IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No: 17709/2006
Date Heard: 19/06/2007
Judgment Date: 01/02/2008

UNREPORTABLE

In the matter between:

BEULAH EVELYN BONUGLI First Applicant
CYNTHIA PHYLLIS GREAVES Second Applicant

And

THE DEPUTY NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS First Respondent

MICHAEL R. HELLENS N.O. Second Respondent

DIRK J. VETTEN N.O. Third Respondent

THE DIRECTOR OF PUBLIC PROSECUTION
(WITWATERSRAND LOCAL DIVISION) Fourth Respondent

UNION FINANCE HOLDINGS (PTY) LIMITED Fifth Respondent

JUDGMENT

DU PLESSIS J:

Introduction

The two applicants have been charged with fraud. The Deputy National Director of Public Prosecutions, who is the first respondent, appointed the second and third respondents as prosecutors in the case against the applicants.

The latter two respondents are advocates in private practice and members of the Johannesburg Bar. I shall refer to the second respondent as Mr Hellens, to the third respondent as Mr Vetten and to the two of them collectively as "the advocates". Contending that the first respondent's decision to appoint the advocates as prosecutors was unlawful, the applicants seek an order to review and set aside the decision. The interest of the fourth and fifth respondents in these proceedings will become clear in due course.

The factual background to the advocates' appointment.

The first applicant was a trustee of the Rivonia Close Trust. The trust owned all the shares in Union Finance Holdings (Pty) Ltd, the fifth respondent that I shall refer to as Union Finance. The first applicant was the chief executive officer of Union Finance and its controlling mind. The second applicant was Union Finance's Discounting Administration Manager.

In 1997 the Rivonia Close Trust, represented by the first applicant, sold all its shares in and claims against Union Finance to Unibank Limited. In terms of the sale agreement Unibank had to pay the purchase price for the shares in four annual instalments, from 1997 to 2000. The seller warranted certain annual profits. If the actual profit in a particular year exceeded the warranted profit, the purchase price was subject to upward adjustment. Conversely, if the actual profit was less than the warranted profit, the price would be adjusted downwards.

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During the profit warranty period (1997 to 2000) the first applicant continued to manage Union Finance.

Although it does not have a direct bearing on the issues before this court, it is worth mentioning that some time after the sale, Absa Bank Limited (Absa) acquired the shares in Unibank.

Unibank paid the first three annual instalments on the purchase price. Contending that the first applicant had fraudulently inflated Union Finance's profit during the profit warranty period, Unibank refused to pay the fourth instalment. In April 2000 the Rivonia Close Trust instituted arbitration proceedings against Unibank seeking payment of the fourth instalment in the sum of R25 million. Unibank filed a counterclaim for repayment of the amount allegedly overpaid in respect of the first three instalments.

The arbitration was set down for hearing on 21 January 2001. Two days before that, on 19 January 2001, the first applicant was arrested on charges of fraud relating to the alleged inflation of Union Finance's profit, the precise allegations that formed the subject matter of the arbitration. The first applicant and her then co-accused (at the time not the second applicant) appeared in the Randburg magistrate's court and the case was postponed several times. The arbitration proceedings were also postponed.

In approximately May 2001 an attorney, Mr Snoyman, briefed Mr Hellens (the second respondent) for his opinion as to whether fraud had been committed in relation to the inflation of Union Finance's profit. Union Finance [1] was the client. In August 2001 the then Director of Public Prosecutions for the Witwatersrand Local Division of the High Court (the DPP) took a decision to prosecute, inter alia, the first applicant. The complainant was Union Finance. The case was to be heard in the Randburg magistrate's court and the prosecution was entrusted to a prosecutor, Ms Dawn Somaroo. The state evidently had difficulty in formulating the charge sheet. Union Finance, through its attorney, Mr Snoyman, retained Mr Hellens and Mr Vetten to assist in the criminal proceedings. The advocates assisted the state in preparing the charge sheet and, later on, further particulars thereto.

