceedings on behalf of the state, carry out any necessary functions incidental to instituting and conducting such criminal proceedings and or discontinue criminal proceedings as contemplated in section 20 (a), (b) and (c) of National Prosecuting Authority Act read with section 179 (2) of the Constitution the latter of which provides that the prosecuting authority has the power to institute criminal proceedings on behalf the state and to carry out any necessary functions incidental to instituting criminal proceedings?*
- 1.2 If the answer in paragraph 1.1 is “yes”, the parties are hereby directed to motivate in the form of further written heads of argument the legal basis and or case law to come to the “yes” answer regard been had also to the definition of “criminal proceeding” in terms of section 1 of the Criminal Procedure Act.*
- 1.3 If the answer in paragraph 1.1 above is “no”, what would then be the basis to confine the present application to legality and rationality principle in particular to come to the conclusion that PAJA is not applicable?*
- 2. Should it be found that PAJA is not applicable, the parties are hereby directed to deal with the following questions:*
 - 2.1 Does the non-applicability of PAJA make the internal remedies adopted by the National Director of Public Prosecutions for representations in terms of section 22 (2) (c), obsolete?*

- 2.1.1 *If the answer in paragraph 2.1 above is “yes”, what is the legal basis or principle to come to the “yes” answer?*
- 2.1.2 *If the answer in paragraph 2.1 above is “no”, the parties are hereby directed to deal with the question whether the present application is not premature in that the applicant did not formally make representations to the National Director of Public Prosecutions before instituting the present application?*
- 2.1.3 *Put it differently to the question in paragraph 2.1.2 above this way: Is the decision of the Deputy Director of Public Prosecutions not to proceed in terms of section 310 of the Criminal Procedure Act a final decision not subject to review by the National Director of Public Prosecutions in accordance with the NPA internal remedies?*
- 2.1.4 *If the answer in 2.1.3 above is that the decision of the Deputy Director of Public Prosecutions is not final, is the present application then not pre-mature?*
- 2.1.5 *If it is suggested that the decision of the Deputy Director of the Public Prosecutions referred to in paragraph 2.1.3 above is final, what is the legal basis to come to such a conclusion?*
3. *The parties are hereby directed to file the further supplementary written heads of argument on the questions raised above **by not later than 12h00 on Tuesday 31 August 2021**”.*

Is refusal to appeal as contemplated in section 310 of the Criminal Procedure Act tantamount to refusal to prosecute in criminal proceedings?

[32] The constitutional authority by the prosecuting authority to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings is founded in section 179 (2) of the Constitution. In terms of subsection (4) of section 179 of the Constitution, a national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

[33] The national legislation referred to in subsection (4) of section 179 of the Constitution, is the National Prosecuting Authority Act No. 32 of 1998. Section 20 thereof provides as follows:

“(1) The power as contemplated in section 179 (2) and all other relevant sections of the Constitution to-

(a) institute and conduct criminal proceedings on behalf of the State;

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings;

(c) discontinue criminal proceedings”;

vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic”.

[34] I find it necessary to start with some “*definitions*” in other legislation insofar as it might be relevant. In terms of section 1 of the Criminal Procedure Act, ‘***Criminal proceedings***’ *includes preparatory examinations under Chapter 20*”. Section 310 of the Criminal Procedure Act does not form part of the sections under Chapter 20. In my view, understandably so. I say so because once criminal proceedings are instituted by charging an accused person and trial has taken place in a court of law where the prosecution tendered the evidence of all its material witnesses and an accused person is discharged by the court in terms of section 174 at the end of the state case like it has been in the present case, the criminal proceedings are terminated or concluded by the due process of the law.

[35] Therefore, it cannot legitimately be contended that rejection by the Deputy Director of Public Prosecutions of representations to invoke the provisions appeal of section 310 of the Criminal Procedure Act offended against legality and rationality principle in section 179 of the Constitution read with section 20 of the NPA Act because a decision not to appeal in terms of section 310 is not the same as instituting and conducting or discontinuing criminal proceedings as contemplated in section 179 of the Constitution read with section 20 of the NPA Act.

