

GEORGIOS KATSIMBERIS  
and  
THE PROSECUTOR GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
**TAKUVA J**  
HARARE, 29 FEBRUARY 2024 & 29 OCTOBER 2024

*Advocate Chinyoka* for the applicant  
*F Kachidza* for the respondent

### **Opposed Court Application**

TAKUVA J: This is an application for an order compelling the production of the requested document which is the *Nolle Prosecui* certificate together with the full docket in the matter reported in CR 246-11-18 (CCD) REF DR 117- 11-18)

#### Background Facts

The applicant made a criminal complaint against one Kenneth Raydon Sharpe. The police opened a criminal docket under CR 246-11-18, DR 117- 11-18. When Sharpe was not prosecuted, Applicant instructed his lawyer to write to Respondent urging the Prosecutor General to prosecute Sharpe. There was no response and the lawyer wrote again requesting a response.

On 19 August 2022, Respondent finally responded advising Applicant to comply with section 16(2) of the Criminal Procedure and Evidence Act [Chapter 9:07] (The Code). Applicant complied with section 16(2) and insisted on being granted the *Nolle prosecui* certificate. However nothing positive materialize leading Applicant to file this application seeking the following relief;

- “1. The Respondent be and is hereby ordered to furnish the Applicant with a certificate of *Nolle Prosecui* in relation to the criminal complaint against Kenneth Raydon Sharpe together with the full docket in the matter reported in CR 246-11-18 (CCD Ref DR 117- 11-18).
2. Costs to be borne by the Respondent.”

The respondent opposed the application arguing that prosecution was never at any stage declined.

### Applicant's Case

Applicant submitted that he is entitled to the certificate of *Nolle Prosequi* since he has complied with section 16(2) of the Act. He also argued that since he has made several attempts to acquire this certificate without any success the Respondent must be compelled to supply the certificate. Further, Applicant stated that the Respondent has clearly refused to prosecute Sharpe but at the same time refuses to issue the certificate to enable Applicant to prosecute Sharpe privately. Not only that, the Respondent is also opposed to this application.

Reliance was placed on section 13 and 16 of the Act for the proposition that where the Respondent declines to prosecute he or she is enjoined to issue a certificate of *Nolle Prosequi* once he or she is requested by a party who intends to institute a private prosecution. According to the Applicant, after reporting Sharpe a docket, was prepared after which the matter was brought to the Respondent's attention. After assessing the docket, Respondent declined to prosecute Sharpe without a justified reason.

Respondent's officer one Chimbari assessed the evidence in this docket and declined to prosecute Sharpe. The docket had three (3) other persons on it, but only one John Van Blerk had a warned and cautioned statement recorded. It was further argued that another officer in the National Prosecuting Authority one Justin Uladi read the docket and concluded that the State would wait for the outcome of a different matter involving the complainant in Sharpe's case. It was applicant's submission that the Respondent is not attending to this matter with the diligence it requires because Respondent did not bother to give reasons for the reluctance in granting Applicant the certificate of *Nolle Prosequi*. It was also contented that Applicant's rights have been deprived despite that he has been able to satisfy the elements that have to be satisfied. Therefore, Applicant ought to be granted the certificate.

Applicant submitted that according to the docket, Sharpe was at large out of the jurisdiction, he returned when his matter was "withdrawn." It appears that Sharpe was placed on remand but the charge was withdrawn before plea on 6 July 2019. Nothing has happened to him since then. Applicant further submitted that a docket exist against Keneth Raydon Sharpe, Michael John Van Blerk and another.

Finally it was submitted that the Respondent has declined to prosecute the matter and Applicant is prompted to seek the relief sought in the draft order because he is an interested party who has presented a substantial and peculiar interest in issues of the trial, arising from injury of deliberate misrepresentation which enabled fraudulent cancellation of the approved diagrams of which Applicant has individually suffered in the consequence of the committed offence.

Accordingly Applicant prayed for an order compelling the production of a certificate of *Nolle Prosecui* together with the full docket in the matter reported in CR 246-11-(CCD REF DR 117-11-18 and costs of suit.

#### Respondent's Case

Respondent opposed the application through an Opposing Affidavit filed by Mr Justin Uladi the Acting Deputy Prosecutor General operations in the employ of the National Prosecuting Authority.

It is conceded that Respondent received correspondence from Applicant requesting to be granted a certificate of *Nolle Prosecui*. It is further conceded that Applicant was requested to comply with section 16(2) of the code. A perusal of the docket revealed that it referred to Kenneth Raydon Sharpe, Michael John Van Blerk and POKUGARA PROPERTIES (Pvt) Ltd. Surprisingly accused person was Michael John Van Blerk meaning that Raydon Sharpe and POKUGARA Properties (Pvt) Ltd were not reflected as accused persons. Similarly, the State outline suffered from the same defect.

According to Mr Uladi, Sharpe and Pokugara Properties were never charged with any offence and their office did not consider them as accused persons. In his view, it would be irregular and premature to apply for a certificate of *Nolle, Prosecui* in respect of a person who has not been charged with any offence.

As regards Mr Chimbari's comments on the docket, Respondent argued firstly that it was not a final decision on whether or not to prosecute. Secondly that he was "seeking clarification from the police." In terms of section 13 and 16 of the code, Respondent is enjoined to embark on a two stage inquiry before arriving at a final decision on whether or not to grant a certificate of *Nolle Prosecui*. The first stage is whether or not to prosecute at the public instance, while the second is whether or not to grant the *Nolle Prosecui* certificate.

