REPORTABLE

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

CASE NO: 4665/2010

In the matter between:

JOHAN WESSEL BOOYSEN	Applicant
and	
THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE PUBLIC PROSECUTOR	Second Respondent
COLONEL PHARASA DANIEL NCUBE	Third Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Fourth Respondent
THE DEPUTY NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Fifth Respondent
THE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Sixth Respondent

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JUDGMENT

GORVEN J

[1] On 18 August 2012 the first respondent issued two written authorisations to charge the applicant (Mr Booysen) with contraventions of s 2(1)(e) and (f) respectively of the Prevention of Organised Crime Act (POCA).[1] In terms of s 2(4) of POCA, a person may only be charged with committing any of the offences created by s 2(1) if a prosecution is authorised in writing by the National Director of Public Prosecutions. Pursuant to the authorisations, Mr Booysen, a Major General in the police at the time, was arrested on 22 August 2012 and has been served with an indictment which confronts him with seven counts, the first two of which relate to the alleged contraventions of POCA. Although the first respondent was, at the time, the Acting National Director of Public Prosecutions, she fulfilled the functions of the National Director and I will refer to her in this judgment as the NDPP.

[2] Mr Booysen seeks to review and set aside the decision to issue the authorisations in question (the first impugned decision) and the decision to prosecute on the counts confronting him (the second impugned decision). Mr Booysen states pertinently that he does not rely on the provisions of the Promotion of Administrative Justice Act (PAJA)[2] but does not enter the debate as to whether the first impugned decision might be excluded from the operation of PAJA.[3] He bases the application directly on the Constitution of the Republic of South Africa, 1996 (the Constitution) and, in particular, relies on the principle of legality. Section 172(1) of the Constitution reads as follows:

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[1] Act 121 of 1998.
[2] Act 3 of 2000.
[3] Section 1(b)(ff) of PAJA provides that administrative action does not include 'a decision to institute or continue a prosecution'.

'(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable....'

The NDPP and the second respondent have opposed the application. The remaining respondents have not entered the lists.

[3] The relief sought by Mr Booysen is in the following terms:

'(a) Declaring the decisions taken by the first respondent purportedly in terms of the provisions of s 2(4), read with s 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998 ("POCA"), on 17 August 2012 to authorise the applicant's prosecution on charges of contravening sections 2(1)(e) and 2(1)(f) of POCA inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid;

(b) Reviewing and setting aside the aforesaid decisions taken by the first respondent on 17 August 2012;

(c) Declaring the decision(s) taken by the first respondent, alternatively second respondent, alternatively first and second respondents, to prosecute the applicant on the charges contained in counts 1and 2 and 8 to 12 of the indictment served upon the applicant on 29 October 2012 ("the indictment") inconsistent with the Constitution of the Republic of South Africa, 1996 and invalid;

(d) Setting aside the first respondent's, alternatively second respondent's, alternatively first and second respondents', decision(s) to prosecute the applicant on the charges contained in counts 1 and 2 and 8 to 12 of the indictment;

(e) Interdicting the first respondent and her successors from authorising the prosecution of the applicant on any charge referred to in s 2(1) of POCA unless and until facts under oath implicating the applicant in the commission of such offences and justifying such prosecution are placed before the first respondent or her successors by an official or officials whose duty it is to place such facts before the first respondent.

(f) Ordering the first respondent and any other respondent who opposes this application to pay the applicant's costs of suit, which costs are to include the costs consequent upon the employment of two counsel.'

Prayers (a) & (c) are sought pursuant to s 172(1)(a) of the Constitution and prayers (b) and (d) pursuant to s 172(1)(b). Mr Booysen submitted in argument that the interdict sought in prayer (e) should be granted within the discretion afforded by the provisions of s 172(1)(b). I will return to this submission later.

[4] Mr Booysen's heads of argument submit, in summary, that:

(a) The impugned decisions are arbitrary and irrational and that such irrationality offends the principle of legality and the rule of law; and

(b) His right to dignity is impaired merely by having to face a prosecution where there are no facts to support a rational decision to authorise his prosecution and to indict him in the first place.

