REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

APPEAL CASE NO: HCAA08/2024
COURT A QUO CASE NO. 6404/2024

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED.

.....
.....

DATE: **10 FEBRUARY 2025**

SIGNATURE: [redacted]

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS — 1ST APPELLANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — 2ND APPELLANT

ADVOCATE SHAMILA BATHOI

AND

NETSHIDZIVHE TSHILILO GODFREY — 1ST RESPONDENT

MASIKHWA NNDANDULENI — 2ND RESPONDENT

MINISTER OF POLICE 3RD RESPONDENT

ACTING HEAD OF DIRECTORATE FOR PRIORITY

CRIME INVESTIGATIONS (DPCI)

CRIME INVESTIGATIONS (DPCI) GENERAL LIEUTENANT 4TH RESPONDENT

Heard : 11 October 2024
Delivered : 10 February 2025 by circulation to the parties' legal representatives
Coram : Pillay AJ, Mashamba AJ et Nkoana AJ

JUDGMENT

MASHAMBA AJ

[1] The matter that serves before us is an appeal being sought by the first and second appellants (the appellants) against the decision of Mdhluli A.J in granting the review application brought by the first and second respondents (the respondents) in the High Court Polokwane, on 2 February 2023[1]. The third and fourth respondents although cited did not participate in both proceedings. The Appellant's leave to appeal was granted by the Supreme Court of Appeal ("the SCA") on the 20 March 2024.

[2] The following orders were granted by the court *a quo* namely;

2.1 the decision taken by the first appellant on the 04th day of May 2018 and the 07th August 2018 to authorize entrapment in terms of section 252A of the

[1] *The date of Judgment in respect of the Review Application.*

Procedure Act 51 of 1997 under ref no: 10/3/5/3 – (252A) 17/18 is hereby reviewed and set aside.

2.2 The appellants' decision to grant additional agents dated the 19th June 2018 and 05th December 2018 under ref no:10/3/5/3-(250A) 17/18 is hereby reviewed and set aside. The first and second appellants' decision to grant additional handler dated the 30th August 2018 under ref no: 10/3/5/3 – (252A) 17/18 is hereby reviewed and set aside.

2.3 The appellants' decision to grant extensions of additional agents dated the 19th June 2018 and 05th December 2018 under ref no: 10/3/5/3 – (252A) is hereby reviewed and set aside respectively. The first and second appellants' decision to grant extension for undercover operation/entrapment d ated the 23rd October 2018 and 20th February 2019 under ref no: 10/3/5/3 – (252A) 17/18 is hereby reviewed and set aside respectively.

2.4 The appellants' decision to prosecute the respondents based on evidence obtained through entrapment under ref no:10/3/5/3 – (252A) 17/18 is hereby reviewed and set aside.

[3] The appellants' raised the following grounds of appeal;

3.1 That the court a *quo* erred in upholding the review application sought by the respondents.

3.2 That the only requirements of section 252A (1) of the Criminal Procedure Act, are that the purpose of the use of a trap or engagement in an undercover

operation should be to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence;

3.3 The respondents neither averred nor proved that the required purpose was absent in respect of this matter.

3.4 That any transgression or non-compliance with the provisions of section 252A of the Act affected the admissibility of the evidence obtained through the trap or engagement in an undercover operation and not the validity of the authorisation of the trap or engagement in an undercover operation.

3.5 That the decision to prosecute the respondents could not be reviewed and set aside because such was not an administrative action that could be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000.

[4] An application was sought by the third and fourth respondents under ref no: 10/3/5/3-(252A) 17/18 for authorisation in terms of section 252A of the Criminal Procedure Act, as amended[2] (hereinafter referred as the Act). The appellants granted and authorised the investigation in terms of section 252A of the Act in respect of allegations of corrupt activities involving officials of the department of transport. Flowing from the aforesaid investigation, the first and second respondents were arrested resulting in them instituting the application for review and the consequent appeal before this court.

[2] 51 of 1977

[5] In this court the appellants submitted that the entrapment application in terms of section 252A of the CPA was not reviewable in terms of PAJA, for the simple reason that section 1(ff) of PAJA excluded same.[3]

[6] The appellants further submitted that non-compliance or transgression with the provisions of section 252A of the Act, would only affect the admissibility of the evidence obtained through such trap or engagement in an undercover operation.[4] The appellants argued that even if there was non-compliance with section 252A of the Act, such would not warrant the authorisation of the trap or engagement in an undercover operation unlawful and or reviewable in terms of PAJA.

