



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 5095/2017

In the matter between:-

JOHANNES CHRISTIAAN BOSHOFF

Applicant

and

NATIONAL DIRECTOR OF PROSECUTIONS

1st Respondent

**THE DIRECTOR OF PUBLIC PROSECUTIONS
FREE STATE PROVINCE (BLOEMFONTEIN)**

2nd Respondent

MPAPI ELIAS MAHLAMBI

3rd Respondent

BENEDICTA PHUZI NKOSI

4th Respondent

CORAM: MOLEMELA, JP

DELIVERED ON: 08 MARCH 2018

JUDGMENT

INTRODUCTION

[1] This is an application for an interdict prohibiting the National Director of Public Prosecutions (NDPP) and the Director of Public Prosecutions, Free State (DPP) from

proceeding with criminal prosecution against the applicant, Mr Boshoff. The facts that gave rise to this application are set out below.

BACKGROUND FACTS

[2] The applicant was arrested in Harrismith on 1 June 2016 pursuant to a complaint filed by the third and fourth respondents (the complainants), the essence of which was that he had referred to them as baboons. Subsequent to his release on bail, the matter was postponed several times pending the decision of the DPP. The DPP, by virtue of a letter dated 18 August 2016, issued instructions to the Senior Prosecutor of Phuthaditjhaba, charting the course that had to be followed in respect of the matter. In a nutshell, the DPP instructed the senior prosecutor to charge the applicant with two counts of *crimen iniuria* and made it clear that no admission of guilt fine was to be fixed. The DPP further indicated that the matter could be finalised by way of a diversion programme if certain conditions were met.

[3] Given the fact that the interpretation of the DPP's instructions is central to this application, it is apposite to quote the contents thereof verbatim. It states:

"The Senior Public Prosecutor
Magistrates Court
Private Bag X801
PHUTHADITHABA
9870

STATE VERSUS JOHANNES C BOSHOF
HARRISMITH CAS 132/06/2016
YOUR REF: 10/2/4/1 – 13/2016

1. Johannes Christiaan Boshoff must be charged in the Magistrate's Court on 2 counts of Crimen Injuria
2. No admission of guilt fine should be set.
3. The matter can be finalized through diversion if Mr Boshoff is prepared to apologize to the complainants and to attend a diversion program. If the Diversion program is successfully completed the charges against the accused may be withdrawn
4. Docket is attached hereto.
5. Return date for feedback: 30 December 2016

**ADV R MAPHUMULO
ADVOCATE
DIRECTOR OF PUBLIC PROSECUTIONS
BLOEMFONTEIN"**

For the sake of clarity, I pause to mention that the diversion programme alluded to by the DPP is pre-trial diversion of an adult suspect and not the one falling within the ambit of the Child Justice Act 38 of 2005.

[4] It is common cause that on 17 November 2016, the DPP's instructions were conveyed to the applicant by the trial prosecutor. The applicant was amenable to finalisation of the matter by way of a diversion programme and indicated his willingness to apologise to the complainants. It is also undisputed that he apologised to the complainants and that they thereafter all shook hands. The application papers are silent on the discussions that preceded the handshake, or on whether the complainants were informed that a diversion option would be followed if they accepted the applicant's apology. The applicant asserts that he understood the handshake to signify acceptance of the apology, thus entitling him to participate in the diversion programme proposed by the DPP. The matter was thereafter postponed to 21 November 2016 so that proper arrangements could be made with the social worker who would facilitate the diversion programme. On 21 November 2016 the applicant appeared in court and was advised that the diversion programme had been cancelled on account of the complainants' subsequent rejection of his apology, which had been communicated to the trial prosecutor on 18 November 2016. He was notified that the trial would therefore have to proceed. On 17 January 2017 the applicant made written representations for a stay of prosecution. On 24 March 2017 the DPP apprised the senior public prosecutor that since the applicant had not undergone a diversion programme, the trial must proceed. Various attempts were made to persuade the DPP to discontinue the applicant's prosecution, to no avail. This prompted the applicant to bring this application.

[5] It is evident from the background facts the applicant was never required to plead to the charges and that he was informed about the cancellation of the diversion

programme before same could be initiated. At no stage were the charges against him withdrawn.

