



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

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Status: Immediate

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Polovin v The Director of Public Prosecutions and Others (1230/2022) [2024] ZASCA 140 (17 October 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment in which it dismissed, with costs, Mr Polovin's appeal against an order of the Western Cape Division of the High Court, Cape Town (the high court).

In May 2012, Mr Polovin accessed Ms Green's confidential credit records, by using a colleague's login details to the Law Data System of TransUnion, without Ms Green's consent and knowledge. Mr Polovin initially denied accessing the records, but later admitted doing so. Ms Green laid a criminal charge of the contravention of s 86(1) of the Electronic Communications and Transactions Act 25 of 2002, which prohibits the access or interception of any data without authority or permission to do so. The Director of Public Prosecutions, Western Cape (the DPP) declined to prosecute Mr Polovin at the instance of the State. Ms Green subsequently elected to pursue a private prosecution against Mr Polovin.

Ms Green's counsel requested copies of correspondence, the docket, and a certificate of *nolle prosequi* from the DPP. The certificate was issued on 20 May 2020, but it lapsed due to proceedings not being instituted within three months. The docket was not available until 25 August 2020, which docket was needed to institute proceedings. On 9 September 2020, Ms Green's counsel applied for a re-issue of the certificate with an additional charge of defeating or obstructing the administration of justice. The certificate was re-issued on 14 October 2020, adding the additional charges and the summons for the private prosecution was issued on 27 November 2020.

Mr Polovin launched a frontal challenge to the private prosecution in the high court in two parts. In Part A, Mr Polovin challenged Ms Green's *locus standi*, the jurisdictional requirements of s 7(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA), the re-issue of the certificate dated 14 October 2020, and the inclusion of additional charges. In Part B, Mr Polovin sought relief that the summons commencing the private prosecution should be declared unfounded and vexatious, as it constituted an abuse of court processes. He further sought an order against Ms Green interdicting her from proceeding with the private prosecution, as it offends public policy. The high court dismissed both Parts A and B of the application, with costs, and further dismissed an application for leave to appeal those orders. Mr Polovin subsequently petitioned the SCA for leave to appeal, which petition was granted and the SCA granted an order referring the application for leave to appeal for oral argument. The order further stated that the parties must be prepared, if called upon to do so, to address the SCA on the merits.

The issues that fell to be decided by the SCA were first whether leave to appeal should have been granted in terms of s 17(2)(b) read with s 17(1)(a)(i) and (ii) and s 17(6)(a)(i) and (ii) of the Superior Courts Act 10 of 2013.

Second, in relation to Part A, whether the jurisdictional requirements for the issue of the certificate in terms of s 7(1)(a) of the CPA were met; whether in terms of s 7(1)(a) Ms Green had *locus standi* had a substantial and peculiar interest in the actual injury individually suffered; and whether the Acting DPP was entitled to re-issue the certificate and include additional charges. Third, and in relation to Part B, whether the private prosecution should be declared unfounded and vexatious, and Ms Green be interdicted from further proceeding with the private prosecution of Mr Polovin on the grounds of public policy.

The SCA found that the application for leave to appeal should be granted as the decision being appealed involved a question that was of importance in law where a decision of the SCA was required to resolve differences in jurisprudence. The SCA found that the question of Ms Green's *locus standi* and whether she had substantial and peculiar interest arising from an actual injury individually suffered arose from the text of s 7(1)(a), which provides that these requirements must be proved by the person seeking to avail him/herself of the exercise of the right to institute private prosecution. The SCA emphasised that the DPP did not assess and evaluate evidence or hold an inquiry in issuing the certificate. All that was required of the DPP was to peruse the statements and affidavits in the docket, in order to *prima facie* verify that the jurisdictional requirements of s 7(1)(a) had been met. Therefore, the contents of the docket were the source of the verification of the information as to Ms Green's compliance with the prerequisites for the issue of the certificate. The SCA held that there was no merit in Mr Polovin's attack of Ms Green's alleged non-compliance with the jurisdictional requirements of s 7(1)(a).

The SCA found that Mr Polovin conflated the right to institute private prosecution and the lapse of the certificate. The certificate lapses three months from the date of its issue. The right to institute private prosecution in respect of an offence, except for the offences referred to in s 18 of the CPA, only lapses, or prescribes 20 years from the time the offence was committed. Therefore, the DPP may re-issue the certificate even in instances where the private prosecutor requests to include additional charges, which the State had initially not contemplated.

The SCA found that the relief sought by Mr Polovin in Part B, a declarator and an interdict, was a rehash of the grounds of appeal already dealt with in Part A. As a result, the SCA found that those contentions had no merit for the reasons already pronounced. The SCA further found that Mr Polovin did not present to the SCA any right that fell to be declared and therefore held that this was not a case where relief in the form of a declarator was warranted. The SCA further held that this was undoubtedly a frontal challenge intended to delay the instituted private prosecution. As a result, the SCA concluded that the appeal had no merit and fell to be dismissed, with costs following the result.

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