Respondent contends that the first stage in the present matter was not reached therefore there can be no question of considering the second stage. Further it is apparent from a glance at the face of the docket that there are three (3) accused persons named above. However according to Mr Uladi a reading of the entire docket reveals that only one accused person Michael Van Blerk was warned and cautioned. The Charge Sheet and State Outline related to Michael Van Blerk only. According to the Respondent, this means that the other two persons were never charged with any crime. In that regard they cannot be referred to as accused persons.

It would be irregular so the argument went to apply for a certificate of *Nolle Prosecui* in respect of Sharpe, a person who was never charged with any offence.

#### ISSUE FOR DETERMINATION

The sole issue is whether or not the Respondent should be ordered to furnish the Applicant with a certificate of *Nolle Proseceui* in relation to the criminal complaint against Kenneth Raymond Sharpe together with the full docket in matter reported in CR 246-11-18(CCA REF DR 117-11-18)

#### The Law

In terms of the Law, in any case in which the State has declined to prosecute for an alleged offence, any private party can prosecute the person alleged to have committed the crime. Section 13 of the Code provides as follows:

“In all cases where the Prosecutor General declines for an alleged offence any private party, who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence may prosecute in any court competent to try the offence, the person alleged to have committed it.”

Section 16 of the Code provides as follows:

“Except as is provided by subsection (2), it shall not be competent for any private party to obtain the process of any court for summoning any party to answer any charge, unless such private party produces to the officer authorized by law to issue such process a certificate signed by the Prosecutor General that he has seen statements or affidavits on which the charge is based and declines to prosecute at the public instance and in every case in which the Prosecutor General declines to prosecute he or she shall , at the request of the party intending to prosecute, grant the certificate required.”

The clear literal meaning of these provisions was enunciated in *Maramwidze v Commissioner General Zimbabwe Republic Police and Prosecutor General* HH 208/14 as follows;

“The simple meaning of the above provision is that where the second respondent declines to prosecute, he is enjoined to issue a certificate referred to in that section once he is requested by a party who intends to institute a private prosecution. He has no discretion to refuse to issue the certificate. His constitutionally guaranteed independence and the concomitant discretionary powers relate to the making of a decision as to whether or not to prosecute. The discretion does not extend to refusing to give a *Nolle Prosequi* Certificate once there has been a request for that certificate by a party intending to prosecute.”

See also *Prosecutor General v Telecel* CCZ 8/14.

The Constitutional Court of Zimbabwe further interpreted the provisions of S16 of the code when it stated that:

“In other words, in terms of section 16 of the Act, the applicant is obliged to issue those certificates as that is what the law requires of him. What the courts have done is to simply interpret what the law says in ss 13 and 16 of the act. For as long as those sections are not set aside, the applicant is obliged to act in accordance.”(My emphasis)

Further the court in *Prosecutor General Zimbabwe (supra)*, stated:

“There is no magic about the interpretation of ss 13 and 16 of the Criminal Procedure and Evidence act, s 16 uses the word “shall” which connotes being compelled to do as provided once the Prosecutor -General declines to prosecute and it is found that the private prosecutor has a substantial and peculiar interest in the matter in terms of s 13, the former is peremptorily required to issue a certificate *Nolle Prosequi* to the latter.”

### APPLICATION OF THE LAW TO THE FACTS

The Applicant contends that prosecution was declined by Mr Chimbari a representative of the Prosecutor General. However what is clear is that Mr Chimbari only dealt with papers relating to one John Van Blerk. These documents were contained in a docket whose cover reflected Sharpe and a third person as accused persons. The charge sheet did not mention Sharpe and his warned and cautioned statement was not contained therein. Also the State’s summary of facts did not contain any allegations against Sharpe. Mr Chimbari then addressed the docket to the investigating officer after assessing the evidence contained therein. See entry no 76. The impression one gets from Chimbari’s entry is that he was not satisfied with the sufficiency of evidence to prove a criminal offence. When the docket got to the police, they entered “Withdrawn Before” plea on it.

In my considered view Chimbari did not decline to prosecute the criminal matter against Sharpe for the simple reason that there was no such case presented to him. In any event whatever decision Chimbari took or whatever words he wrote, relates to John Van Blerk and certainly not

Sharpe. Therefore, the contention that prosecution against Sharpe was declined by Chimbari on behalf of the Prosecutor General is erroneous. Accordingly I find that the Applicant has failed to satisfy the requirements of s 13 of the Code. The Applicant also submitted that Mr Uladi proffered a different reason why the certificate could not be given. The reason given was that the National Prosecuting Authority is waiting for the outcome of a different matter involving the Applicant who was a complainant in that matter. Applicant criticized this reasoning as an “abuse of office” since it was irrelevant to the case on hand.

I do not agree with the Applicant because it is a fact that there are a number of cases involving Sharpe and Applicant that were outstanding. In such a scenario facts can be intertwined to the extent it might be proper to await the outcome of one case before deciding on the fate of the other. In any event, even if it is found that the decision was imprudent or inappropriate, that does not in my view mean that prosecution was declined by the Prosecutor General in terms of section 13 of the Code. I do not find any *mala fides* in the reason proffered by Mr Uladi.

Evidently, the Prosecutor General did not at any stage decline to prosecute Sharpe’s criminal matter. I find that this application was prematurely made. The Applicant ought to have implored the Prosecutor General to invoke her powers in terms of the Code to find out what was happening to the docket involving Sharpe, instead of jumping the gun. In view of my earlier findings, s 16 does not come in. For the Prosecutor General to decline to prosecute at public instance he or she must have seen statements or affidavits on which a charge is based. *In casu*, this never happened.

#### Disposition

The application is devoid of merit and is hereby dismissed with no order as to costs.