[6] The applicant's case is that the DPP's instructions effectively amounted to an offer of a diversion programme, which he accepted and sealed by his apology and its acceptance by the complainant. The applicant asserts that by accepting the DPP's offer, a binding agreement came into existence, thus obliging the DPP to withdraw the charges if he successfully completed the diversion programme. The applicant avers that the word "may", as used in the letter from the DPP is authoritative, giving the senior prosecutor the authority to withdraw the matter in the event of an apology being made and a diversion programme being successfully completed. He argued that the DPP's cancellation of the diversion programme amounted to a repudiation of the agreement. According to the applicant, the DPP was bound by the agreement in question, with the result that any trial based on the same facts would amount to a violation of his constitutionally entrenched right to a fair trial. This formed the basis of his additional prayer for an order directing the NDPP and DPP "to comply with the terms of the agreement entered into between the [DPP] and the applicant on 17 November 2016 under Harrismith Magistrates's Court case No 711/2016, in terms of which the charges laid against the applicant under the above-mentioned case number be withdrawn on condition that the Applicant successfully complete a diversion programme."

[7] The DPP'S case is that her office's standard policy is that all charges pertaining to offences with racial overtones must be referred to her office for determination. It was in accordance with that policy that the matter was referred to her office, hence the instructions that were issued. The DPP asserts that the provisions of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) vests many powers in her office. She contends therefore that the instructions she gave to the senior prosecutor regarding how the applicant's matter was to be dealt falls squarely within those powers and did not take away her power and authority to litigate against the applicant should the interest of justice so require. Furthermore, the usage of the word "may" in the phrase "charges may be withdrawn" negates any suggestion that there was an

agreement that the charges would in fact be withdrawn if the applicant apologised and successfully completed a diversion programme.

[8] It is clear from the DPP's instructions that a withdrawal of the matter would be considered if two conditions were met; firstly, an apology by the applicant and its acceptance by the complainants, and secondly, completion of a diversion programme. The ultimate question is whether the DPP was justified in reviewing her decision on account of the complainants' subsequent rejection of the applicant's apology.

THE APPLICABLE LAW

[9] It is trite that where the words used in a document are capable of more than one meaning, the material known to those responsible for the production of that document assists in the interpretation of the document in question. A sensible meaning must be preferred to one that leads to insensible results or undermines the apparent purpose of the document¹. In a matter of this nature, the exercise of interpreting the DPP's instructions must be undertaken against the backdrop of the powers and functions of the NDPP and the DPP, respectively, as set out in section 179 of the Constitution and in terms of the NPA Act, as well as applicable policies. These prescripts constitute the material known to the DPP which informed her decision to issue the impugned instructions.

[10] Section 179(2) of the Constitution provides that the power to institute criminal proceedings on behalf of the State and to carry out functions incidental thereto vests in the prosecuting authority. Great importance is placed on the independence of prosecutors². The national legislation giving effect to section 179 of the Constitution is the NPA Act. Section 20(1) thereof vests the power to institute, conduct criminal proceedings, to carry out functions incidental thereto in the prosecuting authority. Section 22(4)(f) of the NPA Act enjoins the NDPP to promote compliance with the

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

² See s179(4) of the Constitution of the Republic of South Africa Act 108 of 1996. Also see Hiemstra's Criminal Procedure, service issue 10, p1-4. Also see *Van Heerden v The Regional Court Magistrate, Paarl* Unreported SCA case No 883/2015).

United Nations Guidelines on the Role of Prosecutors within the framework of national legislation. Article 13 of the guidelines adopted by the United Nations in 1990 urges prosecutors to “protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances irrespective of whether they are to the advantage or disadvantage of the suspect.”³ In terms of the NPA Act, a prosecutor has the power to institute and conduct criminal proceedings and to discontinue such proceedings to the extent that he or she may have been authorised to do so by the NDPP or a person authorised to do so. It is evident from the aforesaid provisions that a prosecutor has a wide discretion regarding the institution, discontinuance or withdrawal of criminal proceedings. That discretion must however be exercised properly and is therefore not beyond scrutiny of a court. In this matter, the question is whether the DPP’s discretion was exercised properly when she cancelled the diversion programme and took the decision to prosecute the Applicant.

[11] Section 22(2)(b) of the NPA Act provides the NDPP with the general power to determine prosecution policy and issue policy directives. The DPP’s policy on racial overtones must therefore be seen against this light. The powers exercised by a prosecutor in the lower courts is circumscribed, as they may only exercise powers assigned to them by the DPP in whose area of jurisdiction such court is situated.

[12] A reading of the published Prosecuting Policy⁴ reveals that a decision whether or not to prosecute is preceded by a consideration of a number of factors. The nature of the offence and whether its prosecution will be in the public interest are some of the important considerations. Equally important are considerations such as the attitude of the victim of the offence towards a prosecution, the potential effects of discontinuing prosecution, as well as the necessity of maintaining public confidence in the justice system. In this regard, the interests of the broader community are of relevance. The Prosecution Policy also provides that the review of a case is a continuing process. The Prosecution Policy also encourages prosecutors to take into account the changing

³ See Article 13(b) and 13(d) of the Guidelines on the Role of Prosecutors Adopted by the Eighth United Nations Congress in 1990.

