



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: CCD30/2018P

In the matter between:

**THE STATE**

and

**JACOB GEDLEYIHLEKISA ZUMA  
THALES SOUTH AFRICA (PTY) LIMITED**

**FIRST ACCUSED  
SECOND ACCUSED**

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**Coram: Koen J  
Heard: 31 January 2022  
Delivered: 16 February 2022**

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**ORDER**

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1. The application for leave to appeal and all related applications, which include the application to adduce further evidence on appeal in terms of section 316(5)(a) of the Criminal Procedure Act 1977, the application for leave to appeal to the Supreme Court of Appeal on the grounds of section 317 of the Criminal Procedure Act 1977 and/or for a special entry of an irregularity or illegality to be

made on the record, and the application for leave to appeal to the Supreme Court of Appeal on the grounds of section 319 of the Criminal Procedure Act 1977 and/or for the reservation of questions of law for consideration by the SCA, are all dismissed.

2. The criminal trial shall proceed during the second and third terms of the 2022 court calendar of this court, where it has been set down, as previously agreed by all the parties, commencing at 10h00 on 11 April 2022, being the date to which the trial was adjourned on 26 October 2021.

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## JUDGMENT

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**Koen J**

### **Introduction**

[1] The proceedings giving rise to this judgment commenced with an application for leave to appeal against my judgment of 26 October 2021 (the main judgment),<sup>1</sup> dismissing the plea in terms of section 106(1)(h) (the special plea), read with section 106(4) of the Criminal Procedure Act 51 of 1977 (the CPA), which had been entered by the first accused, Mr Zuma.

[2] Sub-joined to the end of the written application for leave to appeal, and incorporated therein, was also an application 'for further evidence in terms of section 316(5)' of the CPA (the application for further evidence). Annexed to this composite document was an affidavit, termed 'Founding affidavit' deposed to by Mr Zuma's attorney, Mr Thusini, 'in support as per Section 316(5)(b).'

[3] The State filed an answering affidavit by Mr Downer, titled 'The State's Answering affidavit: The First Accused's application for leave to appeal & Application to

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<sup>1</sup> Reported as *S v Zuma and another* [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP).

adduce further evidence on appeal', on 10 December 2021. In response thereto, two replying affidavits, both deposed to on 12 January 2022 were filed on 13 January 2022. One is by Mr Zuma's attorney, Mr Thusini, titled 'Separate Replying affidavit in the Application to Adduce Further evidence on appeal'. The second replying affidavit is by Mr Zuma and is titled 'Mr Zuma's Replying affidavit in the application for leave to appeal (as directed by the presiding judge)'. The latter replying affidavit incorporates, from paragraphs 22 to 32, a 'Conditional Counter Application' claiming, at the end thereof, that 'in addition and/or alternatively to the section 316 grounds, leave to appeal to the Supreme Court of Appeal ought to be granted on the grounds of section 319 and/or section 317 of the CPA'.

[4] In considering the issues arising for determination in this judgment, I shall follow the categorization below as the most convenient:

- (a) The alleged irregular procedure I had adopted in fixing dates for the exchange of affidavits;
- (b) The alleged conflict of interest on the part of Mr Downer, as deponent to the answering affidavit;
- (c) The appealability of the main judgment at this stage of the proceedings;
- (d) The merits of the application for leave to appeal;
- (e) Whether the adjudication of the special plea should have taken the form of a trial;
- (f) The application in terms of s 316(5) of the CPA for further evidence to be led in the prospective appeal;
- (g) The relief sought on the grounds of s 317 of the CPA; and
- (h) The relief sought on the grounds of s 319 of the CPA.

Before dealing with the aforesaid *seriatim*, it is necessary, very briefly, to re-state the fundamental findings and basis of the main judgment, particularly as they are decisive of a number of the issues arising in this judgment, and set the tone for this judgment.

### **Fundamental findings in the main judgment**

[5] These are recounted in the briefest terms by way of introduction. They have been explained in detail in the main judgment.

[6] What was before this court to decide was only the special plea raised by Mr Zuma, nothing else, and in particular, not an application to have Mr Downer removed as the prosecutor. That was unequivocally clear from the terms of the written plea, and the heading to the affidavit filed in support thereof. It was also confirmed upon specific enquiry by me with both senior counsel for Mr Zuma, that is Mr Masuku SC, initially when the matter first came before me on 17 May 2021, and by Mr Mpofu SC, when he first appeared on 26 May 2021.

[7] The trial before this court formally commenced when the pleas by Mr Zuma and accused two, Thales South Africa (Pty) Limited (Thales), were entered on 26 May 2021. Both accused are entitled in terms of s 35(3)(d) of the Constitution to have their trial begin and conclude without unreasonable delay. The State, representing the general public, also has the right, in the greater interest of the administration of justice, that criminal trials begin and conclude without unreasonable delay.

[8] I am enjoined, inter alia by the decision of the SCA in *NDPP v Zuma (Mbeki and another intervening)*,<sup>2</sup> to which I am bound, to confine my judgment to the issues before the court, that is the special plea only, and ‘no other issues or . . . matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; [and] by failing to distinguish between allegation, fact and suspicion . . .’,<sup>3</sup> regardless of how attractive it might be to Mr Zuma to want to deal with any other possible causes of action that are not before this court. The main judgment was accordingly confined to the adjudication of the special plea.

