



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 13 October 2023

Status: Immediate

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Jacob Gedleyihlekisa Zuma v William John Downer and Another (Case no 788/2023) [2023] ZASCA 132 (13 October 2023)

Today the Supreme Court of Appeal (SCA) dismissed an appeal by Mr Jacob Zuma appeal with costs, including those of two counsel, on a punitive scale.

Mr Zuma is facing multiple charges of corruption, fraud, racketeering and money laundering for which he first appeared in court on 29 June 2005, although his trial has still not commenced. The first respondent, Mr William Downer, has served as the lead prosecutor for the National Prosecuting Authority (NPA). In 2021, when Mr Zuma finally had to plead to the charges, he raised a special plea in terms of s 106(1)(h) of the Criminal Procedure Act 51 of 1977 with the Kwazulu-Natal Division of the High Court, Pietermaritzburg (the high court) alleging that Mr Downer is not a fit person to prosecute him. This application was dismissed. So too, were his applications for leave to appeal in the high court and the SCA, along with his application to the President of the SCA for a reconsideration in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act) and his two applications thereafter to the Constitutional Court.

On 5 September 2022, Mr Zuma instituted a private prosecution in the high court against Mr Downer, as also, against the second respondent, Ms Karyn Maughan, a senior legal journalist, who has been reporting on the criminal investigation, his criminal indictment and the numerous legal challenges and proceedings for well on 20 years. Mr Downer and Ms Maughan (collectively referred to as the respondents) applied separately to the high court to have the private prosecution set aside as an abuse of process of the court. Their applications were consolidated and heard on 10, 20 and 22 March 2023, before a specially constituted court of three judges who, on 7 June 2023, set aside the criminal summons against the respondents, interdicted the private prosecution and ordered Mr Zuma to pay costs on a punitive scale (the main judgment). Mr Zuma applied for leave to appeal the main judgment, which was dismissed by the high court on 11 September 2023. During the hearing of the appeal at the SCA, counsel for Mr Zuma informed the Court that a petition, in relation to the main judgment, will be filed with the SCA and further to the Constitutional Court should it fail at the SCA.

Both respondents applied to the high court in terms of s 18(1) read with s 18(3) of the Act for an order that the setting aside of the private prosecution is to remain in force pending the outcome of any appeal against the main judgment. On 3 August 2023, the high court made such an order (the execution order).

Exercising his automatic right of appeal under s 18(4)(ii) of the Act, Mr Zuma filed a notice of appeal with the SCA against the execution order on 14 August 2023. The matter was enrolled, in accordance with s 18(4)(iii), as one of urgency for hearing on Thursday 28 September 2023.

The issue before the SCA was whether Mr Zuma should be permitted to continue the private prosecution while an application for leave to appeal or (if granted) an appeal by him was pending.

The SCA held that the central purpose of the private prosecution is to enable Mr Zuma to have Mr Downer removed as the prosecutor on the basis that he (Mr Downer) stands accused in the private prosecution. The SCA stated that the facts of the case demonstrated that the private prosecution of Mr Downer was an abuse of the process of the court and instituted with an ulterior purpose, holding that the private prosecution is a patently hopeless and unsustainable case as the alleged disclosure of confidential medical information to Ms Maughan was made by Adv Breitenbach SC and not Mr Downer.

With regards to Ms Maughan, the SCA reiterated that the note issued by Mr Zuma's doctor (upon which the private prosecution rests) was not intended to be confidential, did not contain any confidential information and its disclosure did not constitute an actionable violation of Mr Zuma's rights.

The SCA was of the view that for the high court to have allowed the suspension of the main judgment pending an appeal would have been mutually incompatible with the conclusion reached by it that the private prosecution of the respondents constituted an abuse and that if Mr Zuma's private prosecution was indeed an abuse of the process as the high court held, then it followed that allowing it to be enforced pending an appeal would prolong and perpetuate that abuse.

The SCA found that the private prosecution is plainly not urgent as the effect of the execution order was that the private prosecution would be placed on hold pending Mr Zuma's attempt at an appeal and that the only conceivable adverse consequence of the execution order on Mr Zuma is that his private prosecution will be delayed until finalisation of the appeal process. The SCA further stated that a suspension of the high court's orders and the continuation of the private prosecution while Mr Zuma is attempting to appeal, will negate the orders issued and result in the respondents forfeiting the substantive relief which that court ordered in order to put a stop to the abuse.

The SCA highlighted that the mere decision to prosecute can have a far-reaching impact on an accused person's life, because, even if an accused is ultimately acquitted, the harm already suffered could prove to be irreparable. It held that the harm asserted by the respondents is real and that the private prosecution was without any foundation in either fact or law and that the respondents, appearing as accused persons in an abusive private prosecution, would undeniably compromise public confidence in the courts and the administration of justice.

In the result, the SCA dismissed the appeal with costs including those of two counsel on a punitive scale.

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