



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, THOHOYANDOU.

CASE NO. 1091/2020

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED: <u> </u>
16.03.2026 DATE..... SIGNATURE.....	

In the matter between:

FALAZA MATHEBULA AND 15 OTHERS

APPLICANTS

and

**DIRECTOR OF PUBLIC PROSECUTIONS
LIMPOPO DIVISION, POLOKWANE**

FIRST RESPONDENT

**DEPUTY DIRECTOR OF
PUBLIC PROSECUTIONS LIMPOPO
LOCAL DIVISION: THOHOYANDOU**

SECOND RESPONDENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

THIRD RESPONDENT

**SOUTH AFRICAN CUSTODIAL MANAGEMENT
(PTY) LTD**

FOURTH RESPONDENT

KENSANI CORRECTIONS MANAGEMENT

FIFTH RESPONDENT

JUDGMENT

Heard on: 09 October 2025

Delivered: this judgment was handed down electronically by circulation to the parties' legal representatives by email and release on SAFLII. The date and time for hand-down is deemed to be at 10:00 on 16 March 2026.

SEMENYA DJP

- [1] This review concerns the power of the Director of Public Prosecutions, Limpopo (the first respondent), hereafter the DPP, to review the decision made by the Deputy Director of Public Prosecutions (the second respondent), the DDPP, within the same jurisdiction. The DDPP had declined to prosecute the applicants who were charged with certain specified charges in the Louis Trichardt magistrate court. The DPP reviewed the DDPP's decision and ordered the reinstatement of the case and the continuation of the prosecution against the applicants. In this court the applicants seek a review and setting aside the decision of the DPP.
- [2] The fourth and fifth respondents are the operating sub-contractors of South African Custodial Services (SACS), a concession holder of Kutama Sinthumule Correctional Service Centre (the prison) in Limpopo Province.

The prison is a joint venture with the Department of Correctional Services. The fourth and fifth respondents operate and manage the prison and its programs jointly.

- [3] The first to fifteenth applicants are former employees of either the fourth or fifth respondent and were stationed at the prison when the events leading to this application ensued. They were all expelled after a long-drawn-out litigation which culminated in the confirmation of their expulsion by the Constitutional Court.¹ The applicants were, as at the date of the incident, 26 October 2017, the executive committee of the Union for Police, Security and Corrections Organization (UPSCO) at the prison.
- [4] Contrary to the assertions of the applicants, I am of the view that the facts that led to their dismissal from employment and to the matter before me, are relevant to the issues raised in this matter. They are, in any case, the facts which were considered by the DPP and the DDPP in arriving at their respective decisions. The fourth and fifth respondents attached the Labour Court judgment to their answering affidavit.

¹ The Constitutional Court dismissed their application for leave to appeal the order of the Labour Court.

- [5] The background facts have been succinctly summarized in the Labour Court by Moshwana J as follows:

"Background facts

[3] The onset of this dispute is an alleged agreement to pay to the employees of the employers a 16% contribution towards their pension funds in the same manner as government employees in the Department of Correctional Services are dealt with. Union for Police, Security and Corrections Organisation (the trade union) took a view that an agreement was reached that the aforesaid percentage was to be paid by the employers. Suffice to mention that the dispute around the alleged agreement is still pending in the Constitutional Court. Owing to the view of the trade union, a request was made to have a meeting with the employers to discuss the implementation of the alleged agreement. Three days before the meeting and the incidents that led to the dismissal of the dismissed employees, being 23 October 2017, a written request for that meeting was made. A controversy, which shall later be dealt with in this judgment, arose with regard to the purpose and intent of the said written request. The trade union and the dismissed employees contended that the request served as a trade union leave application. The employers did not treat the request as such.

[4] On the morning of 26 October 2017 a meeting between the employers and the dismissed employees took place. The employers understood the purpose of the meeting to be the giving of a feedback and to share an understanding of the 16% contribution issue. It turned out that the dismissed employees had a different understanding. After the employers categorically stated that the 16% shall not be paid, the dismissed employees decoyed, as it were, the representatives of the employers, to deliver the message of non-payment of the 16% to the general staff. The representatives agreed to do so and a notification for a staff meeting was issued.

