IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

S Bench.

In the matter between:

GCINUMUZI PETRUS MALINDI .... First Petitioner
TSIETSI DAVID MPHUTHI .... Second Petitioner
NAPHTALI MBUTI NKOPANE .... Third Petitioner
TEBELLO EPHRAIM RAMAKGULA .... Fourth Petitioner
SEKWATI JOHN MOKOENA .... Fifth Petitioner
SERAME JACOB HLANYANE .... Sixth Petitioner
THOMAS MADIKWE MANTHATA .... Seventh Petitioner
HLABENG SAM MATLOLE .... Eight Petitioner
POPO SIMON MOLEFE .... Ninth Petitioner
MOSIUOA GERARD PATRICK LEKOTA .... Tenth Petitioner
MOSES MABOKELA CHIKANE .... Eleventh Petitioner

and

THE STATE .... Respondent

Coram: CORBETT C J, BOTHA J A et NICHOLAS A J A

Heard: 24 AUGUST 1989

Delivered: 25 SEPTEMBER 1989

J U D G M E N T

NICHOLAS A J A

/2.......

This is an application on petition for directions concerning the prosecution of a criminal appeal.

The petitioners (who will be referred to collectively as "the appellants") were 11 of 22 persons who were indicted in the Transvaal Provincial Division on charges of treason, alternatively terrorism (in terms of s 54(1) of the Internal Security Act 74 of 1982), subversion (in terms of s 54(2) of that Act), murder and, after an amendment granted on 4 November 1985, furthering the objects of an unlawful organisation (in terms of s 13 of that Act).

In terms of s 145(2) of the Criminal Procedure Act 51 of 1977 ("the Act"), the trial judge VAN DIJKHORST J, summoned two assessors to assist him in the trial. They were Dr W A Joubert, formerly a professor of law, and since 1980 an honorary professor of law, at the University of South Africa; and Mr W F Krugel, the President

of the Regional Court for the Northern Transvaal.

The trial began at Bethal on 16 October 1985, and continued at Delmas from 4 November. The first two months were occupied with preliminary legal argument. The accused pleaded on 20 January 1986, and the first State witness was called on the following day. The State case closed in September 1986, and an application for discharge resulted in three of the accused being acquitted. The defence case was begun on 21 January 1987. On 15 November 1988 the learned judge began reading the trial court's judgment. The seventh, ninth, tenth and eleventh petitioners were convicted of treason, and the first, second third, fourth, fifth, sixth and eight petitioners were convicted of terrorism. The remaining eight accused were acquitted. The first, seventh, ninth, tenth and eleventh petitioners were sentenced to terms of imprisonment which they are now serving on Robben

Island. The remaining petitioners received suspended sentences.

The appellants made application to the trial judge for the noting of special entries on the record in terms of s 317 of the Act and for general leave to appeal.

The trial judge made certain of the special entries sought, but refused to make the others. He granted leave to appeal on the merits, limited in certain respects, to those accused who had been convicted of treason, and refused it to the others. The appellants intend to petition the Chief Justice for leave to appeal in respect of the areas in which leave was refused by the trial judge.

The trial, which became known as the Delmas trial, is believed to be the longest in South African legal history. It stretched over 37 months, during which

the court sat on 437 days. 278 witnesses (152 for the State and 126 for the defence) gave evidence. The record of evidence and argument comprises 459 volumes containing 27 194 pages. There are 1556 documentary exhibits which are composed of 14 425 pages. There were put in at the trial 42 video and audio tapes, 5 rolls of 16 mm film and numerous photographs and maps. The trial court's judgment took four days to deliver and runs to over 1500 pages. The hearing of the case in mitigation occupied four days, and the application for leave to appeal spanned three days.

The events which gave rise to the special entries to which this application relates, had their beginning on 10 March 1987. When the court sat on that day VAN DIJKHORST J made an announcement. He said:

> "Before the witness is sworn in, I would like to make a statement. It is the case for the State that the ANC called

for the formation of a United Democratic Front which was to organise, mobilise, condition, and politicise, inflame, indoctrinate, co-ordinate and/or activate the Black masses to participate in activities, deeds, projects, and/or violence whereby the Republic of South Africa is made ungovernable. It is the State's case that the UDF was formed with its aims, the unlawful overthrow and/or endangerment of the lawful government by violence and/or threats of violence and/or by other means which include or intend violence. It is the State's case that the UDF knows that it must unite, organise, mobilise, politically incite, condition and/or activate the Black masses to participate in acts and/or violence whereby the Republic of South Africa is made ungovernable and that, to attain this goal, *inter alia* propaganda attacks are used. It is the State's case that the UDF adopted broad guidelines for a program of action and in furtherance

of its aim to organise, mobilise and activate the Black masses around day-to-day issues, certain campaigns were decided upon. On 5 and 6 November 1983 the National Executive Council discussed a strategy to further the ANC and South African Communist party and/or UDF's campaign against the new constitutional policy of the government by a million signature campaign against the constitution, so it is alleged. It is alleged that this campaign was to improve the organisational capabilities of activists and general organisation of the UDF, to strengthen affiliated organisations and to create enormous propaganda against the government and its policies. This is the State's case. It has to be proved. I express no opinion on the State's chances in this respect. What is clear is that the million signature campaign is an important facet of the State's case. It follows that it merits dispassionate and unfettered consideration by judge and assessors.

When I approached my learned assessors to act in that capacity, I enquired whether they had had any relationship with the UDF. The answer was negative in both cases. Yesterday during the course of the morning, accused no. 6 was cross-examined on the million signature campaign. During the tea adjournment in a discussion of the case the learned assessor, Dr W.A. Joubert, informed me that he had in fact participated in the million signature campaign by signing one of its declarations. An example is EXHIBIT AS1 document 2 which has as its logo the UDF and on top One Million Signature Campaign and then the following declaration is set out to which the signatories subscribe :

> 'We, the freedom loving South Africans, declare for the whole world to know that we reject apartheid, we support the struggle and unity of our people against the evils of apartheid, we stand for the creation of a

> non-racial democratic South
> Africa free of oppression, economic
> exploitation and racism, we
> say no to the new constitution
> because it will further entrench
> apartheid and White domination,
> no to the Koornhof laws which
> will deprive more and more African
> people of their birthright,
> yes to the United Democratic
> Front, UDF, and give it our
> full support in its efforts
> to unite our people in their
> fight against the constitution
> and Koornhof bills.'

Whether the UDF's efforts to unite the people in their fight against the constitution, and inter alia the Black Local Authorities, that is the Koornhof bills, are unlawful and treasonable is one of the main issues in this case. I was perturbed at the implication of these facts and considered the matter from all angles last night. I also

consulted the learned judge-president
of the Transvaal Provincial Division.
I have regretfully come to the conclusion
that there is no option but to rule that
Dr W.A. Joubert has to recuse himself.
I hold that Dr Joubert has become unable
to act as assessor and in terms of Section
147 of the Criminal Procedure Act, no.
51 of 1977, I direct that the trial proceed
before the remaining members of the Court."

There followed an application by the accused for an order quashing the trial on the ground *inter alia* that the dismissal of Dr Joubert had been made without power and was wrong in law, and that in consequence the court was not properly constituted. In the alternative it was asked that the trial judge and Mr Krugel recuse themselves from the trial.

In support of the application reliance

was placed on two affidavits by Dr Joubert (one, "the first report", was annexed to the founding affidavit; the other,"the second report", was annexed to the replying affidavit.)

The hearing of the application commenced on 30 March 1987. Before counsel for the accused began their argument, VAN DIJKHORST J said that he would like to place certain facts on record. He then made a statement which covers some 16 pages. It was largely in reaction to Dr Joubert's reports. The learned judge referred to the relations during the trial between Dr Joubert and himself, and the circumstances which gave rise to, and discussions preceding,his decision to exclude Dr Joubert from further participation in the trial as an assessor. The statement was in some respects critical of Dr Joubert and of his competence as an assessor. It also dealt with certain allegations which had been made in the founding affidavit against Mr Assessor

Krugel.

During the argument the defence received a further report from Dr Joubert ("the third report") which was a response to the statement made by the learned judge on 30 March 1987. After argument, VAN DIJKHORST J ruled on 2 April 1987 that the third report was inadmissible, and that any direct or indirect reference to its contents would not be permitted. He made a similar ruling in respect of paragraph 6 of the second report. He indicated that it would not be permissible to contradict what he had said in his statement in regard to the events leading up to the exclusion of Dr Joubert.

Defence counsel then informed the judge that in view of his rulings the accused were not able to proceed with the application for recusal.