⁴ Final as Revised in June 2013, 27 November 2014.

circumstances of a matter and fresh facts which may come to light after an initial decision to prosecute or not to prosecute has been made. Having regard to the Prosecution Policy in question, one can accept that the nature of the offence, having racial overtones as it does, the attitude of the complainants, as well as public interest would have occupied the DPP's mind when she issued the instructions. Similarly, the DPP would have been entitled to consider the complainants' change of heart, together with all other factors, when reconsidering the matter.

[13] Considering the instructions authored by the DPP in the context of all the prosecutorial powers and functions delineated in the aforesaid prescripts and her standard policy regarding cases with racial overtones, I am left with the impression that the DPP considered the ultimate attitude of the complainants to be an important factor. This view is fortified by the fact that the DPP concluded the letter embodying the instructions by requesting that she be provided with a report on the matter by a certain date. Both the senior and trial prosecutors would obviously have been familiar with the provisions of the Prosecution Policy. The trial prosecutor averred that he was not authorised to oversee the whole process. The fact that the senior prosecutor communicated the complainants' change of heart to the DPP before the next court appearance also suggests that he too, understood the importance of the complainants' attitude in a matter of that nature. The Prosecution Policy in any event stipulates that rules of practice require that certain matters be referred to a Director of Public Prosecutions or the National Director before a prosecution is proceeded with⁵.

[14] The applicant correctly stated that a diversion option is based on the principles of restorative justice. Where diversion is not legislated, it remains the prerogative of the prosecutor, as *dominis litis*, to decide after considering all the circumstance (i) whether a diversion option would be appropriate or not and (ii) the weight to be attached to various factors that warrant consideration. The nature of the offence, the contrition of the offender and the attitude of the victim are some of the factors that play a big role in the consideration of the course which a particular matter should follow. At the end of the day, every case should be assessed on its own merits taking all the

⁵ This is in accordance with clause 4C of the National Policy.

factors which must, according to the prosecutorial prescripts, be taken into account. Given the fact that utterances with racial overtones not only offend the persons they are directed at, but also have an effect on those in whose presence they are uttered, it stands to reason that the broad interests of the community are also an important factor that warrants consideration. A recent Constitutional Court judgment *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*⁶ gives a proper perspective to the nature of the offence similar to that allegedly committed by the applicant and the impact it has on its victims. I can do no better than to quote from that judgment verbatim.

“[2] South Africa’s special sect or brand of racism was so fantastically egregious that it had to be declared a crime against humanity by no less a body than the United Nations itself. And our country, inspired by our impressive democratic credentials, ought to have recorded remarkable progress towards the realisation of our shared constitutional vision of entrenching non-racialism. Revelations of our shameful and atrocious past, made to the Truth and Reconciliation Commission, were so shocking as to induce a strong sense of revulsion against racism in every sensible South African. But to still have some white South Africans address their African compatriots as monkeys, baboons or kaffirs and impugn their intellectual and leadership capabilities as inherently inferior by reason only of skin colour, suggests the opposite. And does in fact sound a very rude awakening call to all of us.

...

[4] It follows that the word kaffir was meant to visit the worst kind of verbal abuse ever, on another person. Although the term originated in Asia, in colonial and apartheid South Africa it acquired a particularly excruciating bite and a deliberately dehumanising or delegitimising effect when employed by a white person against his or her African compatriot. It has always been calculated to and almost always achieved its set objective of delivering the harshest and most hurtful blow of projecting African people as the lowest beings of superlatively moronic proportions.

⁶ [2016] ZACC 38; [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) (8 November 2016) 2017 (2) BCLR 241 (CC) par para 2, 4, 5 and 9.

[5] It could only have been with this disrespect in mind and the need to make a decisive break from the ills of the past, that non-racialism, human dignity and freedoms (which include freedom of expression without any trace of hate speech) are values foundational to our constitutional democracy. The healing of the divisions of the past, the national unity and reconciliation that need to be built and fostered respectively, are likewise intended to entrench peaceful co-existence, respect and the right to dignity of all our people.

...

As Mathopo AJA said in *Prinsloo v S* [2014] ZASCA 96 (SCA) at para 20 in. 'In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. The appellant cannot claim that he did not know that the use of such word is offensive and injurious to the dignity of the complainants. I agree with the trial court's finding that such conduct seeks to negate the valiant efforts made to break from the past and has no place in a country like ours which is founded upon the democratic values of human dignity, and the advancement of human rights and freedoms.'

...

The duty to eradicate racism and its tendencies has become all the more apparent, essential and urgent now. For this reason, nothing that threatens to take us back to our racist past should be glossed over, accommodated or excused. An outrage to racism should not be condescendingly branded as irrational or emotional....This is so not only because the word kaffir is "an inescapably racial slur which is disparaging, derogatory and contemptuous", but also because African people have over the years been addressed as kaffirs. This seems to suggest that very little attitudinal or mind-set change has taken place since the dawn of our democracy.