[5] The meeting was intended to be short and no longer than an hour like the routine staff meetings held in the past. At the meeting the representatives were met by visibly irate staff members and when they explained the position of the employers, they were heckled by the group of staff members present. The staff members demanded to be addressed by the shareholders. An attempt was made to get a hold of the shareholders but ultimately it was agreed with the dismissed employees that such an address will be held on Monday 30 October 2017. There was an indication that due to one of the shareholders being in the United States of America and owing to the time zones differences, they might be available on the other end of the telephone line at about 19h00 South African time.

[6] When the staff was addressed for the second time, the heckling continued unabated by the dismissed employees. They vowed to wait until 19h00 and indicated that they shall not leave the area (Waste Management Area) until their demand of 16% contribution is met. The dismissed employees flatly refused to bring the situation under normality, stating that the meeting was summoned by the employers' representatives and not them as trade union leaders. The dismissed employees had arrived at work on 26 October 2017 not clad in their work garments.

[7] Between 15h00 and 16h00, it is routinely the time to feed and medicate the prisoners. At that time some staff members were still at the Waste Management Area, whilst some of the dismissed employees had accessed the prohibited control room center. The likes of Mr Sadike, whilst at the control room center, commanded some staff members who were intent of feeding the prisoners not to do so. It is common cause that in the past when the prisoners were not fed, they resorted to rioting. Lo and behold, when the feeding time went past, the prisoners started a riot. They burnt certain sections of the prison precinct and other dangerous criminals managed to escape given the mayhem that unfolded. Some of the dismissed employees indicated to the representatives of the employers that had they acceded to the 16% demand the riot would not have happened.

[8] One of the representatives of the employer was to catch a flight back to Johannesburg *via* the Polokwane airport. He was prevented from leaving and other staff members were prevented from leaving the prison precinct. These staff members were effectively held hostage until the following morning.

[9] Ultimately, the dismissed employees were hauled before a disciplinary hearing chaired by an independent practicing advocate of the Johannesburg Bar. The dismissed employees faced a catalogue of allegations, which will be spelled out later in this judgment. The disciplinary hearing hit several snags until the independent chairperson recused himself. The employers came to the realization that the dismissed employees will do everything in their power to avoid the conclusion of the disciplinary hearing and as a result took a decision to dismiss the dismissed employees.”²

[6] Pursuant to the confirmation of their dismissal by the Labour Court, the fourth and fifth respondents proceeded to lay criminal charges against the applicants at Louis Trichardt police station for, amongst others, aiding prisoners to escape and interference with the correctional or custodial officials in the performance of their duties.

[7] On 11 July 2019, the applicants, through their attorneys S.O. Ravele Attorneys, made representations to the Chief Prosecutor for the Makhado District. On 7 August 2029, the Regional Prosecutor forwarded the representations made by the applicants, his or her report (the regional

² South African Custodial Management (Pty) Ltd and Another v Union For Police, Security and Corrections Organisation (UPSCO) obo Makatu and Others (JS383/18) [2020] ZALCJHB 273; [2024] 2 BLLR 200 (LC) (20 October 2020)

prosecutor's) as well as other relevant documents to the office of the DDPP for his consideration.