In June 2002 the parties to the arbitration reached a settlement the effect whereof was that Unibank paid the fourth instalment on the purchase price and withdrew its counterclaim. By then the criminal case against the first applicant and her then co-accused had still not been brought to trial. On representations that the first applicant's attorney made in the light of the settlement and the negotiations preceding it, the DPP on 4 June 2002 withdrew the charges against the first applicant and her co-accused.

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[1] In regard to their role in the criminal proceedings, the parties did not in the papers maintain a clear distinction between Unibank, Union Finance and the ultimate holding company, Absa Bank. I use Union Finance to describe the group and to refer to actions that the group took in regard t~ the criminal prosecution.

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The settlement did not resolve all the disputes relating to the sale of the Union Finance shares. In January 2003 the Rivonia Close Trust issued summons against Union Finance claiming R17 million in respect of an alleged loan account that the trust had in Union Finance. The claim was later increased to R34 million. In the mean time Mr Snoyman had passed away. Mr Darryl Furman took over his practice and continued to act as the attorney for Union Finance in relation to the criminal proceedings. In July 2003, Furman approached one Roberts, a member of the DPP's staff, regarding the reinstatement of the fraud charges. Furman was referred to Mr Dicker, a Deputy Director of Public Prosecutions in the office of the DPP, who was, in his own words, *"the person directly responsible for the matter".* Discussions and correspondence between Furman and Dicker followed. In the course thereof Furman explained to Dicker that Union Finance had appointed one set of legal representatives for the civil dispute between it and the trust, and another to render assistance to the state in the prosecution of the fraud charges. Furman informed Dicker that his predecessor, Snoyman, did not agree to the withdrawal of the charges. Dicker does not explicitly say so, but it is clear that Furman requested him to consider reinstating the criminal charges flowing from the alleged fraud in relation to the profit of Union Finance. Furman provided Dicker with further information, including a forensic auditor's report. Dicker considered all the evidence and concluded that the applicants should be prosecuted. He made a recommendation to Ms Charin de Beer who had by then been appointed as DPP. Ms De Beer, who is the fourth respondent, considered the evidence

and issued an instruction that both the first and the second applicants be prosecuted.

When he initially approached Roberts, Furman informed him that Business Against Crime would fund the prosecution, including the employment of Mr Hellens and Mr Vetten as prosecutors. According to Dicker, he understood that Union Finance (the complainant) would in turn have funded Business Against Crime. Later on, Furman made it clear that Union Finance would pay for the employment of the advocates to conduct the prosecution. On 30 March 2004 the DPP (fourth respondent) addressed a written application to the first respondent, the Deputy National Director of Public Prosecutions (the DNDPP) for the appointment of Mr Hellens to conduct the prosecution. On 26 May 2004 the DNDPP approved the appointment, purportedly in terms of section 38(3,) of the **National Prosecuting Authority Act, 32 of 1998** (the NPA Act). By way of a letter dated 12 August 2004 Mr Vetten was similarly appointed.

The practical arrangements regarding the conduct of the prosecution

The conduct of the prosecution is regulated by a written agreement between the DPP on the one hand and Messrs Hellens, Vetten and Furman on the other. The agreement includes the following provisions:

- Mr Hellens and Mr Vetten are appointed to conduct the prosecution but they must do so in terms of clause 2 "under the control and direction of the Director of Public Prosecutions".
- Clauses 3 and 4 provide for Mr Hellens and Mr Vetten to be assisted by a junior public prosecutor to whom they will provide "in service mentoring".
- Clause 5 provides for the funding and payment of the fees of Mr Hellens and Mr Vetten. The arrangements are that Union Finance deposits sufficient funds into an account held by Mr Furman in the name of the DPP. He holds the funds on behalf of the state and disburses it on its behalf. Mr Hellens and Mr Vetten render their accounts to Mr Furman for payment on behalf of the state and provide the DPP with copies of the accounts.

This agreement was amended by an addendum on 30 October 2005 for the replacement of Mr Furman by another attorney, Mr Canny of Routledge Modise Moss Morris. This firm acts for Union Finance in the civil litigation albeit that Mr Canny does not handle the civil matter.

