REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

7/8/15

CASE NO: **64268/2013**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

p.p. .... 07·08·2015
SIGNATURE DATE

In the matter between:

STEFAN WERNER VAN DEVENTER	Applicant
versus	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS NO	Respondent

JUDGMENT

MATOJANE J

Introduction

[1] This is an application to review and set aside the decision of the Respondent not to refer the Applicant's criminal case of driving under the influence and driving without a valid driver's license for diversion on the basis that the decision of the respondent did not comply with the constitutional principle of legality.

[2] The applicant seek an order:

1. Reviewing, correcting and/or setting aside the Respondent's decision not to refer the Applicant's criminal case, Lyttelton CAS 683/10/2009 for diversion;

2. Directing the Respondent to forthwith consider the applicant's representations for the diversion of the criminal case Lyttelton CAS 683/10/2009, and to take such steps as necessary to ensure that application for diversion be reconsidered, and/ or alternatively:-

3 Directing the Respondent to determine a proper policy and or guidelines for diversion cases, alternatively specific guidelines for diversion of specific crimes.

Background

[3] At approximately 05:10 on 27 October 2009, the applicant, then aged 20 years old, drove a motor vehicle with passengers but failed to stop at a red traffic light. He collided with another vehicle that was damaged beyond economical repair.

[4] At the time of the collision, the applicant did not have a driver's license and was under the influence of alcohol. The concentration of alcohol in applicant's blood was 0.09g/100ml of blood whereas the legal limit at the time was 0,05g/ml.

[5] The applicant was arrested on the scene and appeared in Court. The applicant's legal representative made representations to the senior public prosecutor on 15 October 2012, three years after the incident to have the trial diverted. These representations did not succeed and reasons were provided to the applicant on 12 April 2013.

[6] The applicants legal representatives then made further representations to the Director of Public Prosecutions, North Gauteng 16 March 2013 to have the trial diverted. These representations also did not succeed.

[7] The applicant's legal representatives made further representations to the National Director of Public Prosecutions on 3 June 2013 to have the

trial diverted. These representations also did not succeed and on 3 July 2013, the acting National Director of public Prosecutions informed the applicant that after a perusal of the available evidence, he has decided to confirm the decision of the Director of Public Prosecutions, North Gauteng to continue with the prosecution of the Applicant. It was further stated that a Prima facie case exists against the applicant and the matter could not be diverted because of its seriousness.

[8] The applicant thereafter applied for a review of the above decisions to continue with the prosecution and not divert the trial. The applicant also issued a notice in terms of section 16A on the basis that this application raised constitutional issues.

[9] The trial of the applicant was postponed to accommodate the submission of this representations and this review. It is still currently pending before the Magistrates Court in Pretoria.

[10] The Applicant contend that the decision of the Respondent to proceed with the prosecution was arbitrary, irrational, capricious and in a manner inconsistent with the provisions of Section 179(2) of the Constitution[1] read with Section 20(1)(c), 21 (1)(b) and 22(2)(a)-(c) of

[1] Section 179(2) reads "The prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out necessary functions incidental to instituting criminal proceedings."

the NPA Act[2] by virtue *inter alia,* of the fact that Respondent did not comply with its own policy directives for the diversion of criminal cases.

[11] The Applicant further submit that the decision of the Respondent constitute an administrative action and as such it reviewable in terms of the Promotion of Administrative Justice Act (PAJA)[3].

[12] In **National Director of Public Prosecutions vs Freedom under Law** [4] the SCA had to determine whether the National Director of Public Prosecution's decision to withdraw a prosecution should be reviewed and set aside. The Court held that it was under a duty to determine *first* whether the decision fell to be reviewed under PAJA or under the more general principle of legality before considering the merits of the review. The Court held that the decision to withdraw the prosecution could not be reviewed under PAJA, but could be reviewed under the principle of legality. The SCA commented:

> "The legality principle has now become well established in our law as an alternative pathway to judicial review <u>where PAJA finds no application.</u>" [Emphasis added].

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[2] Act 32 of 1998
[3] Act 3 of 2000
[4] (67/14)[2014]ZASCA 58(17 April 2014

[13] It follows therefore that the Respondent must exercise the powers conferred on it by virtue of section 20 to 22 of the NPA Act lawfully, rationally and in good faith. Applicant alleges that Respondent did not, in compliance with section 21(1)(a) and (b) of the NPA Act determine the prosecution policy and or issue police directives pertaining to which guidelines should be followed when a request for diversion for a specific offence is considered by the Prosecuting Authority.

[14] The Respondent in its reasons for decision, so it was argued, did not refer to the guidelines/ selection criteria that serve as a guide to the prosecutor for consideration, when exercising his or her discretion as set out in paragraphs 3 and 4 of part 7 of the policy directives, which are supposed to serve as a guide to the prosecutor when considering a diversion case.