- [8] Upon consideration of the representation made to him by the applicants the DDPP addressed a letter dated 9 March 2020 to S.O. Ravele Attorneys informing applicants that he has decided to decline to prosecute them. The DDPP proceeded to close the file.
- [9] On 13 May 2020, the applicants served the fourth and fifth respondents with summons commencing action for malicious prosecution. On 23 June 2020, the fourth and fifth respondents, through their attorneys Norton Rose Fulbright, addressed a letter to the DPP in which they requested the DPP to furnish them with the written representations made by the applicants. On 30 June 2020, the DPP addressed a letter to the Chief Prosecutor, Louis Trichardt, informing him that she has decided to prosecute the applicants.
- [10] Subsequently, on 2 July 2020, the DPP addressed a letter to S.O. Ravele in which she stated that she has decided to arraign the applicants in the regional court on three charges, namely, (a) contravention of section 113 read with sections 1 and 129 of Act 111 of 1998 — interference with correctional or custodial officials, (b) contravention of section 115 read

with sections 1 and 129 of Act 111 of 1998- aiding a prisoner to escape and (c) contravention of section 122 read with sections 1 and 129 of Act 111 of 1998 — unauthorised entry at prisons and communication or interference with prisoners to their attention. The DPP's decision led to the review application before this court.

[11] In this court, the first, second, and third respondents, who shall collectively be referred to in this judgment as the NPA respondents, raised several points of law in their answering affidavit. I am of the view that the said points of law are interlinked with the merits of the application. They are nonetheless not dispositive of the issues between the parties. In view of this fact, I have decided to deal with them simultaneously with the merits of the application.

[12] The NPA respondents contend that the applicants seem to be uncertain whether the decision of the DPP is reviewable in terms of the Promotion of Administrative Act³ (PAJA) or under common law legality review. There are paragraphs in the founding and replying affidavits where the applicants state that the provisions of that PAJA are not applicable. However, in other paragraphs, the applicants state that they are bringing this application on

³ 3 of 2000

both PAJA and common law legality review. Counsel for the applicants conceded during oral submissions that section 1 (ff) of PAJA excludes decisions of prosecutors, which includes the impugned decision of the DPP, from the application of that Act. In view of this concession, this point of law cannot be addressed any further than this.

[13] The NPA respondents objected to the applicants' averments that the public has interest in the application and that this application is launched on that basis. The NPA respondents places reliance on **Limpopo Legal Solutions v Vhembe District Municipality**⁴ in which the Constitutional Court held that:

"[12] In *Lawyers for Human Rights* this Court dealt with what needs to be shown in order to establish whether a person or an entity is acting in the public interest.⁵ In this regard, this Court quoted with approval a passage from O'Regan J's judgment in *Ferreira*⁶ where she said:

"This Court will be circumspect in affording applicants standing by way of section 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any

⁴ (CCT119/16) [2017] ZACC 30.

⁵ *Lawyers for Human Rights* [2004] ZACC 12 at para 16.

⁶ *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.”

[14] The NPA respondents argue that in terms of section 38(d) of the Constitution, anyone who acts in public interest, and who alleges that a right in the bill of rights has been infringed, may approach a competent court alleging that he or she is acting in public interest. The NPA respondents contend that in the present case, the applicants failed to comply with the procedure and requirements laid down by our courts in their interpretation of the provisions of section 38(d), including that in *Limpopo Legal Solution*, above.

[15] I agree with the applicants that the NPA respondents are confusing the class action proceedings with those that are brought under public interest. Despite that, the impugned decision is a decision that pertains solely to the prosecution of the applicants for the offences the prosecution alleges they have committed. The applicants’ contention that the public has an interest in the fairness of the DPP’s decision to prosecute them is far-fetched. The public interest, if it exists, would be in the prosecution of those who are alleged to have committed serious offences, such as the ones referred to

in this case. The applicants failed to show that they are genuinely acting in public interest.

[16] The applicants claim that the application raises constitutional issues. They have, for that reason, filed rule 16A of the Uniform Rules of Court notice. The alleged constitutional issues raised in rule 16A notice are:

- i. whether the DPP is permitted in terms of section 179(5)(d) of the Constitution to review the decision of the DDPP which presumably taken on his or her behalf;
- ii. If so permitted, whether the DPP was permitted to decide to continue with the prosecution of the applicants without affording the applicants an opportunity to make their representations;
- iii. Whether the decision of the DPP differentiates between the applicants, as accused persons, and the fourth and fifth respondents, as complainants, and whether such differentiation will amount to violation of the applicants' constitutional rights to equality before the law; and
- iv. Whether the decision of the first respondent was taken arbitrarily, irrationally and unreasonably.