Mr Dicker, who deposed to the answering affidavit on behalf of the first and fourth respondents, explains that Mr Hellens and Mr Vetten hold a brief to act on behalf of the state in terms of clauses 1 and 2 of the agreement. The state is their only client. They are required by their ordinary rules of professional conduct to take their instructions only from the state. The advocates conduct the

prosecution under the control and direction of the DPP. They are obliged to do so in terms of clause 2 of the agreement and in any event also in terms of s 38(4) of the NPA Act.

The DPP has assigned Mr Dicker to the task of exercising immediate control and direction over the prosecution on her behalf. He does so by maintaining contact with Mr Hellens and Mr Vetten. They report to him and consult him whenever material strategic decisions have to be taken. He in turn reports to and liaises with the DPP. The junior public prosecutor assigned to the prosecution is Ms Vargani Naidoo. She participates in the preparation for the prosecution and will in due course participate in the conduct of the trial as a junior member of the team. It means that the DPP and Mr Dicker will also be kept informed of the conduct of the prosecution on a daily basis through a member of their staff who is also a member of the prosecution team.

Union Finance has deposited the funds necessary to cover the fees of the advocates with their attorney Mr Canny who duly holds in a dedicated trust account in terms of clauses 5.2 and 5.3 of the agreement. The advocates render accounts for their services at their normal rates to the DPP care of Mr Canny. He pays their accounts on behalf of the state from the money he holds in trust.

The grounds of review

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The applicants base their application on three grounds of review. I shall deal with each of them in turn. It is convenient first to address the first and third grounds and thereafter the second ground.

The first around: Disreaard of relevant considerations

The applicants say that when the DPP decided to appoint Mr Hellens and Mr Vetten, she apparently did not take into account "their ongoing relationship with (Union Finance) and in particular with its attorneys". The facts show, however, that the DPP was fully aware of these matters and that she took them into account. She indeed referred to the prior involvement of Mr Hellens and Mr Vetten in her letters to the first respondent n which she sought approval of their appointment. She wrote, for instance, that Mr Hellens had prepared the charge sheet and the further particulars for the first prosecution and that Absa had paid him "a substantial amount for his professional services in the above regard and was also prepared to make a donation to Business Against Crime sufficient to cover expenses for the appointment of advocate Hellens SC to act as prosecuting counsel". The first ground of review cannot succeed.

The third around: Irrationality

The applicants assert that, because the DPP was aware of the relationship between the advocates on the one hand and Union Finance on the other, the decision to appoint them was irrational. One of the purposes of s 38 of the NPA

Act is to acquire for the state the benefit of expert and specialist private counsel. The appointment of the advocates in this case serves that purpose and does so at no extra cost to the state. While I shall in due course consider the lawfulness of the decision on other grounds, the decision in my view was not irrational.

The second ground: Unconstitutional and thus unlawful

The applicants contend that the appointment of Mr Hellens and Mr Vetten will have the effect that the prosecution of the applicants "will not be conducted without fear, favour or prejudice" as required by s 179(4) and s 35(3) of the **Constitution of the Republic of South Africa, 1996** and by s 32(1) of the NPA Act.

Section 179(4) of the Constitution provides: "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice". This constitutional imperative is reflected in section 32 of the NPA Act and it is not subject to limitation in terms of section 36 of the Constitution. That is so because it embodies a constitutional principle additional to the rights entrenched in the Bill of Rights (Chapter 2 of the Constitution. See in this regard the reasoning in Van Rooyen and Others v The State and Others (General Council of the Bar intervening) 2002 (5) SA 246 (CC) at para. 35). I shall in due course endeavour to illustrate that to be prosecuted by a prosecutor that exercises his functions "without fear, favour or prejudice" is also part of everyone's right to a fair trial enshrined in section 35(3) of the Constitution.

Section 179(4) of the Constitution entrenches a principle that has long been part of our law. Prosecutors "have always owed a duty to carry out their public functions independently and in the interests of the public" (Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) para.72). In R v Riekert 1954 (4) SA 254 (SWA) (at 260 to G) the principle was stated thus: "The public prosecutor has a wider task than counsel or attorney for a client. He represents the state, the community at large and the interests of justice generally... The public prosecutor does not only represent the interests of the Crown, but he also has a duty towards the accused to see that an innocent person be not convicted ... Although the attainment of truth is in the public interest in both civil and criminal trials, I venture to say that in criminal trials the ascertainment of truth and the prevailing of the interests of justice are of greater public interest than in civil trials ..."