It is clear that a 'rationality enquiry is not grounded or based on the infringement of fundamental rights under the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen ... are rationally connected to the ends sought to be achieved.'[4] Mr Booysen therefore need not show an impairment of his rights, such as the right to dignity, in order to succeed on the first ground. The infringement of his right to dignity was not pressed in argument and I do not intend to say anything more about it.

[5] The two counts under POCA allege that Mr Booysen participated in the conduct of an enterprise through a pattern of racketeering activity[5] and

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[4] *Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* [2014] ZACC 2 (20 February 2014) para 7.

[5] Section 2(1)(e).

managed the operations of such an enterprise.[6] This is alleged to have been done whilst he was in charge of a specialised unit based at the Cato Manor Police Station. The other five counts allege criminal activity conducted with certain members of the South African Police Service who were under his command comprising murder, housebreaking with intent to commit murder, assault, defeating or obstructing the course of justice and unlawful possession of firearms and ammunition. Twenty-nine others were arrested although two of these have since died. There are a total of 116 counts which confront one or more of those presently accused. The trial has not yet commenced.

[6] A point *in limine* raised by the respondents is that, since the impugned decisions were taken in Pretoria and the respondents reside there, this court does not have jurisdiction to entertain the application. Mr Booysen submits that because he has been charged in this division, this court does have jurisdiction. During argument the respondents conceded that this division has jurisdiction, on the basis set out in *Estate Agents Board v Lek*.[7] In my view the concession was appropriate. It was submitted, however, that it is the trial court which should determine an application such as this and that the application is accordingly premature and has been brought in the wrong forum.

[7] The Constitutional Court has expressed itself against pre-trial applications. In an application alleging that evidence had been obtained in a manner which violated a right in the Bill of Rights of the Constitution, Langa CJ said the following:

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[6] Section 2(1)(f).

[7] 1979 (3) SA 1048 (A).

'I nevertheless do agree with the prosecution that this Court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5). Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to the investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The courts' doors should never be completely closed to litigants.... But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and considered together the pertinent interests of all concerned. If that approach is generally followed the State would be sufficiently constrained from acting unlawfully by the application of s 35(5) and by the possibility of civil and criminal liability.'[8]

[8] The respondents submit that the trial court would be best suited to deal with the authorisations since the issue whether the NDPP had information before her justifying rational decisions to authorise Mr Booysen's prosecution on charges of racketeering 'can only be adjudicated upon' in a trial context. In *S v Chao & others*[9] it was held that a challenge to such a decision making process should be brought by way of a substantive application. In *S v de Vries & others*[10] an attack was launched on authorisations under s 2(4) of POCA during the trial, after the accused had pleaded and evidence had been led. The court held that a special entry would have to be made and that the time to launch any attack on the authorisations was prior to the accused pleading. The court could then assess the matter without, in effect, being asked to review its own proceedings.

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[8] *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma & another v* National *Director of Public Prosecutions & others* 2009 (1) SA 1 (CC) para 65.
[9] 2009 (1) SACR 479 (C) para 57.
[10] 2008 (4) SA 441 (C).

[9] I am in respectful agreement that a proliferation of applications brought prior to a criminal trial must be discouraged. If an accused person has properly been brought before a trial court, that court should generally deal with applications which bear on the outcome of the trial such as admissibility of evidence, the validity of search warrants and the like. However, this matter is clearly distinguishable from a situation where the admissibility of evidence is challenged, as took place in *Thint*. I am in respectful agreement with the reasoning in *Chao* and *De Vries* which addresses the nature of a challenge such as that dealt with in this matter. The issue raised in this matter can and should be dealt with prior to the commencement of the trial since the question is whether Mr Booysen can be charged with the two POCA counts. For this to be competent, the validity of the issuing of the authorisations must be determined. If they are not valid, they may be reviewed and set aside, in which case, an application must make use of Rule 53 as has been done. In addition, because this application relates to only one of a number of accused persons, it can most conveniently be dealt with in a separate application which does not affect the conduct of the trial. I am of the view that in this narrow instance, this court is the appropriate forum and that the appropriate procedure has been adopted. The point *in limine* must therefore fail.

[10] I should mention that there is only evidence as to the date on which, and the person by whom, the first impugned decision was made. None of the parties dealt in evidence with these issues in relation to the second impugned decision. It appears to be accepted, however, that the fate of the second impugned decision must follow that of the first one. I shall therefore deal only with the first impugned decision in analysing the facts. The factual matrix on which the application must be determined will be analysed in due

course. It will be useful to first set out the legal framework governing an application of this nature.