[7] The appellants indicated that the decision to prosecute the respondents was not capable of being reviewed and set aside because such was not an administrative action that was capable of being reviewed and set aside in terms of PAJA.

[8] The appellants submitted that section 252A of the Act, provided that the purpose of the trap was to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence and that the trap conduct must not go beyond providing an opportunity to commit an offence. The appellants argued that the third and fourth respondents complied with the application in terms of section 252A of the Act and that the appellants exercised their discretion and granted the application in terms of section 252A. The appellants argued that the court *a quo* erred in granting the orders in respect of the review application in terms of PAJA as it was not applicable and as such sought the granting of the appeal.

---

[3] In terms of section 1(ff).."a decision to institute or continue a prosecution" is not reviewable in terms of PAJA
[4] See S v Odugo 2001(1) SACR 560 (W) at 565

[9] The respondents submitted that the appellants had a constitutional mandate to investigate and prosecute criminal offences, and in doing so, they were exercising public power, hence PAJA found application in respect of these proceedings.

[10] The respondents further submitted that paragraph 12 of the application form provided statutory requirements for the authorisation in terms of section 252A of the Act. The respondents indicated that as provided in paragraph 12 of the application form, the third and fourth respondents in their application in terms of section 252A, were required to attach the following documents; profile of all targets listed in paragraph 6, a summary of all investigation to date of application, a copy of all section 252A authorisation pertaining to the investigation at hand, and a complete list of all case dockets investigated against other targets and the outcomes thereof[5].

[11] The respondents indicated that the appellants granted authority for the S252A entrapment as sought by the third and fourth respondents despite the non-compliance with the statutory requirements as provided in paragraph 12 of the abovementioned application form, therefore, the authorisation of entrapment was unlawful, irrational and bad in law. The respondents sought for the appeal to be dismissed.

[12] There are three paramount legal issues in this case, the first is whether the requirements as stipulated in section 252A of the Act were met and if not, whether there were any repercussions. The second legal question is whether the decision taken in terms of the Act was reviewable in terms of the Promotion of Administration Justice Act[6] (hereinafter referred as PAJA). The third was whether the order made by the court a quo in terms of PAJA, to review and set aside the decision by the appellants to

[5] Volume 1, page 35
[6] 3 of 2000

prosecute the respondents based on evidence obtained through entrapment under ref no:10/3/5/3 – (252A) 17/18 was legally competent.

[13] Section 252A (1) of the Act, states that; -

> *"any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3)".*

[14] In terms of section 252A(3)(a) of the Act; -

> *"If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice".*

[15] The definition of an administrative action in terms of section 1 of PAJA, means any decision taken, or any failure to take a decision, by –

(a) An organ of state, when-

(i) Exercising a power in terms of the Constitution or a provincial constitution; or

(ii) Exercising a public power or performing a public function in terms of any legislation;

or

(b) A natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include….

(ff) a decision to institute or continue a prosecution *(emphasis added)*

[16] The first and second respondents review application was unambiguously grounded on PAJA. The court *a quo* in its judgment considered the review proceedings in terms of PAJA principles and made the orders as highlighted above which was a misdirection.

[17] The court *a quo* erred when deciding that the third and fourth respondents should have attached all documents required in terms of paragraph 12 of the application form in order to succeed with the application in terms of section 252A of the Act[7]. The court *a quo* ignored the fact that the requirements stipulated in paragraph 12 of the application form were not statutory requirements in terms of section 252A of the Act.

[18] Moreover, the repercussion of non-compliance with the statutory requirements would only affect the admissibility of the evidence. Section 252A (3) of the Act provides a safeguard by indicating that, the criminal trial court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

[7] Volume 1 bundle page 35

[19] As section 252A has safety nets ingrained within it, it is the criminal trial court which must enquire and make any determination to the challenges to any aspect of section 252A during trial.

[20] It was not within the powers of the court *a quo* to decide on any issue that is still to be heard by the criminal trial court. No court can usurp the powers of the criminal trial court, as doing so would be tantamount to exercising powers it does not have.

[21] The court *a quo* should have declined to make any findings related to the merits and demerits of the decisions taken by the appellants in terms of section 252A of the CPA. Any challenge to decisions taken and evidence collected in terms of the entrapment must be determined at the trial stage by the trial court, which will rule accordingly. In other words, the court a *quo* ought to have dismissed the application.

[22] Based on the reasons advanced, we find that the court *a quo* committed a misdirection by arrogating to itself powers that are vested in the criminal trial court. On that basis the appeal should succeed.