The principle that prosecutors must act without fear favour or prejudice is not only firmly entrenched in our law, it is an internationally accepted principle. The United Nations Guidelines for the Role of Prosecutors were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba from 27 August to 7 September 1990. Article 12 thereof requires prosecutors to "perform their duties fairly, consistently and expeditiously" and requires them to "respect and protect human dignity and uphold human rights". Articles 13(a) and (b) provide that, in the performance of

their duties, prosecutors must act "impartially", must avoid all forms of discrimination, must act in the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect. Section 22(4)(f) of the NPA Act envisages that the National Director of Public Prosecutions must bring these guidelines to the attention of all prosecutors and promote respect for and compliance with the guidelines.

In **Boucher v The Queen [1955] S.C.R.16 at 23-24** the Supreme Court of Canada said: "It can hardly be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all the available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings". Compare also the judgments of the courts of the United States of America in, for instance, Berger v United States 295 U.S. 78.88 (1935); People v Zimmer 51 NY2d 390 (1980) at 393.

A prosecutor who conducts a prosecution without fear, favour or prejudice is thus seen, locally and internationally, as an integral part of a just criminal prosecution. I have made reference to section 35(3) of the Constitution that enshrines everyone's right to a fair criminal trial. Elements of the right to a fair trail are enumerated in section 35(3)(a) to (o). It is, however, now settled law that the list is not exclusive and that a fair trial does not consist "merely of a number of discrete sub-rights, some of which have been specified in the subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on s 35(3) develops" (**S v Dzukuda and Others; S v Tshilo 2000 (4) SA 1078 at para 9; See also S v Zuma and others 1995 (2) SA 642 (CC) at para 16; S v Jaipal 2005 (4) SA 581 (CC)** at para 28). If a prosecutor who acts without fear, favour or prejudice and thus independently, is an integral part of a just criminal prosecution, it follows, in my view, that such a prosecutor is also an integral part of a fair trial. An accused person who is prosecuted by a prosecutor, who is not free from outside influence, does not receive a fair trial.

It is a well-established principle of law that justice must not only be done, but must be seen to be done. Thus, a court must not only be independent, it must be seen to be independent (See the **Van Rooyen**-case *(supra)* at para 32 and the judgment of the Supreme Court of Canada in **Valente v The Queen (1986) 24**

DLR (4th) 161 (SCC), upon which the Constitutional Court relied). Similarly, it is a requirement of a fair trial that the prosecutor must not only act without fear, favour or prejudice but that he must be seen so to act. In the Zimmer-case *(supra* at 395) the court confirmed that the test is not only whether the independence of the prosecution was in fact compromised but also whether "reasonable potential for prejudice" existed. In this regard the test that the Constitutional court used in regard to the independence of the court may usefully be employed also in regard to the independence of prosecutors, bearing in mind, of course, the difference in the respective functions of the court and the prosecutor. In the **Van Rooyen**-case *(supra* at para 33) the court said: "When considering the issue of appearances or perceptions, attention must be paid to the fact that the test is an objective one. Canadian courts have held in testing for a lack of impartiality 'the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal … that test is what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. This test was approved by the Court in Valente as being appropriate for independence as well as impartiality. It is also similar to the test adopted by this Court in **President of the Republic of South Africa and Others v South African Rugby Football Union and Other [1999 (4) SA 147 (CC)** at para 48] for determining whether there are grounds for refusal: 'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the

Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.'"

I am inclined to the view that section 179(4) of the Constitution, properly interpreted, requires of a prosecutor not only in fact to act without fear favour or prejudice but also to be appointed and to act in a manner that is perceived to be without fear favour of prejudice. Even if that is not so, I hold that the right to a fair trail in terms of section 35(3) of the Constitution includes the right to a prosecutor that acts and is perceived to act without fear favour or prejudice.

There is on the evidence no reason to hold that Mr Hellens and Mr Vetten will not do everything within their power to ensure that they at ail times act without fear favour or prejudice. The question, however, still is "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that" the advocates will not act without fear, favour or prejudice.