[17] The Supreme Court of Appeal in **National Director of Public Prosecutions v Zuma**⁷ (Zuma) held that:

"[67] ...The presumption of equal treatment in statutory interpretation has always been with us and now has a special status by virtue of the Bill of Rights. The question is whether it is ousted by other considerations in the circumstances of this section of the Constitution. I am of the view that it is. The underlying purpose of the provision is not to protect the accused or the complainant: it is to define the procedure for the exercise of the power of control of the NDPP. It would be strange to find such an important right, which is not known in comparable jurisdictions or in our common law, in a chapter of the Constitution that deals basically with structures concerned with the administration of justice and not rights. The Bill of Rights deals in great detail with the rights of accused persons, and is silent about the right to be invited to make representations concerning prosecutorial decisions. The main problem though is that s179 on any interpretation 'discriminates' in the sense that the right to be invited does not extend to most prosecutorial reviews like those by a DPP or a prosecutor. These considerations trump in my view the presumption and Mr. Kemp's reliance on the equal protection clause of the Bill of Rights is, accordingly, misplaced."

[18] The fourth and fifth respondents contend that the applicants' reliance on the right to equality should be considered in conjunction with the way the applicants' representations were considered by the DDPP. They argue

⁷ [2009] 2 All SA 243 (SCA) at [67]

that they were not invited to make representations before the decision to decline prosecute the applicants was made. Instead, the DDPP made his decision based only on the representations made on behalf of the applicants. They further argue that in contrast to the DDPP's approach, the DPP's decision was taken after she considered the applicants' representations which were already part of the case docket when the matter came before her as well as those made by the fourth and fifth respondents.

- [19] The NPA respondents contend that, as in the PAJA issue, there are inconsistencies in the applicants' papers on this issue. They argue that the applicants have presented two conflicting versions in that they admit and deny, in the same papers, that their representations were considered before the decision to continue with the prosecution was made. The applicants' contention is without merit. Their representations were already with the prosecution before the matter could come to the DPP's attention. She stated in her affidavit that she had regard to those representations, and that the applicants are admitting this fact. Bearing in mind that this is an application where the applicants are seeking a final order, the

respondent's version has to be accepted as true. The applicants have not seriously disputed this allegation.⁸

[20] The applicants argue that the DPP violated the provisions of section 179 (5) (d) of the Constitution by usurping the powers of the NDPP. They contend that sub-section (5)(d) empowers the NDPP, as the highest authority within the prosecution authority, to review decisions of all other members of that institution. The NPA respondents hold a different view. They contend that the DPP derives her powers from section 20 of the National Prosecuting Authority Act⁹ (the NPA Act). More on this later in this judgment.

[21] In addition to the argument that the DPP acted ultra vires, the applicants contend that the DPP acted irrationally, arbitrarily, and unreasonably. This argument is based on similar grounds as in the alleged violation of section 9 of the Constitution (equality clause). The applicants contend that the first respondent's decision was arbitrary in that the DPP considered the representations made by the fifth and sixth respondents only. I have already rejected this argument. The applicants admit that the DPP considered both representations. It cannot be said that the DPP acted

⁸ Plascon-Evans rule

⁹ Act 32 of 1998

arbitrarily when she considered the views on both sides. Furthermore, based on the summary of the facts by the Labour Court which were accepted by the Constitutional Court, one may safely find that the DPP's decision was not irrational. These facts, at face value, constitute a *prima facie* case upon which the applicants may be prosecuted.

[22] The applicants contend that the facts before this court raise constitutional issues such as the right to be treated equally before the court. However, it follows from the preceding paragraphs that the applicants' contention is not supported by the facts. I am of the view that the issue here revolves solely on ascertaining the proper interpretation of section 179(5)(d) of the Constitution when read in conjunction with relevant sections of the NPA Act.