...

...My observation is that very serious racial incidents hardly ever trigger a fittingly firm and sustained disapproving response. Even in those rare instances where some revulsion is expressed in the public domain, it is but momentary and soon fizzles out. Sadly, this softness characterises the approach adopted by even some of those who occupy positions that come with the constitutional responsibility or legitimate public expectation to decisively help cure our nation of this malady and its historical allies."

[15] I align myself with the sentiments expressed in the aforesaid judgment and have no hesitation in expressing the view that the usage of the word “baboon” with reference to a black person in this country has the same effect on the victim as the word “kaffir”. The sentiments expressed in the afore-mentioned case and the cases quoted therein therefore have equal application here.

[16] Regard being had to the nature of the offence and its well-documented impact on the victims and the community, it is understandable that the complainants’ change of heart just a day after the acceptance of the apology weighed heavily with the DPP. Given the sensitivity of the matter as well as public interest, the DPP was, in my view, entitled to take into account the complainants’ change of heart as conveyed to him by the senior prosecutor. In view of these changed circumstances, the DPP would have been remiss to ignore the subsequent rejection of the complainants’ apology and to slavishly endorse the initiation of the diversion programme. Doing so would, in my view, amount to undue formalism in the assessment of a victim’s attitude and overall consideration of the suitability of a diversion option.

[17] I am not persuaded that the whole tenor of the DPP’s instruction created a legitimate expectation that charges would be withdrawn once an apology had been made and the applicant had subjected himself to diversion. This is especially so because in the same letter embodying the DPP’s instruction, it is clearly stated that a report about the matter must be filed by a certain date. The consideration of whether the DPP’s discretion was properly exercised must not follow a mechanical approach. The following extract of the UK Guidelines for Diversion⁷ perfectly describes what the exercise entails:

“Deciding on where the public interest lies in a particular case is not simply a matter of adding up the number of factors on each side. It is a matter of judgment. In making that judgment Public Prosecutors must decide the weight to be attached to each factor in the circumstances of each case and go on to make an overall assessment. Assessment of the public interest will often involve the consideration of competing interests. Although there may be some public interest factors against prosecution and in favour of diversion in a

⁷ Published in November 2008.

particular case, sometimes the overall balance is that prosecution should be directed and those matters should be put to the Court by the defence in mitigation when sentence is being considered.”

[18] As stated above, there are various factors to be taken into account when diversion is considered as an option. Similarly, a reconsideration of the matter due to changed circumstances warrants the same exercise. The point is that not all factors which warrant consideration will carry the same weight. The changed circumstances may conceivably have a considerable impact on the potential effects of discontinuing prosecution, which may in turn have a bearing on the consideration of whether or not to proceed with a diversion programme. Having paid due regard to all the aforementioned factors, I am unable to find that the DPP’s decision to proceed with prosecution is unfounded⁸.

[19] The requirements for a final interdict are trite. As stated before, the applicant has failed to prove the existence of the alleged agreement between him and the DPP. The authorities relied upon by the applicant are all distinguishable⁹ as they relate to cases where the prosecution sought to reinstate charges that were previously withdrawn pursuant to a plea agreement or after completion of a diversion programme initiated in terms of the Child Justice Act. In this matter, the charges were never withdrawn and the diversion option was cancelled before it had commenced. The DPP’s decision to continue with the applicant’s prosecution does not violate the applicant’s constitutional rights to a fair trial as it was based on a

proper exercise of the prosecutorial discretion. The applicant still has an opportunity of putting his defence forward in a trial¹⁰. Clearly, the applicant has failed to prove the requirements for the granting of a final interdict. His application therefore falls to be dismissed. There is no reason to depart from the general rule pertaining to cost orders.

ORDER

⁸ Hiemstra’s Criminal Procedure, service issue Issue 8 p1-6(1).

⁹ *Van Eeden v Director of Public Prosecutions, Cape of Good Hope* 2005(2) SACR 22 (C); *MP Steyl v National Director of Public Prosecutions and Another* (27397/2013) [2015] ZAPGPPC 407 (9 June 2015).

¹⁰ *Allen v Attorney-General* 1936 CPD 302.

[20] The application to prohibit the applicant's prosecution under Harrismith Magistrates' Court Case No 711/2016 is dismissed with costs.

M.B. MOLEMELA, JP

On behalf of Applicants:

Adv J.J. Buys
Instructed by:
L & V Attorneys
BLOEMFONTEIN

On behalf of the
1st and 2nd Respondents:

Adv O.L.R Mudau
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