Which of these two versions is to be believed?

But in view of the conclusions reached in paragraph 3.2, nothing turns on this issue. This is because, had the *MJK* court properly engaged with *PAF*, it would have been able (a) to avoid its misinterpretation of *Badenhorst*; (b) to appreciate the need for the *REM* test to be reconsidered in the typical *alter ego* scenario, thus concluding that the trial court had *not* misdirected itself in invoking the control test formulated in that case; and (c) to implement the *PAF*'s extension of this test to the accrual setting. Taken together, these points would require an appreciation of the fact that compliance with the control test renders the second leg of the *REM* test redundant, because such compliance *ipso facto* entails that the errant spouse's estate has been undervalued with the inherent consequence that the obligation to account properly to the aggrieved spouse for his or her accrual has been evaded. As such, the need for a separate allegation to this effect is negated; an allegation of compliance with the control test should suffice.

In sum, it is my view that the *MJK* court should have upheld the appeal based on a *factual* lack of evidence on two separate issues. The first is that there was nothing untoward in the decision *to create* the trusts and the close corporation (as in *REM* para 18). The second is that the respondent's evidence did not establish compliance with the control test. Contrary to the court's view, these issues were indeed "cognisable or derivable from the [respondent's] pleadings" (para 21).

While it is true that the judgment in *PAF* was handed down while the *MJK* court was preparing its judgment, it is my view that the court should have delayed its judgment to engage with *PAF* in a more robust fashion, because the latter provided the wherewithal for the *MJK* court's preliminary understanding of *REM* and *Badenhorst* to be reconsidered. This was not done, which resulted in the *MJK* court missing the opportunity to build on the progress made in *PAF*. This culminated in an unconvincing and theoretically questionable *ratio* that has unnecessarily muddied the waters. The result, unfortunately, is a step backward for our trust and family law jurisprudence.

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PLEA IN TERMS OF SECTION 106(1)(*h*) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

***S v Moussa* [2021] 3 All SA (GJ)**

OPSOMMING

Pleit ingevolge artikel 106(1)(*h*) van die Strafproseswet 51 van 1977

Die beskuldigde het ingevolge artikel 106(1)(*h*) van die Strafproseswet 51 van 1977 gepleit dat die aanklaer nie titel het om te vervolg nie. In dié saak het 'n vorige aanklaer sonder magtiging 'n pleitooreenkoms met die beskuldigde aangegaan. Die beskuldigde het ingevolge die ooreenkoms aan die klaer betalings gemaak onder die indruk dat die klagtes by betaling teruggetrek sou word. Die Adjunk-Direkteur van Openbare Vervolging ("ADOV") het nie die ooreenkoms teruggetrek of die afdwinging van die ooreenkoms voorkom nie, en het voortgegaan met die vervolging. Die beskuldigde het aangevoer dat die Staat as 'n invorderingsagent opgetree het en dat dit 'n misbruik van proses was. Die hof het bevind dat die term "aanklaer" in artikel 106(1)(*h*) nie vir 'n beswaar teen die ADOV voorsiening maak nie, maar wel teen die vorige aanklaer. Die hof bevind verder dat dit nie 'n misbruik van proses was nie. Dit word aangevoer dat die term "aanklaer" in artikel 106(1)(*h*) net die aanklaer voor die hof, en nie 'n vorige aanklaer, die ADOV, die vervolgingsgesag of die Staat insluit nie. Dit word verder aangevoer dat, al sou die term "aanklaer" 'n vorige aanklaer insluit, die gedrag van die vorige aanklaer nie 'n misbruik van proses was nie. Dit word laastens voorgehou dat die beskuldigde op die ooreenkoms moes gesteun het en aansoek moes gedoen het vir 'n permanente verbod teen verdere vervolging, in plaas daarvan om op artikel 106(1)(*h*) te steun.

1 Facts

Moussa was charged in the Gauteng Local Division, Johannesburg, with numerous counts regarding bank accounts where money was withdrawn against uncleared deposits which resulted in a loss for ABSA Bank (paras 1, 2). Prior to the trial the accused gave notice in terms of s 106(3) of the Criminal Procedure Act 51 of 1977 ("CPA") of his intention to enter a special plea (a plea other than a plea of guilty or not guilty (para 4).