[11] The position of National Director of Public Prosecutions is established by s 179 of the Constitution in the following terms:

'(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive....

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.'

[12] The definition of 'administrative action' in PAJA specifically excludes a decision to prosecute or continue a prosecution. It is thus not reviewable under PAJA. Without this exclusion, such a decision would clearly amount to administrative action since the definition includes a decision by an organ of state when exercising a power in terms of the Constitution or exercising a public power or performing a public function in terms of any legislation.[11] The impugned decisions are also not policy matters but involve the implementation of legislation.[12]

[13] In *National Director of Public Prosecutions v Zuma*, Harms DP held that a decision to prosecute 'is not susceptible to review'.[13] Despite this unequivocal wording, it is clear that the dictum was limited to a review under PAJA because that was what Harms DP was dealing with in that paragraph

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[11] Section 1(a) of PAJA.

[12] This distinction was drawn in the pre-PAJA era in *President of the Republic of South Africa and others v South African Rugby Football Union & others* 2000(1) SA 1 (CC) para 143.

[13] 2009 (2) SA 277 (SCA) para 35.

and because he went on to hold that the principle of legality nevertheless applies to such a decision.[14] This is clearly correct. It has been said that the 'Constitution constructs and restrains the exercise of public power in our democracy'.[15] The relationship between the common-law grounds of review and the Constitution was considered in *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others*[16] on the basis that the control of public power is always a constitutional matter. In summing up, Chaskalson P said:

'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'[17]

After all, one of the foundational values of the Constitution is the supremacy of the Constitution and the rule of law.[18] These concepts seem to me to have similar, if not identical, content.

[14] The principle of legality is an aspect of the rule of law.[19] In *Fedsure* it was said that the principle of legality expresses the fundamental idea that 'the exercise of public power is only legitimate where lawful'.[20] It is clear that the NDPP exercised a public power in arriving at the impugned decisions. The impugned decisions are therefore subject to the scrutiny of the court based on

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[14] Ibid, para 36.
[15] Per O'Regan J in *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) para 85.
[16] 2000 (2) SA 674 (CC) paras 33-45. It is of interest to note that the common law was invoked to successfully review and set aside a decision to prosecute. See *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order & others* 1994 (1) SA 387 (C) at 394C-H where the court applied the grounds of review set out in *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642. These grounds of review were held to be 'consistent with the foundational principle of the rule of law enshrined in our Constitution' in *Pharmaceutical Manufacturers*, para 83. See also *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) para 30.
[17] Para 44. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 22.
[18] Section 1(c) of the Constitution.
[19] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 56.
[20] Loc cit.

the principle of legality. This begs the question as to the content of the principle of legality in the context of the impugned decisions. The detailed content of the principle of legality must be worked out from the Constitution as a whole. This is an ongoing, incremental process which has been addressed by the Constitutional Court in a series of cases involving non-administrative action. Sachs J, in a minority judgment in *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others*,[21] described the principle of legality as 'an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner'.[22]

[15] In turn, the principle of legality requires that the exercise of public power 'must be rationally related to the purpose for which the power was given.'[23] This is the rationality test. It has been held that rationality is a minimum requirement applicable to the exercise of all public power.[24] 'Decisions must be rationally related to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement'.[25] A rational connection means that 'objectively viewed, a link is required between the means adopted by the [person exercising the power] and the end sought to be achieved'.[26] The test is therefore twofold, 'Firstly, the [decision maker] must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the

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[21] 2006 (2) SA 311 (CC).
[22] Para 614. The last phrase echoes that used by O'Regan J in *Rail Commuters Action Group* para 85 as to the approach to be adopted by courts in determining the scope of public power and the duties attached to it.
[23] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 75.
[24] *Pharmaceutical Manufacturers* para 90.
[25] Loc cit.
[26] Per Van der Westhuizen J in *Merafong Demarcation Forum & others v President of the Republic of South Africa & others* 2008 (5) SA 171 (CC) para 62.

power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.'[27]