The application was then dismissed <u>in</u>

toto on 2 April 1987. Reasons for judgment were handed down on 10 April 1987. They are reported sub nom. S v Baleka & Others (4) 1988 (4) SA 688 (T), and the judgment will be referred to hereinafter as "the reported judgment".

During the application for the noting of special entries on the record, there was tendered to the court an affidavit to which a copy of Dr Joubert's third report was attached. VAN DIJKHORST J refused to accept this affidavit, stating that if it contained inadmissible evidence it could not be placed before the court. As far as he was concerned, the relevant special entry should be made on the question whether in law the trial court was correct in its ruling that the evidence was inadmissible. And in his judgment on the application for leave to appeal he said:

"As I firmly hold the view that my ruling

> on admissibility is correct I will neither here nor in a report in terms of section 320 of the Criminal Procedure Act 51 of 1977 refer to these discussions (_sc_. the _in camera_ discussions between judge and assessors). I trust that I will be afforded an opportunity of replying to such documents should the Appellate Division find that they are admissible."

The learned judge ordered that a special entry be made on the record in terms of paragraphs 1, 1.1, 1.2, 1.3, 1.4, 2, 3 and 7 of the draft handed to the court by the defence. These were set out in the judgment. Paragraphs 3 and 7 do not arise in the present proceedings. The paragraphs which do arise read as follows:

"1. Whether in connection with or during the proceedings, there were irregular and/or

illegal departures from and infringements of the formalities, rules and principles of procedure which the law requires to be observed, in that it is contended by the accused :

1.1 The trial judge wrongly construed section 147(1) of the Criminal Procedure Act No 51 of 1977 as being applicable to the circumstances described in the statement made by him on 10 March 1987, as a result of which, and without hearing any argument thereon, he wrongly concluded that he had the power to rule that in such circumstances Dr W A Joubert had become unable to act as assessor.

1.2 Thereafter, and on 10 March 1987 the trial judge,purporting to act in terms of section 147(1) of the Criminal Procedure Act No 51 of 1977, and without hearing any argument thereon, wrongly ruled that the assessor, Dr W A Joubert, had to recuse himself and had become unable to act as assessor, notwithstanding

that no application for recusal had been made either by the State or the accused, that Dr Joubert was not willing to recuse himself and that he was willing to continue as assessor.

1.3 Thereafter, having made such a ruling, and without hearing any argument thereon, the trial judge irregularly continued the trial before an improperly constituted court consisting of himself and the remaining assessor Mr W F Krugel and/or

1.4 During the course of the application for the quashing of the trial and the recusal of the trial judge alternatively the assessor Mr W F Krugel, the trial judge having made a statement on the morning of 30 March 1987, thereafter ruled that paragraph 6 of the second report of Dr W A Joubert, and the whole of the third report (which he refused to read notwithstanding the fact that to his knowledge it had come to the attention of the accused) were inadmissible, and that the accused had

to accept the correctness of and could not contradict what he had put on record in his statement, and thereby made it impossible for the accused to rely on the contents of the third report and paragraph 6 of the second report, and make submissions which, but for such ruling, would have been relevant to and relied upon in the application for the quashing of the trial.

2. The trial judge's ruling in relation to the admissibility of Dr W A Joubert's third report and paragraph 6 of his second report and his ruling that the correctness of the statement made by him on 30 March 1987 had to be accepted and could not be contradicted, precluded the accused from relying on evidence and making submissions which, but for such rulings, would have been relied upon and taken together with the other matters referred to in the affidavits filed in support of the application, would have constituted

> good grounds for the recusal of the trial judge and the assessor Mr W F Krugel."

Because of the magnitude of the trial and the complexity of the appeal, the legal representatives of the appellants sought an interview with the Chief Justice in order to discuss matters relating to the procedure to be followed in the prosecution of the appeal. The interview took place on 22 February 1989. Counsel for the appellants and representatives of the Attorney-General of the Transvaal were present. It was proposed by the appellants' counsel that the appeal on the special entries numbered 1 and 2 should be dealt with separately from and prior to the hearing of the main appeal, and on the basis of a comparatively short record. This course was opposed by the State, and it was then indicated by counsel for the appellants that a substantive application in this regard would be made.

An order was thereafter made by the Chief Justice giving directions in regard to the making of such substantive application, and *inter alia* suspending the duty of the appellants to order and prepare copies of the full trial record.