In the notice the accused stated the grounds on which he based his plea. The accused submitted that: (a) the prosecutor had no title to prosecute him, on the ground that the prosecution constituted an abuse of the court's process; (b) the continuation of his prosecution in the circumstances of the case brought the administration of justice into disrepute; and (c) a written agreement was concluded between the accused and the prosecution that on his making payment of R1000 000 to the attorneys of ABSA Bank, and on receipt of confirmation that payment had been made, "the prosecution of the accused would be reconsidered and stopped" (para 4).

The notice further indicated that: (a) the State represented by the National Prosecuting Authority ("NPA"), and in particular adv Naidoo, entered into a written agreement with the accused, and that the essential terms of the agreement were as follows: (i) that the accused agreed to pay an amount of R1 million to ABSA for legal fees incurred by ABSA in recovering money due and payable to it by accused; (ii) "that the state w[ould] deliberate on the matter and provide a final response to Mr Sylla and the court regarding the withdrawal of charges in the matter … after confirming with ABSA that the agreed amount was paid timeously. It being contemplated that the charge would be withdrawn on payment of the agreed amount to ABSA" (para 5); (iii) that the accused did make repayment timeously, and ABSA did confirm receipt of the payment; (iv) that ABSA further confirmed in writing that it did not object to the withdrawal of the charges against the accused; and (v) that the prosecution reneged on the agreement and did not withdraw the charges as contemplated in the agreement between the accused and the prosecution. (b) The agreement made with the state was a binding agreement. (c) It was contemplated and intended by the parties to the agreement that on confirmation of receipt of the agreed payment by ABSA, the charges against the accused would be withdrawn. (d) In the event that the state represented by the NPA "dispute[d] the agreement as understood by the accused, that the agreement and continuing prosecution [were] an abuse of the court's process" (*ibid*). (e) In such circumstances the prosecution "ha[d] been compromised and weaponised to act as an extortionist or collecting agent" for ABSA against the accused (*ibid*). (f) In such circumstances the accused would not receive a fair trial. (g) In the circumstances the administration of justice had been brought into disrepute to such an extent that the integrity of the administration of justice could only be redeemed by a stay of prosecution against the accused (*ibid*).

At the trial the accused pleaded not guilty to all counts and that the prosecutor had no title to prosecute in terms of 106(1)(*h*) of the CPA (para 3). The court ordered that the plea be dealt with separately upfront by way of a trial-within-a-trial. The parties agreed that the accused bore the *onus* on a balance of probabilities to prove jurisdictional facts to vest the special plea. The accused and his erstwhile attorney, Mr Ratau, testified on behalf of the accused. Ms Wright, the attorney who represented ABSA in the civil litigation, and adv Roberts, the Deputy Director of Public Prosecutions ("DDPP"), Johannesburg, testified on behalf of the State (paras 20, 21, 23).

The accused testified that he was approached by adv Naidoo, the prosecutor at the time, who suggested that he pays R1 million to ABSA for legal fees in respect of the litigation against him, and that on payment "the case will go away". The accused also testified that this meant that the State would withdraw the charges against him and that he accepted the agreement on advice of his attorney at the time (para 24). An agreement (exhibit X) was drafted in terms of which the accused would pay back the R1 million in instalments as arranged with ABSA, represented by Ms Wright. The agreement also provided that the state "[would] deliberate on the matter further and provide a final response" to the accused and the court regarding the charges in the matter after confirming with ABSA that the amounts were timeously paid (para 25).

The accused testified that he enquired why the agreement did not specifically say that the charges would be withdrawn. He was informed that the phrase "the state will deliberate" implied that the case would be withdrawn. He testified that there was no doubt between the parties that upon payment of the R1 million the matter would be withdrawn (para 26).

The accused testified that the matter was postponed from time to time to afford him the opportunity to pay the money, which he duly did. He expected that the charges would be withdrawn after full payment had been made. However, adv Naidoo approached him in tears at the next appearance and informed him that her superiors refused to allow the charges to be withdrawn. She then invited him to make further representations. The representations were submitted but also refused (paras 26–29).