[16] Professor Hoexter comments that the use of the principle of legality may well give rise to 'a complete parallel universe of administrative law' alongside PAJA.[28] A timely note of caution has been sounded in a recent article regarding the need for courts to respect the separation of powers and to be conscious of not intruding into the territory of either the executive or the legislature.[29] The learned author argues that the principle of legality, and in particular its requirement of rationality has brought about a 'subversion of the Promotion of Administrative Justice Act ... and its underlying scheme as laid down in s 33 of the Constitution through trending "parallelism"'.[30] In addition, she argues, 'the courts may be perceived to be expanding their supervisory review jurisdiction in a manner that amounts to an affront' to the doctrine of the separation of powers.[31] Whether the latter statement is correct or not, it is important to recognise that 'the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.'[32] In other words, the courts are themselves constrained to act within the bounds of the powers accorded to them by the Constitution.[33] I prefer to think of it as deference or respect directed, not at the legislature or executive, but at the Constitution and the rule of law. Along with the other

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[27] Per Moseneke DCJ in *Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC) para 81.
[28] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 124.
[29] Lauren Kohn *The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?* (2013) 130 *SALJ* 810.
[30] Op cit at 812.
[31] Loc cit.
[32] Per O'Regan J in *Bato Star* para 46.
[33] The constitutional 'job description' of courts has been said to be 'primarily twofold: it requires the courts to uphold zealously the tenets of our Bill of Rights, and it demands that every exercise of public power be subjected to constitutional control'. Per Kohn, op cit at 821 citing Kate O'Regan 'Helen Suzman Memorial Lecture. A forum for reason: Reflections on the role and work of the Constitutional Court.' (2012) 28 *SAJHR* 116 at 126.

tests developed in the jurisprudence of the Constitutional Court, it seems to me that this understanding provides a valuable touchstone for when courts are requested to exercise their judicial review function.

[17] As Professor Hoexter points out,[34] the Constitutional Court has applied the principle of legality in an increasing range of contexts. First, in *Fedsure*, where the municipality was held obliged to exercise its legislative function within the powers lawfully conferred on it.[35] Secondly, in *President of the Republic of South Africa v South African Rugby Football Union*,[36] where it held that 'the [holder of public power] must act in good faith and must not misconstrue [his or her] powers'.[37] Thirdly, in *Pharmaceutical Manufacturers*, where it held 'that the exercise of public power...should not be arbitrary' or irrational.[38] Fourthly, and most extensively, in *Albutt v Centre for the Study of Violence and Reconciliation & others*,[39] where it treated procedural fairness as a requirement of rationality.

[18] In the present matter, as I indicated earlier, Mr Booysen's contention is that the NDPP acted arbitrarily and irrationally and accordingly offended the principle of legality. It is accordingly the need for rationality, arising from the third example referred to in the preceding paragraph, on which Mr Booysen primarily relies.

[19] As regards the first impugned decision, the legislature introduced two formal requirements. First, the decision must be taken by the National Director of Public Prosecutions. For the purpose of s 2(4) of POCA this is

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[34] Op cit at 122-3.
[35] *Fedsure* paras 56 and 58.
[36] Note 12 supra.
[37] Para 148.
[38] *Pharmaceutical Manufacturers* paras 85 & 86.
[39] 2010 (3) SA 293 (CC).

defined to include a Director of Public Prosecutions and a Special Director of Public Prosecutions referred to in s 1 of the National Prosecuting Authority Act.[40] In that Act, a definition is given of the word 'Director' as being a Director of Public Prosecutions appointed under s 13(1). This section refers to the two named officials. It is clear that the National Director, a Director and Special Director are high-ranking officials within the National Prosecuting Authority. Accordingly, the purpose for which the power in s 2(4) of POCA was conferred is to ensure that the decision making process is limited to a few high ranking officials within the National Prosecuting Authority. It seeks to exclude other persons who would be entitled to make such a decision in respect of other offences. The object is clear. The decision should be made by a person of higher position, presumably due to their qualifications and experience.

[20] In the second place, it requires written authorisation as opposed to any other form of authorisation to prosecute. The purpose for this provision also seems clear. It is to facilitate an ability to prove that the requisite, empowered, person has in fact made the decision in question. The existence of writing is a jurisdictional fact required to be in place before a prosecution can proceed. It would be clear from the content of the writing that, first, a decision has been made and, secondly, the person with the requisite authority made the decision.[41] In the present matter the NDPP was the person who took the decision and the authorisations were issued in writing. This was not disputed or placed in issue by Mr Booysen.