[15] Chapter 3 of the National Prosecuting Authority of South Africa's Policy manual defines the role of the Prosecutor as follows:

> "Prosecutors must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community.
>
> The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based

upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of the victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner.

The prosecutor has a discretion to make decisions, which affect the criminal process. This discretion can be exercised at specific stages of the process, for example:

the decision whether or not to institute criminal proceedings against the accused;

the decision whether or not to withdraw charges or stop the prosecution;

the decision whether or not to oppose an application for bail or release by an accused who is in custody following arrest;

the decision about which crimes to charge an accused with and in which court the trial should proceed;

the decision whether or not to accept a plea of guilty tendered by the accused;

the decision about which evidence to present during trial;

the decision about which evidence to present during sentence proceedings, in the event of a conviction; and

the decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail, or to seek review of proceedings.

Members of the Prosecuting Authority must act impartially and in good faith. They should not allow their judgement to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender.

Prosecutors must be courteous and professional when dealing with members of the public or other people working in the criminal justice system."

[16] Chapter 4 of the National Prosecuting Authority of South Africa's Policy manual set out the criteria governing the decision to prosecute as follows:

"a) General

The process of establishing whether or not to prosecute usually start when the police present a docket to the prosecutor. This happens after the suspect has been arrested. The case needs to be studied to make sure that it is properly investigated.

The prosecutor should consider whether to-

- Request the police to investigate the case further;
- Institute a prosecution;
- Decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or
- Decline to prosecute without taking any other action.

The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system.

Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy or prosecution.

In deciding whether or not to institute criminal proceedings against the accused, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continues.

This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of the written statements.

Where the prospects of success are difficult to assess, prosecutors should consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused must also be considered, before a decision is made.

This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. However, prosecutors should not make unfounded assumptions about the potential credibility of witnesses.

The review of a case is a continuing process. Prosecutors should take into account changing circumstances and fresh facts which may come to light after an initial decision to prosecute has been made.

This may occur after having heard and considered the version of the accused and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused has pleaded in spite of an initial decision to institute a prosecution.

b) **Factors to be considered when evaluating evidence**

When evaluating the evidence prosecutors should take into account all relevant factors, including-

How strong is the case for the State?

- Is the evidence strong enough to prove all the elements of an offence?

- Is the evidential material sufficient to meet other issues in dispute?

Will the evidence be admissible?

- Will the evidence be excluded because of the way in which it was acquired or because it is irrelevant or because of some other reason?

Will the state witnesses be credible?

- What sort of impression is the witness likely to make

- Are there any matters which might properly be put by the defence to attach the credibility of the witness

- If there are contradictions in the accounts of witnesses, do they go beyond the ordinary and expected, thus materially weakening the prosecution case?

Will the evidence be reliable?

- If, for example, the identity of the alleged defender is likely to be an issue, will the evidence of those who purport to identify him or her be regarded as honest and reliable?

Is the evidence available?

- Are the necessary witnesses available, competent, willing and, if necessary, compellable to testify, including those who are out of the country?

How strong is the case for the defence?

- Is the probable defence of the accused likely to lead to his or her acquittal in the light of the facts of the case?

Prosecution in the public interest

- Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.

- There is no rule in law which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

- When considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

The nature and seriousness of the offence:

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.

- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.

- The economic impact of the offence on the community, its threat to people or damage to public property , and its effect on the peace of mind and sense of security of the public.

- The likely outcome in the event of a conviction, having regard to sentencing options available to the court.

The interests of the victim and the broader community:

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care should be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted –regardless of a complainant's wish not to proceed.

- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.

- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

The circumstances of the offender:

- The previous convictions of the accused, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.

- Whether the accused has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (in this regard, the degree of culpability of the accused and the extent to which reliable evidence from the said accused is considered necessary to secure a conviction against others, will be crucial).

- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.

- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay.

- The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.

- It is important that the prosecution process is seen to be transparent and that justice is seemed to be done."

[17] Part 7 of the Policy Directives of the National Prosecuting Authority of South Africa deals with the principle of Diversion as follows:

"1. By 'diversion' is understood the election – in suitable and deserving cases – of a manner of disposal of a criminal case other than through normal court proceedings. It usually implies the provisional withdrawal of the charges against the accused, on condition that the accused participates in particular programmes and /or makes reparation to the complainant. Diversion is preferable to the mere withdrawal of cases as the offender is charged with taking responsibility for his or her actions.

Although diversion is primarily employed in the case of juvenile offenders, there are also other diversion programmes in operation. These include victim-offender mediation programmes and performance of community service as an alternative to prosecution.

