



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO: D10552/2023**

**In the matter between:**

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**First Applicant**

**PROVINCIAL DIRECTOR OF PUBLIC PROSECUTIONS**

**Second Applicant**

**and**

**GAVIN DYKES KRUGER**

**Respondent**

**In re the matter between:**

**GAVIN DYKES KRUGER**

**Applicant**

**and**

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**First Respondent**

**PROVINCIAL DIRECTOR OF PUBLIC PROSECUTIONS**

**Second Respondent**

**PETER STAUDE**

**Third Respondent**

**MURRAY HECTOR MUNROE**

**Fourth Respondent**

**MICHAEL EDWARD DEIGHTON**

**Fifth Respondent**

**RORY EDWARD WILKINSON**

**Sixth Respondent**

**KAMLASAGRIE SINGH**

**Seventh Respondent**

**SAMANTHA SHUKLA**

**Eighth Respondent**

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| <b>Coram:</b>    | Reddi AJ     |
| <b>Heard:</b>    | 04 June 2025 |
| <b>Judgment:</b> | 18 July 2025 |

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### **ORDER**

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#### **The following order is granted:**

The application for leave to appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel on scale C.

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### **JUDGMENT**

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**REDDI AJ**

#### **Introduction**

[1] This is an opposed application for leave to appeal the order I granted on 23 December 2024, declaring invalid and setting aside the First Applicant's decision, in terms of s 2(4) of the Prevention of Organised Crime Act, 1998 (POCA), to authorise the Respondent's prosecution on a charge in terms of s 2(1)(e) of POCA.

[2] Mr VS Notshe appeared for the Applicants in the main and the present applications, while Mr J Marais appeared for the Respondent on both occasions. Both counsel and I arranged for the application for leave to appeal to be heard on 02 May 2025 in Durban. However, the matter could not proceed on the agreed date as the file went missing and had to be reconstructed. I am grateful to the Respondent's attorneys for completing the tedious task of reconstructing the file. The application was later heard on 04 June 2025, in Pietermaritzburg, where I acted from 19 May 2025 to 20 June 2025. I am most grateful to Mr Notshe and Mr Marais for agreeing to argue this matter in Pietermaritzburg.

## **Basis of the application for leave to appeal**

[3] In the notice of application for leave to appeal, dated 27 January 2025, the Applicants indicate that they are seeking leave to appeal the whole of the judgment and order delivered on 23 December 2024 on the following six grounds of fact and law:

That the court *a quo* had:

- (i) failed to properly apply the applicable test regarding the First Applicant's decision, to wit, whether she had the powers that she exercised and whether she had exercised them for the purposes for which they were conferred;
- (ii) ignored the fact that the legislature had not designated any procedure or requirements for exercising that power. Therefore, the existence of a watertight case is not a requirement for the authorisation of a prosecution by the First Applicant;
- (iii) went beyond the test for rationality and traversed the reasonableness test;
- (iv) overlooked that POCA seeks the essentials of the charge. It requires the authorisation of a charge, which is a valid charge if it contains all the essentials;
- (v) should have considered that the provisions of s 2(2) of POCA are still subject to the safeguards of a fair trial; and
- (vi) There is a reasonable prospect of success on appeal.

I shall consider each of these grounds shortly.

## **Requirements of leave to appeal**

[4] The rationale for needing litigants to obtain leave to appeal was set out in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd*,<sup>1</sup> where Wallis JA said this: 'The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.'

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<sup>1</sup> *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) para 24.

[5] Leave to appeal from a decision of a High Court is governed by s 17(1) of the Superior Courts Act 10 of 2013 (the Act), which provides the following:

'Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

At the core of s 17(1)(a) lies the requirement of the applicant having to demonstrate that, should the application be granted, there is a reasonable likelihood that another court would arrive at a different decision. Alternatively, proof of some compelling reason countenancing the appeal must be proffered. Absent either of these discrete requirements, there would be no basis to grant leave.

[6] Before the Act came into force, the test in an application for leave to appeal was whether there were reasonable prospects that an appeal court might conclude differently from that of the lower court. The advent of the Act has modified the test and, arguably, raised the threshold for granting leave to appeal.<sup>2</sup>

[7] In *Ramakatsa and Others v African National Congress and Another*,<sup>3</sup> the Supreme Court of Appeal (SCA) referred to what it had said in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*,<sup>4</sup> that even if the court is unconvinced that there are prospects of success, it must nevertheless explore if there is a compelling reason to entertain the appeal. According to the SCA, compelling reasons would include an important question of law or a subtle matter of public importance that may impact future

<sup>2</sup> *Public Protector of South Africa v Speaker of the National Assembly and Others* [2022] ZAWCHC 222 para 14.