[40] Act 32 of 1998.

[41] In *National Director of Public Prosecutions v Moodley & others* 2009 (2) SA 588 (SCA) para 12, the court held that as long as the requisite authorisations existed at the time of trial, this was sufficient. It left open the question as to the time that it can be said that the accused have been charged as that word is used in s 2(4) of POCA.

[21] The first impugned decision therefore qualifies under the *Fedsure* approach, namely that the person who made the decision was authorised to do so by the legislation in question and did so in the manner specified in the legislation. These criteria satisfy the first aspect of the twofold test referred to by Moseneke DCJ in *Masetla*.[42] The respondents argue that the principle of legality is therefore satisfied and that is an end of the matter. Mr Booysen goes further, however. He submits that, notwithstanding the compliance with the formalities of the legislation, the NDPP must, in addition, have adequately assessed 'the sufficiency and admissibility of evidence to provide reasonable prospects of a successful prosecution' as is required by policy directives issued pursuant to the provisions of s 21 of the National Prosecuting Authority Act.

[22] I do not intend to deal with the specific content of this submission of Mr Booysen. What is actually at issue is whether the second part of the twofold test, the rationality aspect, was satisfied. As we have seen in the legal framework explored earlier, the question is whether the decision of the NDPP, viewed objectively, was rational. This decision is not a polycentric one[43] or one involving the formulation or implementation of policy[44] so the rationality test is somewhat less variable.[45] In the context of the first impugned decision, my view is that the information on which the NDPP relied to arrive at her decision must be rationally connected to the decision taken.

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[42] See footnote 27 supra.

[43] Such as was the case in *Bato Star* where O'Regan J, in dealing with the meaning of reasonableness (not rationality) under s 6(2)(h) of PAJA, recognised that s 2 of PAJA only requires decision makers who have to consider a range of factors to strike a reasonable equilibrium in doing so (para 49).

[44] *Ronald Bobroff and Partners Inc* para 6.

[45] Yacoob J, in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another* 2007 (1) SA 343(CC) para 29 said, as regards variability of the test for rationality 'It must … be borne in mind that the requirement of legality may be more complex in relation to judicial decisions and executive action both of which undoubtedly represent the exercise of public power.'

[23] Mr Booysen submits that the first impugned decision lacked a rational basis since, at the time it was made, the material relied on by the NDPP could not, viewed objectively, support a decision to prosecute him for those offences. He submits that the material did not include any evidence at all of his having contravened the relevant provisions of POCA.

[24] The Notice of Motion in this matter is in the form provided for in Rule 53 and requests a copy of the record and reasons for the impugned decisions, indicating that Mr Booysen may thereafter supplement the founding papers. No record was put up or reasons given by the NDPP or the second respondent. As is evident from their affidavit, they were of the view that because PAJA excluded a decision to prosecute or to continue a prosecution from its operation, the impugned decisions were not reviewable at all. Two requests for any further documents leading to the impugned decision were made prior to the launch of the application. These requests were declined. The approach that the impugned decisions were not subject to judicial review was echoed in their heads of argument and only during argument did they concede that a review based on the principle of legality was competent.

[25] It is common cause that after the indictment was served on Mr Booysen, the NDPP was requested to make available all the documents on which the state intended to rely. In compliance with that request, 23 dockets were made available. These were the only documents furnished to him prior to the launch of this application. Of the 23 dockets, he is mentioned in only two. Of 290 statements in all of the dockets, only three statements even mention him. Two of these say he arrived on the scene of a shooting in a helicopter after the event and the third states that he was noticed on the scene of a shooting after it had taken place. In response to Mr Booysen's assertion that no statements in the dockets implicate him, the NDPP says that she

relied on four statements on oath, copies of which she says she annexed to her answering affidavit. I will return to this response below. What is clear, however, is that this in no way challenges the averment of Mr Booysen that none of the documents in the dockets implicates him in the offences in question.