[23] In **S v Boesak**¹⁰ it was stated that:

"If regard is had to the provisions of s 172(1)(a) and s 167(4)(a) of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State. Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under s 39(2), is the question whether the

¹⁰ 2001 (1) 912 (CC); 2001 (1) BCLR 36 (CC) par 13

interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”

[24] It is clear from what has been said in *Boesak* that the mere mention of a constitutional issue, which is what the applicants did, without support for the said contention in fact does not satisfy this Court, nor does it empower this Court to, for the sake of countenancing a constitutional issue, skip over the inconsistencies in the facts that support the raising of the constitutional issue in the first place.

[25] Returning to the power of the DPP to review the decision made by the DDPP, the powers of the prosecuting authority to review decisions within that institution are governed by statutes. The starting point is the Constitution. Section 179 (5) (a) to (d) of the Constitution provides that:

“(5) The National Director of Public Prosecutions –

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting

the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.”

[26] The applicants contend that the power to review decisions within the prosecuting authority lies only with the NDPP as envisaged in section 179(5)(d). They argue, as stated above, that the DPP acted *ultra vires* when she reviewed the DDPP’s decision. The NPA respondents contend that the DPP derives the power to review the decision made by the DDPP NPA Act, being an Act of parliament enacted in terms of section 179(4) of the Constitution, and from the Prosecution Policy established under that NPA Act.

[27] Section 22 and 24 of the NPA Act lays down the powers, duties, and functions of the NDPP, the DPP, and the DDPP as follows:

“22. Powers, duties and functions of National Director

(1) The National Director, as the head of the prosecuting authority, shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, this Act or any other law.

(2) In accordance with section 179 of the Constitution, the National Director- (a) must determine prosecution policy and issue policy directives as contemplated in section 21;

(b) may intervene in any prosecution process when policy directives are not complied with; and

(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.

24 Powers, duties and functions of Directors and Deputy Directors

(1) Subject to the provisions of section 179 and any other relevant section of the Constitution, this Act or any other law, a Director referred to in section 13 (1) (a) has, in respect of the area for which he or she has been appointed, the power to

(a) institute and conduct criminal proceedings and to carry out functions incidental thereto as contemplated in section 20 (3);

- (b) supervise, direct and co-ordinate the work and activities of all Deputy Directors and prosecutors in the Office of which he or she is the head;
- (c) supervise, direct and co-ordinate specific investigations; and “
- (d) carry out all duties and perform all functions, and exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of this Act.

...

- (9) (a) Subject to section 20 (4) and the control and directions of a Director, a Deputy Director at the Office of a Director referred to in section 13 (1), has all the powers, duties and functions of a Director.
- (b) A power, duty or function which is exercised, carried out, or performed by a Deputy Director is construed, for the purposes of this Act, to have been exercised, carried out or performed by the Director concerned.”

[28] In accordance with section 179 of the Constitution read with sections 2 and 4 of the NPA Act, the NDPP issued a policy that guides DPPs and all other prosecutors in the country, in the performance of their duties and functions. Paragraph 4B of the policy (revised in June 2013) emphasises the importance of the community’s need to rely on the decisions made by members of the NPA. It states that under normal circumstances, if an accused person is informed that there will not be a prosecution or that charges have been withdrawn, that should be the end of the matter.

[29] The prosecution policy, however, recognizes that special circumstances that call for the reinstatement of the case after its withdrawal may arise. Examples given in the policy include: (i) where the initial decision was clearly wrong and should not be allowed to stand, (ii) an instance where a case has not been proceeded with in order to allow the police to gather and collate further evidence, in which case the prosecutor should normally have informed the accused person that the prosecution might well start again; and (iii) a situation where a prosecution has not been proceeded with due to lack of evidence, but where sufficient incriminating evidence has since come to light.