The accused testified that the state had reneged on the oral and written agreements by not withdrawing the matter. He also testified that because he was led to believe that the matter would be withdrawn if he paid the money, the state acted as a collecting agent or debt collector for ABSA, and in doing so adv Naidoo abused her position as prosecutor. He testified that he would not have paid the money if the case was not going to be withdrawn by the state (paras 29, 32).

The accused also referred to two letters attached to the notice in terms of section 106(1)(*h*). In the letters Ms Wright informed adv Naidoo that once the payment was made, ABSA would not continue any further litigation against the accused (para 36). When asked whether his attorney objected to the use of the word "deliberate", he testified that adv Naidoo told him in the presence of Mr Ratau that the case "would be" withdrawn (para 36).

Mr Ratau testified that adv Naidoo confirmed to him that as soon as the accused paid the money, the charges "might be" withdrawn and that ABSA would not oppose the withdrawal of the matter. He also indicated that although the word "deliberate" was used, there was no reason to doubt that the matter "would be" withdrawn upon payment of the full amount (para 37).

Mr Ratau testified that there was no reason to doubt the authority of adv Naidoo as she worked for the NPA and he also got the impression that she was acting on behalf of ABSA as she continuously indicated that she would talk to ABSA and revert back to them (para 38).

He also testified that the accused informed him that he was told by adv Naidoo that the matter would be withdrawn if payment was made. However, he denied that the assurance was given in his presence. What adv Naidoo said in his presence was that upon payment the state would consult with ABSA, and then consider withdrawing charges (para 39).

Mr Ratua further testified that the intention of the parties when they concluded the contract were to secure the freedom of the accused and that the word "deliberate" in the contract "was to deliberate with ABSA" (para 40). He and the accused believed that upon payment the case would be withdrawn. If the NPA had not been involved in the agreement the accused would not have paid the money. He reiterated that the NPA was not a debt collector. This concluded the case on behalf of the accused (paras 40, 41).

On behalf of the state, Ms Wright testified that ABSA did not get involved in the decision to prosecute, but had agreed not to object to the withdrawal of the charges against the accused, should the state decide to withdraw these. She denied that she had anything to do with an agreement between the accused and the state to pay ABSA R1 million. She was not willing to concede that the payment of the R1 million was linked to the withdrawal of the matter and stated that she never asked Adv Naidoo to assist ABSA to get the money from the accused (paras 42–47).

Adv Roberts testified that he was tasked to oversee the prosecution of the accused. He indicated that a DDPP was responsible for the decision to prosecute or stop a prosecution. Adv Naidoo did not have that authority. He considered the unsuccessful representations by the accused. It had never been the intention to withdraw the charges against the accused (para 48).

He further testified that he was shocked when adv Naidoo showed him the agreement (exhibit X). He stated that it was unlawful, did not fall within the authority of the NPA, and was done without his knowledge and consent. At that stage he decided not to withdraw the agreement, as the agreement was not prejudicial to the NPA. He also indicated that the state fulfilled its obligations in the agreement by deliberating on the charges and communicating the outcome to the accused after the full amount had been paid. He indicated that the accused did not fulfil his obligations in terms of the agreement. Adv Naidoo did not testify at the proceedings (paras 49–54).

The legal representative for the accused applied for the record of the proceedings to be accepted as evidence and the court allowed the record of the transcriptions as evidence in terms of section 235 of the CPA. The previous proceedings revealed that adv Naidoo had erroneously informed a previous court that the agreement had been made an order of court, ABSA obtained a civil judgment against the accused for payment of the R1 million but that the accused still had to pay an outstanding amount of R500 000, the outstanding amount of R500 000 had to be paid before deliberations on the representations could be made, and when the accused applied for permission to travel abroad, the outstanding amount of R500 000 was used as a reason to oppose the application (para 61).

2 Accused's submissions

The accused's submissions can be summarised thus: (a) adv Naidoo entered into an agreement with the accused which had no foundation in the CPA or other legislation. It was an agreement in favour of ABSA and for purposes alien to the administration of justice under law. The court processes were used for ulterior purposes or in such a way as to cause improper vexation and oppression. Adv Naidoo acted deliberately and consciously to facilitate payment to ABSA. It offended the court's sense of justice and propriety (paras 69.2, 78, 81). (b) The discretion of the prosecuting authority is not unrestrained. Prosecutors must exercise their discretion and powers in good faith so as to promote the statutory purpose for which they are conferred. This was not done by adv Naidoo (para 79). (c) The constitutional principle of legality requires that a decision maker exercises the powers conferred lawfully, rationally, and in good faith (para 80). (d) It was a misuse of the court's processes by those responsible for the fair and just administration of law. Continuing with the prosecution would be inconsistent with the recognised purposes of the administration of criminal justice (para 81).