[23] This court had regard to Section 1 of PAJA which stipulates that a decision to institute or continue a prosecution is not an administrative action. The abovementioned order by the court a quo restricting the prosecution of the respondents under ref no: 10/3/5/3-(252A) 17/18 was a misdirection as the provisions of PAJA is specifically excluded as an administrative decision.

[24] This court considered the matter between ***National Director of Public Prosecution v Zuma***[8], where Brand JA concluded that although decisions to prosecute are in the

[8] 2009 (2) SA 277 (SCA) para 27-29

same way as decisions not to prosecute, subject to judicial review, judicial review does not extend to the wider basis of PAJA, but is limited to grounds of legality and rationality.

[25] The same principles were applied in the case of ***Polovin v National Director of Public Prosecutions and Others***. 1230/22[2024] ZASCA (17 October 2024), specifically, in para 17 and 18, the SCA made reference to the case of ***National Director of Public Prosecutions and Others v Freedom Under Law***[9], when the court reasoned and concluded as follows:

'(a) . . . . . .

(d) Against this background I agree with the obiter dictum by Navsa JA in DA and Others v Acting NDPP that decisions to prosecute and not to prosecute are of the same genus, and that, although on a purely textual interpretation the exclusion in s 1(b)(ff) of PAJA is limited to the former, it must be understood to incorporate the latter as well. (e) Although decisions not to prosecute are – in the same way as decisions to prosecute subject to judicial review, it does not extend in a review on the wider basis of PAJA, but is limited to grounds of legality and rationality.'

[26] The court *a quo* in its judgment found that the appellants' decision to grant the application for entrapment was in contravention of section 33 and 35(5) of the Constitution of the Republic of South Africa[10] (the Constitution). The entrapment was done in terms of section 252A of the Act, therefore, it was incorrect to state that such an application was repugnant to the provision of section 33 and 35(5) of the

[9] National Director of Public Prosecutions and Others v Freedom Under Law [2014] ZASCA 58; 2014
[10] The constitution of the Republic of South Africa, Act 108 of 1996, as amended.

Constitution. The court a *quo* erred in granting the application relying on the provision of the Constitution as same was not applicable.

[27] Based on the reasons advanced, this court finds that the court *a quo* committed a misdirection by arrogating to itself powers that are vested in the criminal trial court when considering the authorisation under ref no: 10/3/5/3-(252A) 17/18. On that point the appeal should succeed. The court a *quo* by extending the ambit of authority in ordering the prosecution to not proceed with the criminal trial against the respondents was usurping the authority vested in the state to litigate, this conduct is not supported by legislation and therefore, must be set aside as an irregular act.

[28] It is for the abovementioned reasons that the appellants have made out a case for the granting of the appeal.

[29] When attending to the issue of costs, both the appellants and respondents argued for same to be granted. This court found no reason to deviate from the general rule that the cost follows the successful party. The appellants succeeded in this appeal and therefore should be awarded cost as prayed.

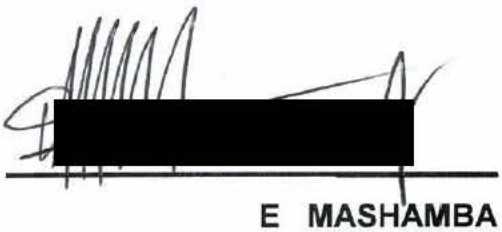
[30] In the circumstances I make the following order;

30.1 The appeal is upheld with cost, including cost for two counsels.

30.2 The order of the court a *quo* is set aside and replaced by the following order;

30.2.1 The application is dismissed.

30.2.2 The applicants are ordered to tender the cost, jointly and severally, the one paying the other to be absolved.

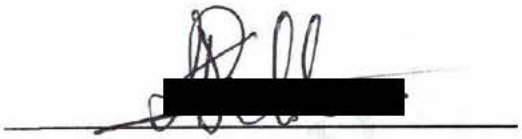


E MASHAMBA

ACTING JUDGE OF THE HIGH COURT,

POLOKWANE; LIMPOPO DIVISION

I agree and it is so ordered



PILLAY, AJ

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

I agree

NKOANA, AJ

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES

For the appellant: Viwe Notshe SC and Mashudu Isaac Tshisikule

Instructing attorney: Office of The State Attorneys

For the First and Second Respondents: T Maluleke

Instructed by: Mvundlela & Associates Attorneys

Heard on: 11 October 2024

Judgement delivered on: **10 February 2025**