Diversion is inappropriate where the charge is one of murder, robbery with aggravating circumstances, rape or a similarly serious offence. Offenders with a criminal record and persons to whom the opportunity has been granted previously should only be included in exceptional circumstances

4. The following selection criteria are not hard and fast rules, and should serve as a guide to the prosecutor in exercising his or her discretion to determine whether or not an offender qualifies for the program. The accused should —

(a) have a fixed address;

(b) acknowledge liability for the offence

(c) be prepared to participate in the diversion programme;

(d) In the case of juvenile offenders-

(i) be between the ages of 12-18 years; and

(ii) have a parent or guardian who is prepared to take responsibility for his or her attendance and to be present in court

5. Once the prosecutor has identified a candidate, a probation officer must screen such a candidate and thereafter advise the prosecutor on the suitability of the candidate for the programme.

6. The prosecutor makes the final decision and is not bound by the recommendations of the probation officer.

7. The prosecutor is satisfied that an offender is suitable for a diversion programme, the offender (and, in the case of juvenile offenders, his or her parents or guardian) must be made aware of the possibility of diversion. They should be advised

that participation is voluntary and that, should the offender not meet all the requirements the case will not be withdrawn.

8. Whilst the establishment of diversion programmes is primarily the responsibility of the Department of Welfare, prosecutors should take some initiative in this regard. Non- governmental organizations, such as NICRO (the National Institute for Crime and Rehabilitation of Offenders) may be of assistance.

9. After the offender has completed the diversion programmes the social worker submits a report to the prosecutor. If it is clear that the offender has cooperated and benefitted from the programme, the matter is withdrawn. If not, the prosecution is to proceed.

10. If at the sentencing stage of his or her trial, the situation arises where an accused appears to be a suitable candidate for a programme, the same procedure applies, with the necessary changes. The court can then consider imposing a suspended sentence with participation in the programme as one of the conditions of suspension. If the offender does not successfully complete the programme, the prosecutor must apply in the normal manner for the suspended sentence to be put into operation.

11. A register must be kept regarding all offenders screened for the diversion programme. The reason for the decision to divert or not must be recorded, as well as the way in which the matter was eventually disposed of."

[18] The Respondent took into account the personal circumstances of the applicant in refusing to divert the prosecution. The Respondent stated that the fact that appellant was 23 years old likely to have a criminal record was insufficient to justify a diversion in this matter. Respondent noted that were no substantive facts set out in applicant's representations and on this application for that matter, as to why Applicant is entitled to have his criminal charges diverted. The seriousness and prevalence of the offences as well as the circumstances under which they were committed were taken into account. National Director of Public Prosecutions stated that drunken driving, driving without a driver's licence and driving recklessly or negligently through a red traffic light accounted for deaths of many innocent drivers, passengers and pedestrians on a far too regular basis. He concluded that failure to prosecute Applicant effectively will not be in the public interest and will sent a wrong message to the public in general including but not limited to Appellant and victims of such crimes.

[19] Section 179 (2) of the Constitution as read with section 20(1) of the NPA Act governs the Prosecuting Authority's power to institute criminal proceedings on behalf of the State, to carry out any necessary functions incidental to instituting criminal proceedings and to discontinue proceedings.

[20] In its further reasons for the decision, the Respondent informed Applicant that after perusal of the available admissible evidence, it has decided to confirm the decision of the Director of Prosecutions, North Gauteng to continue with the prosecution of the applicant as a prima facie case exists against applicant and the matter could not be diverted because of its seriousness.

[21] It is clear that the Respondent considered the available evidence as well as the circumstances under which the offence was committed, the personal circumstances of the Applicant and the interest of society and had due regard to the guidelines and policy directives in existence in the exercise of its discretion. This exercise of discretion cannot in my view, be faulted.

[22] In its replying affidavit, applicant argue that respondent did not comply with its Policy Directive that requires a register to be kept regarding all offenders screened for the diversion programme and that the reasons

for the decision to divert or not must be recorded. Applicant argue that Respondent furnished him with reasons for the decision not the record and so the argument goes, either the register does not exist and or if it exists, Respondent did not properly record the reasons for not granting his diversion.

[23] In my view, the insistence on the register is just an afterthought as it is raised in reply. The register is a formal document regarding all offenders screened for the diversion programme containing reasons for the decision to divert or not. It contains confidential information about other offenders who have been screened. By his own admission, applicant was furnished with the reasons for the decision and Respondent has thereby adhered to its policy directive.

[24] For the reasons given, I consider that the decision not to divert the prosecution of the applicant was a rational decision based on the Policy Manual and Policy Directives of the National Prosecuting Authority of South Africa. In the result, I find that Applicant has not made out a case to support a rule of law or principle of legality review of the decision to divert his prosecution.

[25] Order

The application is dismissed with costs.

K E MATOJANE
JUDGE OF THE HIGH COURT