3 State's submissions

The state's submissions can be summarised thus: (a) the NPA exercised its discretion in terms of the authority conferred by section 179(2) of the Constitution of the Republic of South Africa, 1996 to institute proceedings against the accused and to continue with those proceedings (paras 82, 83). (b) The accused's evidence should not be accepted and he failed to prove abuse on the part of the NPA. The prosecution had never been wrongful or for an improper purpose. Reasonable and probable grounds exist for prosecuting, the existence of which is undisputed (para 84). (c) There was no evidence that the state had an ulterior motive in instituting or continuing the prosecution. What happened between adv Naidoo and the accused did not change the position. There are no objective grounds for finding any abuse of the court's process (para 85). (d) In the alternative, even if the court were to find that the conduct of adv Naidoo amounted to an abuse of process, it did not warrant an intervention by the court in putting an end to a constitutionally mandated prosecution (para 86).

4 Judgment

Even though the plea was not strictly about the title of the prosecutor, it was held that section 106(1)(*h*) also applies where it is contended that the prosecution constitutes an abuse of the court process, albeit in the context of a private prosecution (*Singh v Minister of Justice and Constitutional Development* 2009 1 SACR 87 (N) 92i–93c; paras 6, 7).

In *Solomon v Magistrate Pretoria* 1950 3 SA 603 (W) 607F–H, the court noted that where a process of the court serving a particular purpose was used to achieve a completely different object – the oppression of an adversary – it amounted to an abuse of process. The court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings (*Western Assurance Co v Caldwell's Trustee* 1918 AD 262; *Corderoy v Union Government* 1918 AD 512 517; *Hudson v Hudson* 1927 AD 259 267).

In *Phillips v Botha* 1999 2 SA 555 (SCA), the court, referring to *Solomon*, confirmed that where an attempt is made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the court to prevent the abuse of such machinery. However, the court's power had to be exercised with great caution and only in a clear case (para 7).

In the present case the prosecution was not instituted by a private prosecutor but by the DDPP. When the prosecution was instituted many years ago, it could not have been argued that the prosecution was for an ulterior, collateral, or improper purpose. It is now argued that if a prosecutor (adv Naidoo) abuses his or her position many years later to the detriment of the accused, it will affect the title of the prosecutor in a broad sense, and the accused would be entitled to invoke section 106(1)(*h*). The same should apply if the conduct is condoned by the prosecuting authority (para 8).

The court also referred to *Ndluli v Wilken* 1991 1 SA 297 (A) where the accused raised a section 106(1)(*h*) plea that the prosecutor lacked title to prosecute, as the State breached an agreement not to prosecute. The court interpreted the reference to "prosecutor" in the section to refer to the prosecutor in court and not to the State. It is an objection against the right or authority of that person to act as the prosecutor in the case (306C). Based on the *Ndluli* decision, the section does not provide for a complaint against the prosecuting authority or the State. However, the conduct of Adv Naidoo is not excluded from the provision (paras 9–13).

The court held that the term "prosecutor" in section 106(1)(*h*) was not limited to the prosecutor before court on the day that the charges are put to the accused, but to any prosecutor "who appeared or appears [in court] in the matter". The court explained that to argue differently would mean that any previous abuse of process by a prosecutor could merely be ignored by replacing the court prosecutor (para 14).

The court found that the majority of the issues were actually common cause, including that the accused made full payment (although not timeously as per the agreed dates), and that ABSA confirmed receipt of the payment. However, it was not common cause that adv Naidoo verbally informed the accused prior to the signed agreement that the matter would be withdrawn should he pay the R1 million to ABSA (paras 62, 63). The court found that the probabilities favoured the accused in as far as it was highly improbable that the accused would have paid the R500 000 in his difficult financial position, if he had not been led to believe that the matter would be withdrawn by adv Naidoo (para 67).