[36] Take it a step further: According Merriam-Webster, “prosecute” means “to institute legal proceedings with the intention to prosecute a claim”. “Prosecute” also means “to bring action against a person for redress or punishment of a crime or for

violation of law". "Prosecution in criminal justice system" means also "the process of instituting and undertaking criminal proceedings against any person in a court of law", something which the prosecuting authority did in the present case. To charge the accused (fifth respondent) with murder, put the charge to him in a competent court and then tendered evidence on behalf of the State and the trial court having considered an application for the discharge at the end of the state case and the trial court having so discharged the accused in terms of section 174 of the Criminal Procedure Act, brought to an end or concluded the criminal proceedings as defined.

[37] The definition of criminal proceedings seen in the context of paragraphs [34] to [36] above, could not have included an appeal process in terms of section 310 after the criminal proceedings were concluded through the due process of the law and the accused having been discharged in terms of section 174 by a competent court. Simply put, section 179 of the Constitution and section 20 of the NPA Act do not find application to appeal in terms of section 310 of the Criminal Procedure Act.

[38] Even if the applicant might have wanted to rely on "*and to carry out necessary functions incidental to instituting criminal proceedings*" in section 179 (2) of the Constitution and section 20 (1) (b) of the NPA Act, these functions, in my view, must be seen to be limited to "the necessary functions" preceding the actual institution and conducting of criminal proceedings. This is clear from the wording "*necessary functions incidental to instituting criminal proceedings*". The definition of "criminal proceedings" in section 1 of the Criminal Procedure Act, speaks to this as well. That is, an appeal in terms of section 310 is not part of preparatory examinations under Chapter 20 of the Criminal Procedure Act. Chapter 20 deals with preparatory examination. Meaning criminal proceedings before the actual institution of criminal proceedings. If it was the intention of the legislature to include appeal process in section 310 as criminal proceedings, the inclusion of Chapter 30 in the definition of "criminal proceedings" could have been a simple thing to do.

[39] Section 310 falls under Chapter 30 which has nothing to do with criminal proceedings preceding the ultimate institution and conducting of criminal proceedings. Section 310 like the rest of the sections under Chapter 30, deals with events after institution, conducting and conclusion of the criminal proceedings in the lower courts.

I therefore find that the present application is not excluded from the application of PAJA. Therefore, there is nothing to depart from as the matter was previously argued. In other words, what was said by Brand JA as alluded to in paragraph [31] of this judgment does not find application under section 310 of the Criminal Procedure Act.

[40] Take it a step further: Rejection of representations by the applicant to appeal in terms of section 310 remains to be an “administrative action” taken by Deputy Director of Public Prosecutions and is a “decision” which is not covered under exclusion in section (1) (ff) of PAJA because it has nothing to do with “a decision to institute or continue a prosecution” or to discontinue in criminal proceedings as defined or as such criminal proceedings were concluded by following due process of the law until the fifth respondent was discharged at the end of the state case. In other words, the decision to reject the representations by the applicant remains to be a “decision” of an administrative nature made, as defined in section 1 of PAJA. However, should one be wrong in this regard, there is still another problem the applicant is faced with. (My emphasis).

Is the application premature? Put differently, is the decision by the Deputy Director of Public Prosecutions final?

[41] In paragraphs [10] and [11] of this judgment, I referred to the internal remedies the national prosecuting authority set for itself. These internal remedies have not been set aside by any competent court or revoked by the national prosecuting authority and therefore they remain to be in force and of effect. It does not matter whether one is dealing with judicial review based on legality or rationality principle or based on administrative review governed by PAJA.

[42] In fact, the making of such internal remedies should be seen in the context of the legislative imperative in section 179(5)(b) of the Constitution which of relevance provides that the National Director of Public Prosecutions must issue policy directives which must be observed in the prosecution process read with section 21(1) (b) of the NPA Act which provides that the National Director shall in accordance with section 179(5)(a) and (b) and other relevant sections of the Constitution determine prosecution

policy and issue policy directives which must be observed in prosecution processes. (My emphasis).

[43] Furthermore, in terms of section 179(5)(d) of the Constitution the National Director of Public Prosecutions may review a decision to prosecute or not to prosecute after consulting the relevant Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions from the accused person, the complainant or any other person or a party whom the National Director considers to be relevant. This must be read together with section 22 (2) (c) of the NPA Act insofar as it might be of relevance. It provides:

“(2) In accordance with section 179 of the Constitution, the National Director

(a) ...