<sup>3</sup> *Ramakatsa and Others v African National Congress and Another* <sup>3</sup>[2021] JOL 49993 (SCA) para 10.

<sup>4</sup> *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA).

disputes. But, *Ramakatsa* also embraced what had been expressed in *Caratco*, that 'here too the merits remain vitally important and are often decisive'.<sup>5</sup>

[8] Ultimately, *Ramakatsa* has clarified that if a reasonable prospect of success is established, leave to appeal should be granted. Likewise, leave should be granted if there are other compelling reasons why the appeal should be heard. However, the prospects of success must not be remote, and the applicant must show that there exists a sound, rational basis for the conclusion that there are prospects of success.<sup>6</sup>

### The application

[9] The facts of this matter bear brief mention. In July 2022, the respondent, a chartered accountant, was charged with the third to eighth respondents in the High Court of South Africa, KwaZulu-Natal Division, Durban, on 26 counts, including a charge of contravening s 2(1)(e) of POCA. The allegations against the respondent were linked to his role as the engagement partner in Deloitte & Touche, the company appointed to render audit services to Tongaat Hulett Developments (Pty) Ltd (THD) and Tongaat Hulett Limited (THL) for the financial years 2015 to 2018.

[10] The charge under POCA alleges that the respondent and the third to eighth respondents had participated in the conduct of an enterprise and received or retained property derived, directly or indirectly, through a pattern of racketeering activities conducted within THL or THD via the acts of fraud listed in counts 3 to 21 of the indictment.

[11] The respondent contended that the First Applicant's decision to issue the s 2(4) POCA authorisation was irrational as it was based on information that did not allow for her to objectively conclude that reasonable and probable cause existed that he had committed the alleged racketeering acts of which he is accused. My analysis of the

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<sup>5</sup> Ibid, para 2.

<sup>6</sup> *Ramakatsa and Others v African National Congress and Another* [2021] JOL 49993 (SCA) para 10. See also *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 para 17, and *Fairtrade Tobacco Association v President of the Republic of South Africa* (21688/2020) ZAGPPHC 311 (24 July 2020) at para 6.

matter led me to conclude that the First Applicant's decision to issue the POCA authorisation had been irrational.

### Grounds of appeal

[12] I turn now to the first ground on which I am alleged to have erred. The Applicants contend that I did not properly apply the applicable test in determining whether the First Applicant had had the powers she exercised and whether she had exercised them for the purposes they had been conferred.

[13] This contention is without basis, as even a cursory reading of my judgment would indicate that I viewed rationality as the constituent component of the assessment. Moreover, supported by the authority of *Scalabrini Centre, Cape Town & Others v Minister of Home Affairs & Others*<sup>7</sup> and *Democratic Alliance v President of the Republic of South Africa & Others*,<sup>8</sup> the judgment also specified that ignoring relevant factors and considering incorrect material or the unfair presentation of such material were shortcomings in the decision-making process that would render the First Applicant's decision irrational.<sup>9</sup>

[14] The legal principles articulated above are commonplace, well-established in our law, and ubiquitous and, consequently, need no further re-examination or reconsideration by another court.

[15] With these fundamental principles being the foundation of my analyses, I concluded that the principle of legality would be offended if the information on which the First Applicant based her decision were to be misleading or incorrectly represented the available evidence.<sup>10</sup> This is a logical corollary to my application of the basic principles. The approach adopted in the context is incontrovertible.

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<sup>7</sup> *Scalabrini Centre, Cape Town & Others v Minister of Home Affairs & Others* 2018 (4) SA 125 SCA.

<sup>8</sup> *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC).

<sup>9</sup> Paragraphs 27 and 28 of the judgment.

<sup>10</sup> *Ibid* at para 29.