[30] The prosecution policy requires the prosecutor to obtain the consent of the DPP before he or she can stop the prosecution that has already commenced. However, it is notable that the policy is silent about the procedure that is to be followed by prosecutors when a decision to withdraw a case is to be reviewed. However, the NPA Act and the Constitution make it clear that that decision must be made by the NDPP.

[31] The other reason proffered by the applicants why the DPP is not empowered to review the decision of the DDPP is that in terms of section 24(9)(b) of the NPA Act, a power, duty or function which is exercised,

carried out or performed by the DDPP is construed, for the purposes of the NPA Act to have been exercised, carried out or performed by the DPP concerned. They proceeded to argue that the DPP has no authority to review the decision of the DDPP in this case in that this will amount to a review of her own decision.

[32] The applicants' contention that the DPP acted outside the powers conferred on her in terms of the NPA Act, has merit. Section 24 of the NPA Act excludes the power to review decisions made by prosecutors from the purview of the DPP. The NPA respondents argue that this Court is bound by its earlier decision where Gededger AJ in **Maremba and Others v National Director of Public Prosecutions and Others**¹¹ (Maremba) found that the DPP does have the power to review the decision of the DDPP.

[33] In **Bloemfontein Town Council v Richter**¹² the Court said the following:

“The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding that is there has been something in the nature of a palpable mistake a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors - such preference, if allowed, would produce endless uncertainty and confusion. The maxim “*stare decisis*” should, therefore, be more rigidly applied in this, the highest Court in the land, than in all others.”

¹¹ (2031/2023) [2024] ZALMPHC15 (8 February 2024).

¹² 1938 AD 195 at 232

[34] Section 2 of the Constitution of the Republic of South Africa, 1996 provides that the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. The decision of the DPP is inconsistent with the provisions of section 179(5)(d). It is therefore invalid. It is on this basis that I find that Maremba was clearly wrongly decided. I further find that I am justified from deviating from this earlier decision even though it emanates from this Division.

[35] The NPA respondents contend that this Court should not entertain the matter and should rather refer it to the NDPP for her consideration. This argument, in essence, is asking this Court not to usurp the functions of the NDPP. The applicants, on the other hand, contend that referring the matter back to the NDPP in this case will be a futile exercise. They argue that the fact that the NDPP is opposing the application is sufficient proof that she is aligning herself with the decision of the DPP. The applicants argue that an impartial NDPP would not have opposed the application. They further submit that the NDPP is conflicted.

[36] The criticism leveled against the NDPP's decision to oppose the application is unfair. She had the right to do so since she was drawn into the case by the applicants. It is indeed so that she is not distancing herself from the views of the DPP. For this reason, I find that referring the case to her office will constitute a delay in bringing the criminal case against the applicants to finality. The fourth and fifth respondents have interest in the case and are eager to know their fate therein. It would be prudent, in my view, to allow the criminal case against the applicant to run to its conclusion without further ado.

[37] In **Luphondo v The State**¹³ the Supreme Court of Appeal said the following:

"[96] The Constitutional Court drew an important distinction between two categories of State conduct when considering applications to halt proceedings. The first category concerns cases in which the criminal prosecution is preceded and tainted by illegal and egregious State conduct. The second concerns cases where unlawfulness or irregularity arises from a bona fide error in the process. Criminal proceedings will be halted only in the former category because it would amount to 'an affront to the public conscience' or 'would be contrary to the public interest in the

¹³ (123/2024) [2026] ZASCA 24 (10 March 2026) at [39]

integrity of the criminal justice system' for a criminal trial to proceed in such circumstances. The Court emphasised the need to strike an appropriate balance between upholding the rule of law and combating impunity.

[97] In the present matter, the lack of written authorisation specifically for the applicant's prosecutions had nothing to do with illegality or any objectionable conduct by the State. From his testimony, Mr Mzinyathi bona fide, but erroneously, believed that the section 75 letter sufficed to comply with Part 8 of the Prosecution Directives. This conduct falls into the second category and, therefore, does not constitute a ground for halting the applicant's criminal proceedings.