However, the accused did not bring an application to enforce the agreement to withdraw the matter but rather relied on section 106(1)(*h*). The question is accordingly – what effect did the agreement have in relation to the plea in terms of section 106(1)(*h*)? Did it constitute an abuse of prosecutorial powers which brought the administration of justice into disrepute? If so, was this an abuse of the court process? Was the prosecutorial integrity tarnished to such an extent that the administration of justice could be redeemed only by a permanent stay of prosecution (paras 68, 88)?

Relying on section 179(4) of the Constitution, section 32 of the National Prosecuting Authority Act 32 of 1998 ("NPA Act"), and the Code of Conduct for Prosecutors, the court held that a prosecutor was expected to perform his or her duties in good faith, without fear, favour, or prejudice and subject only to the Constitution and the law (paras 71–74). A prosecutor must act within the framework of the law when dealing with an accused. An act exceeding a statutory power is invalid under the Constitution, in terms of the doctrine of legality (*Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC)).

Adv Naidoo must have been aware that she did not have the authority to withdraw the matter. She accordingly abused her position in informing the accused that the matter would be withdrawn upon payment of the R1 million. Even if she had not given an undertaking that the matter would be withdrawn, she must also have been aware that she did not have the authority to enter into contracts on behalf of the State. Even more serious abuse occurred when adv Naidoo informed the court that the agreement was made an order of court. In doing this she did not act in good faith. When she opposed the travel request, she persisted that payment be made in terms of an unlawful agreement to the detriment of the accused (paras 91–93).

The court held that the principle underpinning the abuse of process doctrine was the maintenance of public confidence in the administration of justice. In *Moevao v Department of Labour* [1980] 1 NZLR 464, the New Zeeland Court of Appeal described the principle as follows:

> "It is essential to keep in mind that it is the 'process of law', to use Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the Court system. It is the function and purpose of the courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase 'abuse of process' by itself does not give sufficient emphasis to the principle that in this context the Court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general" (cited in *Moussa* para 94).

The conduct of Adv Naidoo must be seen in this context. The mandate and functions in terms of the Constitution, the NPA Act, and the Code of Conduct for Prosecutors did not include facilitating the payment of legal fees by the accused to the complainant. Adv Naidoo got personally involved in the matter and provided incorrect information to the court. Even if her actions had been inadvertent, she favoured the complainant to the detriment of the accused. Adv Naidoo was accordingly held to have abused her position as prosecutor (paras 95–99).

However, it cannot be said that the institution or continuation of the matter would constitute an abuse of the "court processes". The prosecution is not conducted for an ulterior motive, nor is it vexatious or frivolous, or designed to oppress the accused (para 99).

The question remains whether the abuses of adv Naidoo affected the title to prosecute as contemplated in section 106(1)(*h*). In this case the indictment was signed by the DDPP and adv Naidoo was not vested with title beyond the right to represent the prosecuting authority in court. It was the DDPP's prerogative to prosecute the accused or to stop the proceedings. In ordinary criminal proceedings there is not the same *nexus* between the prosecutor and the person who holds the title to prosecute as one finds in a private prosecution. The abuse of process did not affect the title to prosecute which vests in the prosecuting authority represented by the DDNP. The plea, therefore, could not be upheld (paras 100–103).

5 Discussion

Certain interesting legal aspects emerged in this matter. The first aspect concerns the meaning of the term "prosecutor" in section 106(1)(*h*). The accused objected to the conduct of the prosecutor who was previously involved with the matter, as well as the conduct of the relevant DDPP who instituted the prosecution and oversaw the prosecution on behalf of the state.

The term "prosecutor" is not defined in the CPA. However, the term is a well-known one, referring to a person, usually a public official, who institutes or conducts criminal proceedings against an accused (see, for example, the definition of "prosecutor" and "prosecute" in the *South African Concise Oxford Dictionary* (2002) 936). The term includes state advocates appointed at the various offices, directorates, and courts (see the definition of "prosecutor" in s 1 read with s 6 and 16 of the NPA Act).

No doubt the term refers to the prosecutor that appears in court at the time of pleading (see also *Ndluli v Wilken*; *S v Chao* 2009 1 SACR 479 (C) 488). Perhaps not so clear is whether the term also includes a prosecutor who was previously involved with the matter and the DDPP.