[16] The Applicants' second ground of appeal alleges that the court required the existence of a watertight case for the authorisation of a prosecution by the First Applicant, despite the legislature not having designated any procedure or requirements for exercising that power. I have difficulty with this ground as nowhere in the judgment is there any suggestion that the court set as a prerequisite for establishing rationality the existence of a watertight case. On the contrary, the judgment referred with approval to the helpful advice provided by Gorven J's statement in *Booyesen v Acting National Director of Public Prosecutions and Others*,<sup>11</sup> regarding not setting any requirement for the level of disclosure or the detail necessary for a rational decision.<sup>12</sup>

[17] The third ground of appeal the Applicants raise is that in assessing whether the s 2(4) of POCA authorisation was valid, I went beyond the test for rationality and traversed the reasonableness test. This ground, too, is baseless. In the initial review proceedings, the Applicants' counsel had submitted that the Respondent was attacking the reasonableness and not the rationality of the First Applicant's decision. This argument was rejected by the court *a quo*, which, in the process, confirmed that rationality and not reasonableness must be assessed when looking at the decision-maker's actions.<sup>13</sup>

[18] The fourth and fifth grounds of appeal are linked and will be dealt with together. The Applicants contend that the court *a quo* 'overlooked that POCA seeks the essentials of a valid charge (sic).' It requires the authorisation of a charge, which 'is a valid charge if it contains all the essentials.' They contend further that the court *a quo* should have considered that the provisions of s 2(2) of POCA are still subject to the safeguards of the fairness of the trial.

[19] Nothing more needs to be said about these two grounds, but that both are non-issues which conflate the question of the trial's fairness with the issuing of the authorisation. The Respondent's challenge related to the First Applicant's decision to issue a s 2(4) authorisation when there was no rational basis. The Applicants, by

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<sup>11</sup> *Booyesen v Acting National Director of Public Prosecutions and Others* 2014 (2) SACR 556 (KZD) para 38.

<sup>12</sup> See paragraph 58 of the judgment.

<sup>13</sup> See paragraphs 61 – 63 of the judgment.

raising the essentials of a charge and the s 2(2) fair trial safeguard, seem to have adopted the position that the First Applicant's decision-making can be without circumspection so long as the fairness of the trial is protected. This approach is objectionable and does not align with the established legal principles.

[20] The Applicants' Notice of Leave to Appeal indicates that they seek to appeal on both legal and factual grounds. However, a close reading of the notice reveals that the grounds relied on are solely legal or have the semblance of being such. I say this because the Notice seems to focus more on non-issues instead of directly raising issue with the legal principles relied on by the court *a quo*.

[21] Respondent's counsel submitted that there can be no appeal on the legal principles based on the unassailable position adopted by the court concerning the applicable principles. Therefore, the application of the principles to the evidence would be the sole determinant of the leave application. The court agrees.

[22] However, the Applicants have not engaged with the facts. Respondent's counsel submitted that the reason for this failure seems self-evident: no factual disputes arose and the approach adopted by the court *a quo*, on the facts, was demonstrably justified in the absence of any meaningful factual disputes.

[23] Listed below are my factual findings, which have been summarised in the Respondent's heads of argument as follows:

- (a) not only was there a paucity of evidence to indicate back-dating, but such evidence as there was indicated that the Respondent, himself, had enquired about the availability or whereabouts of Sale Agreements;
- (b) the First Applicant's inference of a conspiracy arising from neutral remarks in the minutes, was not justified;
- (c) that reliance upon the THD recognition criteria was plainly wrong;
- (d) that the information before the First Applicant contained no evidence to indicate any kind of special relationship between the Respondent and Tongaat Hulett employees;

- (e) that the Applicants did not meet the threshold to find that there was a type of conspiracy as contemplated in the Act;
- (f) that there was no challenge to the factual circumstances relied upon by the Respondent to demonstrate that the Respondent wanted to hide anything from the internal and external audit teams;
- (g) that the First Applicant had made no attempt to explain how she had arrived at her decision, something which she could clearly not justify on the basis of inaccurate, misleading and incorrect information in the White Report;
- (h) that *prima facie* it was hard to fathom the basis of the First Applicant's decision, and that became even more difficult in the absence of a basic explanation by her.

[24] The First Applicant's approach to dealing with these facts was a terse statement that she had authorised the prosecution and had relied on the Memorandum in doing so. This is hardly adequate in the circumstances.<sup>14</sup>

[25] The factual findings were the premise for my conclusion that it is impossible to find a decision to be anything but irrational where it was founded on misleading and inaccurate evidence.