[98] That there was no compliance with the strictures of the Prosecution Directives in the sense that there was no written authorisation for the prosecution of the applicant, is not the end of the enquiry. The question is whether it was fatal that it had not been complied with. In *Maharaj v Rampersad*,...

[38] In this case, neither the DPP had the power to review the decision of the DDPP nor did the latter have the power to review that of the regional court prosecutor. The question is therefore whether the applicants should not be prosecuted on that basis alone. In line with *Luphondo*, above, I am of the view that this should not be the case. In any event, the decision to prosecute is not a foregone conclusion that the applicants are guilty of the

offences they are charged with. Their right to be presumed innocent until proven guilty is constitutionally entrenched. The State still bore the duty to prove their guilt beyond reasonable doubt.

[39] In conclusion, I find that the review and the setting aside of the impugned decision should be dismissed and the trial of the applicants should commence. Based on the merits of this case, which as already stated, are intertwined with the points of law raised, I am of the view that there is no need for this Court to pronounce on the points of law raised by the NPA respondents.

[40] On the issue of costs, the applicants contend that the principle laid down in **Biowatch Trust v Registrar Genetic Resources and Others**¹⁴ applies in this matter in that they have raised constitutional issues. The applicants are correct on the point that the DPP has no power to review the decision of her deputy. However, it was not necessary for them to approach this Court for the setting aside of the impugned decision. They should have approached the NDPP as the authority that has the power to review the impugned decision. It appears clearly in their affidavit that they were fully

¹⁴ (CCT 80/08) [2009] ZACC at 14

aware of the procedure available to them even before they approached this Court.

[41] In **Limpopo Legal Solutions and Another v Eskom Holdings SOC Limited**¹⁵ the Constitutional Court held that Biowatch finds no application in instances where litigation is manifestly inappropriate, vexatious and frivolous. I consider this application to be falling within that category of cases. I find that the applicants' reliance on Biowatch is misplaced.

[42] The SCA in *Luphondo* restated the general principle applicable on costs by stating the following:

"The general approach in matters of this nature is that costs do not necessarily follow the result. The rationale was explained in *Sanderson*:

'[104] Ordinarily the dismissal of a claim such as this in the High Court should not carry an adverse costs order. It is not a suit between private individuals; it relates directly to criminal proceedings, which are instituted by the State and in which cost orders are not competent; and the cause of action is that the State allegedly breached an accused's constitutional right to a fair trial...'.¹⁶

¹⁵ [2017] ZACC at 34.

¹⁶ At [104]

[43] The above general principle is applicable to NPA respondents. The appropriate court order in this case will therefore be that each party to pay own costs. However, the position is different regarding the fourth and fifth respondents. They are private institutions whose interests are important to this case. They were drawn into the case by the applicants who were fully aware that it was not necessary to approach this Court well knowing that the NDPP is the functionary responsible for the review of the impugned decision. They were put out of pocket by the conduct of the applicants. What is concerning is that according to the fourth and fifth respondents, the applicants still owe them costs granted by the Labour court and the Constitutional Court. They are entitled to costs of this litigation.

[44] The NPA respondents filed an application condonation for the late filing of the answering affidavits. The said application is not opposed and is granted as prayed for.

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

- i. The NPA respondents' application for condonation for the late filing of the answering affidavit is granted;
- ii. The application for the review and for the setting aside of the DPP's decision is dismissed.

- iii. The decision to prosecute the applicants on the preferred charges stands.
- iv. The applicants are ordered to pay the fourth and fifth respondents' costs jointly and severally, the one paying the other absolved.



MV SEMENYA

DEPUTY JUDGE PRESIDENT

LIMPOPO DIVISION

APPEARANCES:

For the applicants: S.O. Ravele
S.O. Ravele Attorneys

For the 1st, 2nd and 3rd Respondents: Adv E Tsatsi with Ntsako Baloyi

Instructed by: State Attorney, Thohoyandou

For 4th and 5th Respondents: Adv Y Pillay

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