In *Moussa* it was held the term "prosecutor" in section 106(1)(*h*) included any prosecutor "who appeared or appears [in court] in the matter" (para 101). The court explained that to argue differently would mean that any previous abuse of process by a prosecutor could merely be ignored by replacing the court prosecutor. This inclusion, of course, does not prevent any abuse of process by a previous prosecutor who was involved in the matter, but did not appear in the matter, from being ignored.

Nonetheless, it is submitted that in this regard the court erred. The intended objection in terms of section 106(1)(*h*) is not to cure the abuse inflicted by a previous prosecutor involved in the case (or by the DDPP); rather, it is against the right or power of the person before the court to act as prosecutor in the case. In the ordinary sense the term further refers to a person and not to an entity. The term, therefore, does also not include the prosecuting authority or the state (*Ndluli*; *Munuma v S* (CC 03/2004) [2018] NAHCMD 142 (29 May 2018) para 14; *S v Zuma* [2022] 1 All SA 533 (KZP); Du Toit *et al Commentary on the Criminal Procedure Act* (looseleaf, 2022) 15-39).

In addition, it does not follow that any previous prosecutorial abuse of process could merely be ignored by replacing the court prosecutor, if the scope of 106(1)(*h*) is not widened to include any prosecutor who appeared or appears on behalf of the state. It may not be necessary to rely on section 106(1)(*h*) to place the objection before court. The accused can rely on his or her right to be treated fairly during the criminal justice process in terms of section 12 or section 35(3) of the Constitution, depending on the circumstances (*Ferreira v Levin NO; Vryenhoek v Powell NO* (No 2) 1996 2 SA 261 (CC); *De Lange v Smuts NO* 1998 3 SA 785 (CC)). In *Moussa* the accused was treated unfairly because adv Naidoo entered into a plea agreement with the accused without the authority to do so, persisted in its performance, and led the accused to believe that the charge would be withdrawn upon payment of the money.

The decisions by the DDPP in *Moussa* to condone or not withdraw the agreement, not to prevent the enforcement of the unlawful agreement, and to continue with the prosecution, could also have been taken on review by the accused and set aside. The accused could further have applied to the court to uphold the agreement and order a permanent stay of prosecution. There is, therefore, no need to pursue a forced meaning of the term prosecutor in section 106(1)(*h*).

Because the objection was not against the prosecutor in court, the reliance on section 106(1)(*h*) was accordingly misplaced. The objection in terms of the section further available to the accused only at the time of pleading (see also *S v Delport* (unreported, GNP case no A458/2012, 13 June 2013) para 74(*b*)).

As far as the meaning of the term "title" in section 106(1)(*h*) is concerned, the objection may, *inter alia*, be against the lack of authority (such as that the prosecutor was not properly appointed), non-compliance with jurisdictional requirements, and the absence of *locus standi* of the prosecutor (*S v Bekker* [1977-9] BSC 132 134D; *Nundalal v Director of Public Prosecutions KZN* (AR723/2014) [2015] ZAKZPHC 25 (8 May 2015) para 54; *Munuma*; *Zuma*).

The objection may also be against an abuse of process. An abuse of process takes place if the process is used for an improper, ulterior, or collateral purpose. The power to object should be exercised with great caution and only in a clear case where the purpose of the process in a criminal case is used for a totally different object than to attain criminal justice (*Singh*; *Solomon; Hudson*; *Philips*).

Even if it is accepted that a lack of title for purposes of section 106(1)(*h*) could be grounded in the conduct of the prosecutor who was previously involved with the matter, as was found by the court in *Moussa*, I submit that it cannot be said that the conduct of the previous prosecutor was for a different purpose than to obtain criminal justice.

It was common cause that ABSA, the complainant, did not request and was not involved with an agreement to get money from the accused. I also submit that the evidence does not suggest that the purpose of adv Naidoo was anything other than to settle the matter. It is not uncommon for the prosecuting authority to come to an agreement with an accused to withdraw a matter if the losses incurred by the complainant are reimbursed (even though the agreements are usually regarding much smaller amounts of money).