[26] It is necessary to set out fairly fully what the NDPP says in her answering affidavit about what she considered in arriving at the first impugned decision. Below is what she says in response to the challenge of Mr Booysen that there was no material before her at the time she made the first impugned decision linking him to the offences with which he is now confronted:

'16. After due and careful consideration of the information under oath and the evidence as contained in the dockets (copies of which were made available to the Applicant), the Respondents were, and still are satisfied that there is *prima facie* evidence that an offence has been committed and Applicant is implicated in that:

16.1 From January 2007 to March 2010, the Applicant was a Provincial Commander in charge of KwaZulu-Natal Organised Crime. Subsequent thereto, and in 2010, he was appointed as the Provincial Head of the newly established Directorate for Priority Crime Investigations ("DPCI") in KwaZulu-Natal.

16.2 During 2006, the Serious Violent Crime ("SVC") Section based at Cato Manner was incorporated into the Durban Organised Crime Unit. The Durban Organised Crime Unit form part of the KwaZulu-Natal Provincial Organised Crime structure. The Applicant then conducted it as an enterprise as defined in the Prevention of Organised Crime Act 121 of 1998 ("POCA").

16.3 During 2010, the Organised Crime structures became part of DPCI and as indicated above, the Applicant was heading DPCI in KwaZulu-Natal.

16.4 During May 2008 to September 2011, members of the South African Police Service ("SAPS") under the Applicant's command killed members of the KwaMaphumulo Taxi Association who were in conflict with the Stanger

Taxi Association, as well as ordinary civilians and/or criminal gangs who were suspected of being involved in ATM bombings.

16.5 The information before me suggested that these members of the SAPS, would in most of the killings place a fire-arm next to the deceased person to create the impression that s/he was armed and had attacked the police by shooting at them or endangering their (police) lives.

16.6 The information under oath which was placed before me also indicated that the Applicant knew or ought to have known that his subordinates were killing suspects as aforesaid instead of arresting them.

16.7 The information further revealed that the unlawful activities of killing suspects and/or civilians were, in certain instances motivated by the Applicant's and members of his Unit's desire to enrich themselves by means of State monetary awards and/or certificates for excellent performance. In this regard, I annex a copy of an example of such a monetary award claim documented as "NJ1" in which *inter alia* the Applicant is recommended for such an award resulting from the deaths of suspects.

17. Particular reference is made in this regard to the statements made by Colonel Rajendran Sanjeevi Aiyer, Mr Aris Danikas, and Mr Ndlondlo from which it is apparent that the Applicant is well aware of the information that the Respondents have in their possession relating to the murder of at least 28 people and the monetary and non-monetary awards claimed by him (the Applicant) for the instrumental part that he played in these crimes. Additionally, Mr Danikas has revealed some of the information that he has provided to the Respondents and to the press and even posted video footage thereof on YouTube. I annex copies of the statements as "NJ2"; "NJ3", "NJ4" and "NJ5", respectively....

21. These are only some of the instances that are referred to in the above-mentioned statements, which were considered together with the other information in the docket before the impugned decisions were made. In this affidavit, I do not intend to detail all of the information that was placed before me prior to me making the decisions in issue. I submit with respect that the aforementioned information is *prima facie* proof that the Applicant was involved in racketeering activities.'

[27] From this it can be seen that the NDPP says that she relied on 'information under oath and the evidence as contained in the dockets' and that the instances relied on by her are 'referred to in the above-mentioned statements, which were considered together with the other information in the docket (*sic*) before the impugned decisions were made.' Whilst she says that she will not detail all the information placed before her prior to her making the first impugned decision, she does not say that any of that undisclosed information was relied on by her. In argument the respondents submitted that because correspondence annexed to the founding affidavit refers to documents which contain prosecution strategy and information concerning informers or sources contained in correspondence between the DPP and NDPP, the inference should be drawn that those documents were also relied on by the NDPP. The insurmountable difficulty with this submission is that the NDPP does not say that she had regard to any such information or documents at the time the impugned decisions were made. She limits herself to the documents dealt with above. Had she said that she had considered such documents, even if the precise contents were not disclosed, this might well have affected the outcome of this application. The provisions of POCA allow for hearsay and similar fact evidence to be led in certain circumstances.[46] Once again, however, the NDPP does not indicate that any reliance was placed on any such evidence.

[28] On a factual level, therefore, she states that there were only two categories of information on which she based the first impugned decision. First, the contents of the dockets. Secondly, statements under oath which she says are annexed as NJ2, NJ3, NJ4 and NJ5.