(b) ...

(c) may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations, within the period specified by the National Director, of the accused person, the complainant and any other person or party whom the National Director considers to be relevant”.

[44] Even if section 22 (2) (c) may not be relevant seen in the context of my findings regarding section 310, the point I am making is that the applicant was obliged to comply with the policy document referred to in paragraphs [10] and [11] of this judgment seen in the context of section 179 (5) (b) of the Constitution. Therefore, any failure to finally appeal to the National Director before the institution of the present proceedings, is fatal to the applicant. The application must be found to have been instituted prematurely. There is constitutional and legislative obligation to comply with such internal process by lodging of final internal appeal to the National Director of Public Prosecutions. The applicant has failed to comply therewith. On this alone, the application ought to be dismissed. Again, in the event I was also to be wrong on the heading under discussion, there is still another problem for the applicant.

Has the state established a prima facie case against the fifth respondent?

[45] From the onset, I must indicate that whatever I say hereunder in particular regarding the merits or otherwise of the application is not a final determination as the

applicant may still want to refer his representations to the National Director of Public Prosecutions in terms of the final appeal process referred to in paragraph [11] of this judgment. However, I find it necessary to deal with the merits of the application in case I was to be found to be wrong regarding my findings in the preceding paragraphs.

[46] Starting with the applicant's critic of the ruling by the trial court to discharge the fifth respondent at the end of the state case, a contention is made as follows in the applicant's founding affidavit:

"31.3 The factual and legal question is whether the fifth respondent acted within the bounds of self-defence at the time when he shot the deceased in the head and killed him.

31.4 The fifth respondent's evidence is that he was walking away from the deceased and that when he turned to look back he saw the deceased attempting to reach for the respondent's firearm on the fifth respondent's waist and the fifth respondent 'pulled out a fire arm, shot and killed the deceased.

31.5 The long and short of the fifth respondent's version of defence starts and ends with following statements put to the state witness, Sibuyi by the fifth respondent's legal representative during the trial:

"And when the accused looked back the deceased took his right hand towards his waist. When the accused looked back as the deceased was following him and uttering the words (mother tongue) he reached out to his waist. ... Okay. Fearing for his life the accused then shot at the deceased".

31.6 There is nothing in the abovementioned self-defence version of the fifth respondent to justify the shooting and killing of the fifth respondent to justify the shooting and killing of the deceased who was unarmed at the time. This version of the fifth respondent demonstrates that the fifth respondent had an ample opportunity to pull out his firearm. Take full control of it and fired the fatal shot to the deceased's head.

31.7 Assuming there was such imminent harm on the fifth respondent's life posed by

the deceased, it is submitted that the fifth respondent exceeded the bounds of self-defence.”

[47] What is quoted in paragraph 31.4 of the applicant’s founding affidavit is actually paraphrased and is somewhat selective as it leaves out one aspect of what was put to the first state witness, Mr Mdluli. In cross-examination, it was put to Mr Mdluli that as the deceased was following the fifth respondent, he uttered the words to the effect that he (the deceased) will or was going to smash the fifth respondent’s head. Mr Mdluli responded to the question by saying that he did not hear that and he could not deny that the deceased could have uttered those words. This is a very important aspect to consider taking into account also the angry mood of the deceased as described hereunder.

[48] Furthermore, with regard to paragraph 31.4 of the applicant’s founding affidavit, it is wrong to characterise the version put to Mr Mdluli (first state witness) during cross-examination as “evidence” by the fifth respondent. It will only become evidence if so confirmed by the witness under cross-examination or if the evidence of a witness is not denied or challenged under cross-examination. In other words, what is said in chief especially on a material aspect of a case, if not challenged under cross-examination, such evidence becomes common cause. In the present case the bulk of the evidence of the deceased’s girlfriend was not denied or challenged under cross-examination and perhaps correctly so because it favoured the fifth respondent’s self-defence. The quotation in paragraph 31.5 of the applicant’s founding affidavit referred to in paragraph [45] above, must therefore be seen in the context of the evidence the deceased’s girlfriend as it would appear later hereunder.