The facts show that Mr Hellens previously advised the complainant in the case against the applicants on the prospects of successfully prosecuting at least the first applicant. The case against the first applicant was withdrawn and the prosecution was reinstituted at the urgings of the complainant's attorney acting on its behalf. In theory the advocates are paid on behalf of the state with funds that the complainant made available. In fact the complainant funds the entire prosecution. The respondents admit that, but for the complainant's funding, the prosecution would not have proceeded. There is civil litigation pending between

the complainant and a trust closely linked to the applicants and the subject matter thereof is closely related to, if not the same as, that of the criminal charges against the applicants.

Relevant to this case, section 38 of the NPA Act provides for the appointment of *ad hoc* prosecutors in the following terms:

"(1) The National Director may in consultation with the Minister, and a Deputy National Director or a Director may, in consultation with the Minister and the National Director, on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases.

(2) ...

(3) Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the State –

(a) the National Director; or

(b) a Deputy National Director or a Director, in consultation with the National Director,

may, on behalf of the State, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting the Minister as contemplated in that subsection.

(4) ..."

Mr Trengove for the first and fourth respondents correctly pointed out that section 38(3) of the NPA Act envisages that the fees of prosecutors appointed under section 38 may be pad by someone other than the state. Accordingly, the mere fact that someone else funds the prosecution cannot be objectionable. In this case, however, the advocates are paid by the complainant who urged the prosecution after it had been withdrawn and who is engaged in civil litigation with the trust whereof the first applicant is the only trustee. In my view a reasonable and informed person would on the basis of these facts already reasonably apprehend that the advocates would not throughout, albeit subconsciously, act without fear favour of prejudice. In the course of a criminal prosecution the prosecutor must, virtually on a daily basis, take decisions that might seriously impact on the rights and interests of the accused. The potential for a prosecutor paid by the complainant who had urged the prosecution subconsciously to have undue regard to the interests of the complainant who foots the bill is self evident.

The question is whether the practical arrangements and the agreement regulating the advocates' conduct are sufficient in this case to exclude a reasonable perception that they might not always act without fear, favour or prejudice. I do not think so. I accept that all concerned did their best to ensure that the prosecution is conducted in accordance with the Constitution. No agreement can, however, ensure that the advocates do not subconsciously have undue regard to the interests of the complainant. The advocates consult Mr

Dicker when material decisions have to be taken. There is no agreed criterion, however, as to which decisions are material, nor could there practically be. A junior prosecutor will assist the advocates and will report to Mr Dicker. There is no basis to hold that she has the experience or the knowledge to identify each instance of conduct that might be regarded as not in accordance with the required standards. Moreover, viewing the matter practically, the prosecutor will be the junior member of the prosecution team and she will be working closely with the advocates on a daily basis. She will not reasonably be perceived also to play the role of an objective monitor of their conduct.

I conclude that the appointment of the second and third respondents as prosecutors in the case against the applicants is in conflict with the provisions of section 35(3) of the Constitution and therefore unlawful. I should add that there was no argument that the appointment constitutes a valid limitation of the applicants' right to a fair trial.

As to costs, only the first and fourth respondents appeared to oppose the application. Both sets of parties were represented by two counsel and the costs of two counsel were certainly warranted.

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The following order is made:

1. The decision by the first respondent to appoint the second and third respondents as prosecutors under case number *111/01/06* in which the first and second applicants are the accused, is reviewed and set aside.

2. The first and fourth respondents are ordered to pay the costs of the application, including the costs of two counsel.

B. R. DU PLESSIS
Judge of the High Court

Applicants' Legal Representation:
ADV. G.J. Marcus, SC (011 291 8600); ADV. P.R. Jammy (011 2904000); TWB Attorneys (011 291 5000, Ref: A da Silva *c/o* Jacobsen & Levy Inc, 012320 2202, Mr Levy)

Respondents' Legal Representation:
ADV. W.H. Trengrove, SC (011 291 8600); ADV. J. Cassette (011 2904000); The State Attorney (012 3091516, Ref: Mr P. Kleynhans)