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[46] Section 2(2) provides that 'The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.'

[29] As regards the contents of the dockets, the respondents conceded in argument that no statements contained in them implicate Mr Booysen in any of the offences with which he has been charged. The dockets could therefore not have provided a rational basis for arriving at the impugned decisions.

[30] This leaves the four annexures to the answering affidavit mentioned above. These are the only documents not contained in the dockets on which the NDPP says she based the impugned decisions. She says that they are all statements made under oath. She says, in addition, that they implicate Mr Booysen in one or more of the offences in question.

[31] The submissions of Mr Booysen in his replying affidavit can be summarised as follows. Two of the annexures are sworn statements made under the name of one Colonel Aiyer. These are annexures NJ2 and NJ4 respectively. Mr Booysen describes these as statements which concern 'office politics' and submits that they in no way implicate him in any of the offences with which he has been charged. The second of these, in addition to not implicating him in any of the offences in question, was deposed to on 31 August 2012, some two weeks after the first impugned decision was taken. The document referred to as a statement by Mr Danikas, annexure NJ3, is not a sworn statement. It is not even signed by anyone. It is not dated. Even if it can be attributed to the named person and even if it was a sworn statement as claimed by the NDPP, the contents do not cover the period dealt with in the indictment except for one event which does not relate to Mr Booysen. As regards annexure NJ5, this does not implicate Mr Booysen in any of the offences in question.

[33] In argument, the respondents did not in any way challenge the above factual submissions concerning the nature and content of the annexures in question. The factual submissions appear to me to be accurate.

[32] In his replying affidavit, Mr Booysen submits that the NDPP is 'mendacious when she asserts in paragraph 21 of the answering affidavit that she considered the statements together with the other information in the "docket" before making the impugned decisions. She could not have considered the statements referred to in her answering affidavit. She is invited to explain how she could have taken into account information on oath that objectively did not exist at the time of taking the decision'.

[34] Mr Booysen was clearly within his rights to deal in reply with the inaccurate assertions by the NDPP in her answering affidavit and to issue the challenge and invitation in question. He had not seen the statements until they were annexed to the answering affidavit. As regards the inaccuracies, the NDPP is, after all, an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. Despite this, the invitation of Mr Booysen was not taken up by the NDPP by way of a request, or application, to deliver a further affidavit. In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence. In such circumstances, the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her version, the NDPP did not have before her annexure NJ4 at the time. In addition, it is clear that annexure NJ3 is not a sworn statement. Most significantly, the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offences in question. This means that the

documents on which she says she relied did not provide a rational basis for the decisions to issue the authorisations to charge Mr Booysen for contraventions of s 2(1)(e) and (f) respectively.

[35] Although the question has been left open,[47] a decision to stop a prosecution probably falls within the ambit of PAJA. Professor Hoexter argues that the legislature distinguished between decisions to prosecute and decisions not to prosecute because when a decision is made to stop a prosecution, the public interest requires a review. In a decision to prosecute, however, the public interest would be catered for by a trial in due course.[48] I agree with these observations. An additional consideration may be that a person who is prosecuted will have an action in delict if the prosecution was a wrongful one. Professor Hoexter also argues that 'review in terms of the principle of legality…is currently more limited and less searching than review in terms of the PAJA or s 33, which is what one would expect of a general constitutional principle'.[49]

[36] It is not necessary to attempt to set a threshold for the rationality test applying to the decision to issue authorisations to prosecute under s 2(4) of POCA. Kate O'Regan says that rationality boils down to the 'rhyme or reason' test. 'As long there is some rhyme or reason to what the legislature or executive seeks to do, it will probably pass the rationality test.'[50] Even accepting the least stringent test for rationality imaginable, the decision of the NDPP does not pass muster. I can conceive of no test for rationality, however relaxed, which could be satisfied by her explanation. The impugned decisions were arbitrary, offend the principle of legality and, therefore, the rule of law and were unconstitutional.

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[47] *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* para 27.
[48] Hoexter op cit at 242.
[49] Hoexter op cit at 124.
[50] Kate O'Regan op cit p127.