[49] The suggestion in paragraph 31.6 of the applicant’s founding affidavit that ‘there is nothing in the aforesaid self-defence version of the fifth respondent to justify the shooting and killing of the deceased who was unarmed at the time’, seems to blatantly ignore the evidence tendered by the state through the deceased’s girlfriend (Ms Sibuyi). Her evidence has been summarised in paragraphs [26] to [28] of this judgment. I hereby revisit her evidence at the risk of repetition and unnecessarily prolonging this judgment but without making a final determination for reasons already mentioned in this judgment.

[50] When the deceased was told by the fifth respondent to leave the area at the mall, the deceased became angry and described by the deceased's girlfriend in chief as follows: *"Deceased alighted from the motor vehicle in a very quick speed your worship and it was for the first time for me to see him being angry as such your worship"*.

[51] Then the questioning in chief unfolded further as follows:

"What is it that he was doing madam that cause you to say the way he was angry it was for the first time for you to observe? --- Because previously at some stage your worship when he was angry he could listen to me when I reprimand him."

On the day in question after the utterances that were conveyed to him by these two gentlemen you said he was angry, did you try to calm him down? --- Your worship when he started to alight from the motor vehicle I reprimanded him but the way he was your worship he could not listen to me or I could not be able to calm him down and if I have alighted from the motor vehicle maybe I should have also been injured."

Why do you say so? --- He was uncontrollable".

[52] That was the mood in which the deceased was and in which he alighted from the vehicle. His actions and what he did after he had alighted from the vehicle in that mood was told in chief by the girlfriend as follows:

"Now, he is out of the vehicle madam, take me through, what happened? --- He grabbed the accused your worship on his waist."

Ja? --- They started to struggle there your worship."

How were they struggling, I was not there? You can step out and demonstrate to me, is it not that you say the accused was grabbed on his waist, they started to, demonstrate that to me, the grabbing the wrestling? --- Grabbed and they struggled going to the ground your worship and up, going up and down."

Ja, you can go back. There was a wrestling as you have demonstrated then what happened? --- After that I heard the sound of a gunshot."

How many? --- Once.

Then? --- Your worship I could not observe who was shot and who was the shooter”.

[53] Fast forward, the witness was further asked what happened after she had heard a gunshot and she indicated that she saw the deceased falling down. Then the answer as quoted in paragraph [28] of this judgment was elicited when a question in chief was put as follows after having made reference to “grabbing”:

“I do not understand. So, not forget madam I was not there, what did you mean when you said he grabbed the accused on his waist?

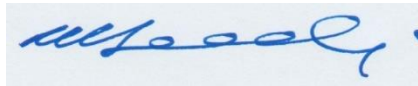
[54] Clearly the prosecutor was getting frustrated by hearing his own key witness turning into a key witness for the defence and the applicant is unfortunately not referring to the evidence of the deceased’s girlfriend in his founding papers. Instead, the applicant seeks to suggest that the trial court got it all wrong when it discharged the fifth respondent at the end of the state case and by so doing ignoring the imperative in section 174 of the Criminal Procedure Act. That being said, it would be difficult to find any misdirection on the part of the court a quo to invoke the provisions of section 174 in favour of the fifth respondent.

[55] Look at it this way: A finding by the court a quo that there was no enough evidence that calls for a rebuttal from the fifth respondent and that the evidence cannot become conclusive evidence on which the court may convict, cannot be faulted on the available evidence. In fact, the evidence on self-defence raised by the fifth respondent seems to have sufficiently been covered by the evidence of the second state witness and thus making it unnecessary to hear the fifth respondent in person or to invoke the authority referred to in paragraph [2] of this judgment. In other words, the presumption of unlawfulness has been averted by the evidence of the second state witness. But again, I am not making a final determination in this regard.

[56] Consequently, an order is hereby made as follows:

56.1 The application is hereby dismissed with costs.

56.2 The applicant if he so chooses, is hereby directed to resort to making representations in accordance with the policy directive adopted by the National Director of Public Prosecutions as per Annexure “MP” referred to in paragraph 18 of the answering affidavit and quoted in paragraph [11] of this judgment.



LEGODI JP

DATE OF HEARING: : 10 AUGUST 2021
DATE OF JUDGMENT : 08 SEPTEMBER 2021

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