[26] The correctness of my approach, in investigating the means that led to the First Applicant's decision to issue the s 2(4) POCA authorisation, finds support in the decisions of the SCA and the Constitutional Court. In *Scalabrini Centre, Cape Town & Others v Minister of Home Affairs & Others*,<sup>15</sup> for instance, the SCA said this:

'As the Constitutional Court has explained, a failure to take into account relevant considerations in the process of making a decision can render it irrational where: (1) the factors are relevant; (2) the failure to consider the material concerned is rationally related to the purpose for which the power was conferred; and (3) ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.'

<sup>14</sup> See paragraphs 57, 59, 61 and 63 of the judgment.

<sup>15</sup> *Scalabrini Centre, Cape Town & Others v Minister of Home Affairs & Others* 2018 (4) SA 125 SCA, para 51.

In *Democratic Alliance v President of the Republic of South Africa & Others*,<sup>16</sup> Yacoob ADCJ emphasised the importance of evaluating the means used to achieve the purpose when he said the following:

'The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between the means and the ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute the means towards the attainment of the purpose for which the power was conferred.'

[27] Yacoob ADCJ stated further that a failure to consider relevant material constitutes part of the means to achieve the purpose for which the power was conferred. 'If that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.'<sup>17</sup>

[28] According to the learned acting deputy chief justice, deciding the issue necessitated a three-stage enquiry by the court faced with an executive decision which ignored certain factors.<sup>18</sup> The enquiry involves a consideration of: (i) whether the factors ignored are relevant; (ii) whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and (iii) if the answer to (ii) is negative, whether ignoring the relevant factors taints the entire process with irrationality, so rendering the final decision irrational.<sup>19</sup>

[29] Based on the issues that needed consideration, my analysis in the present matter revealed that the memorandum on which the First Applicant relied, contained information that was misleading, inadequate and inaccurate. The memorandum was the instrumentality of the rhyme and rhythm test and gave support to it. However,

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<sup>16</sup> *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC), para 36.

<sup>17</sup> *Ibid* at para 39.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid*.

because it was patently misleading, the memorandum called for the consideration of something more by the First Applicant when deciding whether to issue the s 2(4) authorisation. The reason is self-evident: the factors which demanded further consideration were of such relevance and significance that ignoring them coloured the First Applicant's decision-making process with irrationality, thus rendering her final decision irrational.

[30] Based on the provisions of s 17(1) of the Superior Courts Act, 2013, for leave to be obtained, an applicant must demonstrate that the envisaged appeal would have a reasonable prospect of success or that there is some compelling reason why the appeal should be heard. The applicant must, therefore, discharge a meaningful onus.

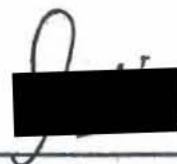
[31] In weighing the grounds of appeal indicated in the Notice of Appeal against the preceding discussions, it is clear that the Applicants have not mounted any consequential challenge to the well-established legal principles applied by the court *a quo*. In addition, they have failed to address the facts. Their focus has been elsewhere, leading to a failure to discharge the meaningful onus which vested in them.

[32] Having dispassionately considered my judgment and having given due consideration to the parties' submissions, I am not persuaded that any basis exists to justify granting the Applicants' application for leave to appeal.

#### Order

[33] As the result, the following order shall issue:

The application for leave to appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel on scale C.



REDDI AJ

**CASE INFORMATION****APPEARANCES:**

First and Second Applicants' Counsel: VS Notshe SC  
S Cele

First and Second Applicants' Attorney: The State Attorney (KwaZulu-Natal)  
Mr MP Pillay (Snr. Ass. State Attorney)  
6th Floor, Metlife Building  
391 Anton Lembede Street  
Durban  
Email: [ManoPillay@justice.gov.za](mailto:ManoPillay@justice.gov.za)  
[LungiDlamini@justice.gov.za](mailto:LungiDlamini@justice.gov.za)  
Tel: (031) 365 2535/59  
Ref: 119/25311/23/K/P10

Respondent's Counsel: J Marais SC  
W Lombard

Respondent's Attorneys: Norton Rose Fulbright South Africa Inc  
3 Pencarrow Crescent, Pencarrow Park  
La Lucia Ridge  
Durban  
Email:  
[Craig.Woolley@nortonrosefulbright.com](mailto:Craig.Woolley@nortonrosefulbright.com)  
[Laura.Steele@nortonrosefulbright.com](mailto:Laura.Steele@nortonrosefulbright.com)  
Tel: (031) 582 5814  
Ref: KRU124/CW