[37] Having come to this conclusion, s 172(1)(a) of the Constitution obliges me to declare the impugned decisions invalid. Mr Booysen is therefore entitled to relief in terms of prayers (a) and (c) referred to in paragraph 3 of this judgment. In addition, I am given a discretion by s 172(1)(b) of the Constitution to make a decision which is just and equitable. Since I have found that there was, at the time the first impugned decision was made, no material which was considered by the NDPP on which to rationally authorise a prosecution of Mr Booysen, the just and equitable consequence of making such declarations of invalidity is to review both of the impugned decisions and set them aside. Mr Booysen is thus entitled to prayers (b) and (d).

[38] I hasten to emphasise that this outcome is based purely on the facts of the present case. It does not provide a basis for opening the floodgates to applications to review and set aside decisions to issue authorisations to prosecute under s 2(4) of POCA. If the respondents had properly understood the principle of legality, it seems to me that their responses to demands for documents or reasons might have been different. As mentioned, there is reference to documents in correspondence and the NDPP states that she will not detail all the information placed before her prior to her making the first impugned decision. Had she outlined even in basic terms what these documents and information comprised, said that she had relied on them and shown that they had included information linking Mr Booysen to the offences in question, this application might not have seen the light of day. The 'rhyme or reason' test for rationality might have been satisfied. The level of disclosure of the NDPP for offences of this nature cannot be such as to prejudice the state in its conduct of a future trial. In my view it will therefore not require an exacting, still less an exhaustive, level of disclosure. *De Vries* found that the consideration of a request for authorisation 'forwarded to the NDPP under cover of a letter summarising the form and content of the

charge-sheet, setting out a detailed background to the charges and summarising the evidence' was sufficient. It is certainly not necessary to disclose every detail of the state's case, strategy or evidence where this is not subject to the criminal discovery process. In the light of the provisions of POCA, it is also not necessary to have before her sworn statements from witnesses on which the state intends to rely. I expressly refrain, however, from making a positive finding as to the level of disclosure necessary in meeting an application such as the present one or the detail required. This can only be assessed on a case to case basis.

[39] It is important to note that the above findings do not amount to a finding that Mr Booysen is not guilty of the offences set out in counts one and two and eight to twelve. That can only be decided by way of a criminal trial. Setting aside the authorisations and decisions to prosecute also does not mean that fresh authorisations cannot be issued or fresh decisions taken to prosecute if there is a rational basis for these decisions.

[40] Prayer (e) in paragraph 3 of this judgment seeks to interdict the NDPP from issuing fresh authorisations in the absence of the NDPP having before her facts under oath implicating Mr Booysen. A final interdict is thus sought. The requisites for a final interdict are well established. A clear right must be shown, an injury actually committed or reasonably apprehended and an absence of an alternative remedy.[51] Mr Booysen has a clear right to a lawful decision making process. He certainly has no right at all to such a decision being taken only if affidavits connecting him to offences are in the possession of the NDPP. I have mentioned above, for example, that hearsay and similar fact evidence is admissible under certain circumstances in respect of offences under s 2(1) of POCA. A further difficulty is found in the other

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[51] *Setlogelo v Setlogelo* 1914 AD 221.

two requirements for an interdict. There is no evidence that Mr Booysen has a reasonable apprehension of suffering an injury. Neither can it be said that there is no alternative remedy available to him. It is clear, therefore, that there is no basis for the interdict sought by Mr Booysen in paragraph (e), either in the form sought or in any other form. Outside of the requisites for an interdict and if indeed I have a general discretion to grant such an order (on which I make no finding), I am of the firm view that to do so in these circumstances would amount to an unjustified intrusion into executive territory and would offend the principle of the separation of powers. To make such an order would amount to fettering the discretion of the NDPP to make the decisions in question. This discretion has been given to the NDPP by the requisite legislation and there is no attack on the constitutionality of that legislative provision. No order shall therefore issue in terms of prayer (e).

[40] In the result, an order is granted in terms of paragraphs (a), (b), (c), (d) and (f) referred to in paragraph 3 of this judgment.

DATE OF HEARING:	7 February 2014
DATE OF JUDGMENT:	26 February 2014
FOR THE APPLICANT:	A Katz SC with M Collins, instructed by CARL VAN DER MERWE & ASSOCIATES INC.
FOR THE RESPONDENTS:	LM Hodes SC with N Manaka, instructed by THE STATE ATTORNEY.