

Special Plea That The Prosecutor Does Not Have Title To Prosecute

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Abstract : Section 106(1)(h) of the South African Criminal Procedure Act 51 of 1977 provides that an accused may enter a special plea that the prosecutor does not have title to prosecute. In a seminal matter (S v Mousa 2021 2 SACR 378 (GJ)) regarding section 106(1)(h), certain interesting legal aspects emerged. The first aspect concerned the meaning of the term “prosecutor”. More specifically, the question arose whether the term included a prosecutor who was previously involved with the matter, as well as the relevant Deputy Director of Public Prosecutions (DDPP) who instituted the prosecution and oversaw the prosecution on behalf of the state. The meaning of the term “title”, and with regard to the conduct of the “prosecutor”, the term “abuse of process,” were also raised and decided. In the paper, the facts, and the arguments in, and the decisions of the court, are discussed critically. The author argue that the intended objection in section 106(1)(h) is not to cure the abuse inflicted by a previous prosecutor or by the DDPP. I point out that the term “title” includes a lack of authority, non-compliance with jurisdictional requirements or absence of locus standi. I also point out that an abuse of process takes place if the process is used for an improper, ulterior or collateral purpose. I also argue that the accused should, instead of relying on section 106(1)(h), have relied on the prior agreement and applied for a permanent stay of prosecution.

Keywords : special plea, prosecutor, title, abuse of process

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