The appellants duly filed a petition in which they prayed for an order as follows:

1. That the special entries numbered 1 and 2 made by the trial Court be argued *in limine* and separately from the other issues in the main appeal.
2. In the event of the relief in paragraph 1 above being granted, that the papers contained in Annexure "A" to this Petition stand as the record for the purpose of the adjudication of the two special entries mentioned above.
3. Giving directions as to the further

prosecution of the appeal and the preparation and lodging of the record in the light of the rulings made in respect of prayers 1 and 2 above, and the order made by the Honourable the Chief Justice on 27 February 1989 ...."

In his opposing affidavit the Attorney-General asked :

1. that prayer 1 of the petition be refused;

2. that prayer 2 be refused and that, in the event of it being held that special entries 1 and 2 could be heard in limine, it be ordered that the petitioners should lay before the court a full record in terms of the Appellate Division Rules.

Two preliminary questions arise. Has the court the powers necessary to grant the relief claimed in prayers 1 and 2 of the petition ? And, if so, what considerations should affect the exercise of such powers?

Since there are no specific provisions

in the Rules of the Appellate Division, any such powers must be sought elsewhere. Although the court does not possess inherent power to enlarge the substantive jurisdiction which it has by virtue of the Criminal Procedure Act and any other relevant statutory provisions (Sefatsa & Others v Attorney-General, Transvaal & Another 1989(1) SA 821 (A) at 834 E), "there is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice." (Universal City Studios Inc. and Others v Network Video (Pty) Ltd. 1986(2) SA 734 (A) at 754 G per CORBETT JA). The learned judge of appeal there said that the dividing line between substantive and adjectival law is not always an easy one to draw, but that it was difficult to compose a closer definition of the distinction than that of Salmond Jurisprudence 11th ed at 504 - "Substantive law is concerned with the ends

which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained." (ibid at 754 H - 755 A).

The inherent power of the court to regulate its own procedure is epitomized in A D Rule 13, which provides -

> "13. The court may, for sufficient cause shown, excuse the parties from compliance with any of the aforegoing rules and may give such directions in matters of practice and procedure as it may consider just and expedient."

It is plain that the remedies sought by the appellants are procedural remedies and do not concern the court's substantive jurisdiction.

In their first prayer the appellants ask in effect that the appeal on the ground of the irregularities and illegalities stated in special entries 1 and 2 should

be heard at a preliminary hearing, and that the issues in the main appeal should stand over for later decision, if that should prove necessary.

This court is in principle strongly opposed to the hearing of appeals in piecemeal fashion. (See R v Adams and Others 1959 (3) SA 753 (A) at 763 B - F: S v Naude 1975(1) SA 681 (A) at 695 H). An exception may be made, however, where unusual circumstances call for such procedure (Adams, loc.cit;) or in "enkele gevalle van 'n besondere aard" (Naude, loc.cit). An illustration is afforded by the recent decision in Gqeba & Others v The State 1989 (3) SA 712 (A). In that case, after a protracted trial before a judge and two assessors, in the course of which one of the assessors had been discharged, seven of the fourteen accused were convicted of murder and sentenced to death. They appealed against the convictions and sentences,

and also on a special entry of an irregularity alleged to have stemmed from the discharge of the one assessor during the trial. When the appeal was called on 16 May 1989, an application was made for the postponement of the appeal on the merits, on the ground that the appellants' counsel had not had sufficient time to master the lengthy record. The court granted the postponement, but in the special circumstances of the case, agreed to hear the appeal on the special entry. On 24 May 1989 the appeal was allowed and the convictions and sentences were set aside.

There are no reported cases which discuss the factors which may influence the court to direct that an appeal be heard in stages. Guidance may, however, be obtained from the judgment of MILLER J in Minister of Agriculture v Tongaat Group Ltd 1976(2) SA 357 (D & C L D). The learned judge was there dealing with an application under

subrule (4) of rule 33 of the Rules of the Supreme Court, which deals with an analogous situation in trial actions.

The sub-rule is in these terms :

> "(4) If it appears to the court mero motu or on the application of any party that there is, in any pending action, a question of law or fact which it would be convenient to decide either before any evidence is led or separately from any other question, the court may make an order directing the trial of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question has been disposed of."

Some of the points made by MILLER J in the course of his judgment were these. Substantial grounds should exist for the exercise of the power. The basis of the jurisdiction is convenience - the convenience not only of the parties but also of the court. The advantages and disadvantages likely to follow upon the

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