It is standard practice to afford the complainant an opportunity to make representations regarding the content of the agreement (see also ss 105A and 300 of the CPA in terms of which the complainant must be consulted regarding the content of a plea agreement and compensation, respectively). The fact that the previous prosecutor did not have authority to enter into an agreement with the complainant does not affect the purpose of the conduct. The conduct was most probably motivated by a reluctance to go to trial. The reliance on the lack of title in section 106(1)(*h*) in *Moussa* accordingly also was misplaced. I agree, therefore, that the accused's plea should not have been upheld, but for different reasons.

Finally, I submit that the accused in *Moussa* should have relied on the prior agreement and applied for a permanent stay of prosecution rather than rely on section 106(1)(*h*). Adv Naidoo created the impression and expectation that the matter would be withdrawn upon payment of the money. The DDPP, on behalf of the prosecuting authority, created the impression that adv Naidoo had the necessary authority to conclude the agreement by not withdrawing the agreement and not preventing the enforcement of the agreement when he became aware of the agreement. The accused reasonably believed that adv Naidoo had sufficient authority and relied on the impression created by adv Naidoo and the DDPP on behalf of the prosecuting authority, to the detriment of the accused.

It is not necessary to decide whether the agreement is an undertaking to which the prosecuting authority is bound under constitutionally sanctioned criminal procedure principles, or a contract where the prosecuting authority is bound in terms of the doctrine of estoppel.

As the prosecution's conduct led the accused reasonably to believe that the matter would be withdrawn when payment had been made, the prosecution will be treated as if it agreed to withdraw the matter, based on the principle of quasi-mutual assent (*Van Eeden v DPP, Cape of Good Hope* [2004] JOL 12916 (C)). The constitutional notion of basic fairness and justice dictates that the prosecution be held bound to an agreement it has made, or is deemed to have made. It is palpably unfair for the prosecution to enjoy the benefits of an agreement, or for an accused to act to his detriment in terms of an agreement, and for the prosecution then to be able to avoid doing what was contemplated in the agreement (see also *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 699 (C) 682j–683a).

The prosecution will also be bound to the agreement in terms of the doctrine principles of estoppel. In *Makate v Vodacom Ltd* 2016 4 SA 121 (CC), the Constitutional Court held that the principal would be bound simply on the ground of ostensible authority where it is shown that the principal by conduct or words caused an appearance that the agent had the power to act on its behalf. The court held that nothing more was required and that it was not necessary that the principal makes a representation to the person claiming that the agent has authority.

Under both sets of principles, the prosecution would have been bound to the agreement exactly as if adv Naidoo had authority to conclude the agreement (with regard to estoppel, see *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 1 SA 396 (SCA); *Glofinco v Absa Bank Ltd t/a United Bank* 2002 6 SA 470 (SCA); *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd* 2012 5 SA 323 (SCA)).

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THE CONSTITUTIONAL COURT TAKES A STEP TOWARD EMPOWERING WOMEN TRAPPED IN A PATRIARCHAL SYSTEM

***Bwanya v Master of the High Court* 2022 3 SA 250 (CC)**

OPSOMMING

Die Konstitusionele Hof neem ŉ tree ter bemagtiging van vroue wat in ŉ patriargale stelsel vasgevang is

Hierdie vonnisbespreking ontleed die uitspraak in *Bwanya v Master of the High Court* 2022 3 SA 250 (CC). Die bespreking fokus op die regsvraag of ŉ vrou wat nie getroud was met haar oorlede manlike lewensmaat nie wel ŉ eis het vir onderhoud teen sy boedel omdat sy bygedra het tot die groei van sy boedel en hom ondersteun het. Dit is duidelik dat dié hofuitspraak sal help om vrouens in Suid-Afrika te bemagtig in ŉ patriargale stelsel. Die uitspraak dui verder daarop dat die hof erken dat gesinne op verskillende maniere gevorm word. Kortliks is die feite van hierdie saak dat die partye saamgebly het en dat hulle beplan het om te trou, en selfs reëlings getref het om te trou. Die applikant, me Bwanya, het die oorledene, mnr Ruch, emosioneel ondersteun en die huishouding bedryf. Ongelukkig is Ruch oorlede voordat die partye kon trou. Daar is wel ŉ skikkingsooreenkoms in hierdie saak bereik, maar die hofsaak het voortgegaan omdat die hof bepaal het dat die uitspraak deurslaggewend sal wees vir Suid-Afrikaanse vrouens in