[9] The primary issue, more specifically, was not whether Mr Zuma’s complaints might possibly require or justify the removal of Mr Downer as prosecutor, but whether

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<sup>2</sup> *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) paras 15 -19.

<sup>3</sup> *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) para 15.

they, assuming that they were established, would result in Mr Downer lacking the ‘title to prosecute’ as contemplated in s 106(1)(h) of the CPA.

[10] That enquiry depended on the meaning to be assigned to the words, ‘that the prosecutor has no title to prosecute’ in s 106(1)(h) of the CPA.

[11] That ‘prosecutor’ refers to the person prosecuting, and not the State, has been the law binding on this court<sup>4</sup> since at least *Ndluli v Wilken NO*.<sup>5</sup> No doubt arises in that regard.

[12] As to what is meant by ‘title’, was decided authoritatively in *Porritt and another v NDPP and others*.<sup>6</sup> The *ratio decidendi* in *Porritt* is clear. Complaints of an alleged lack of impartiality, or of bias on the part of a prosecutor, as in *Porritt*, might, allowing that prosecutors have to advance the State’s case and can therefore never be totally impartial, might in exceptional instances possibly impair the fair trial rights of an accused. But they do not affect the prosecutor’s title to prosecute. That does not mean that a prosecutor can never be removed, but such relief is to be claimed in a separate substantive application;<sup>7</sup> not pursuant to s 106(1)(h) of the CPA.<sup>8</sup> A number of

<sup>4</sup> Although the *ratio* in *Ndluli v Wilken NO en andere* 1991 (1) SA 297 (A); [1991] 1 All SA 256 (A) was accepted in the argument leading to the main judgment, in the application for leave to appeal, Mr Masuku SC disputed the correctness thereof. *Ndluli v Wilken NO* is binding on me. I am furthermore satisfied that it was correctly decided, and that Mr Masuku’s submission is wrong.

<sup>5</sup> *Ndluli v Wilken NO en andere* 1991 (1) SA 297 (A); [1991] 1 All SA 256 (A).

<sup>6</sup> *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168; 2015 (1) SACR 533 (SCA); [2015] 1 All SA 169 (SCA).

<sup>7</sup> Whether fair trial rights are infringed is an issue for determination by the trial court when in its discretion considered appropriate, and when the need to address such alleged infringement rights arises. The stage where it will be best considered, is in the discretion of the trial court. Often that might only be after ‘the materiality of any such allegations in respect of issues and evidence revealed to be relevant, are established’ (see main judgment para 77, with reference to *Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA), [2017] 4 All SA 726 (SCA) para 17). It might however happen that no evidence arising from a specific event complained of, is adduced in the trial, in which event the question of a possible infringement of fair trial rights will not arise. It is the quality and probative value of evidence that a trial court has to have regards to. I am bound by authority that the motive with which it is adduced, is irrelevant: ‘The motive behind the prosecution is irrelevant.’ (*National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] ZASCA 1, 2009 (2) SA 277 (SCA), [2009] 2 All SA 243 (SCA) para 37).

<sup>8</sup> Such an application was, by the express agreement of counsel in *Porritt*, in addition to the plea in terms of s 106(1)(h), before the court, but was dismissed on the facts. There is no such agreement or application before this court *in casu*.

alternative satisfactory remedies exist in our law for an accused if his fair trial rights are infringed. But they do not include success with a special plea under the rubric of s 106(1)(h) of the CPA

[13] Both *Ndluli* and *Porritt* are decisions of the SCA and accordingly binding on this court, even if wrongly decided, which I am not persuaded they were. Accordingly, those decisions were dispositive of the special plea. They are also dispositive of the prospects of success of the application for leave to appeal, and also some of the other applications pursued in conjunction with, and some conditionally in the alternative, to Mr Zuma's application for leave to appeal.

#### **Alleged irregular procedure in fixing dates for the exchange of affidavits**

[14] In paragraphs 5 to 9 of his replying affidavit, Mr Zuma contends that I directed that the State was to deliver an answering affidavit, and he a replying affidavit, in the application for leave to appeal, and that by doing so, this court adopted, in his words, a 'very problematic and potentially irregular procedure', because no law or procedural rule entitles the parties to deliver such affidavits.

[15] This allegation is factually incorrect for reasons which I shall set out below. It is also legally irrelevant, as the fixing of dates for the exchange of affidavits had no impact on whether the main judgment was correct or wrong. It only arose after the main judgment had been delivered and cannot conceivably, even if it amounted to an irregularity, taint the main judgment.

[16] As regards the factual incorrectness of what is alleged, Mr Zuma failed to deal with the correspondence that was exchanged between myself, the state, his attorney and the attorney for Thales, to establish a date for the hearing of the application for leave to appeal and the application for further evidence, and to fix dates for the exchange of affidavits in the application for further evidence, to ensure the expeditious disposal of that application. It is unfortunate that the allegation of an irregularity is made

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in the replying affidavit of Mr Zuma, and not in the evenly dated replying affidavit of Mr Thusini. Mr Thusini was the recipient of all the correspondence, and my directive relating to the exchange of answering and replying affidavits, which Mr Zuma complains of. He would then have addressed the context, being the chronology of correspondence, in which the fixing of the dates for the filing of the affidavits occurred. That, with respect, is what is required before an allegation of an irregularity is made against a judicial officer. It would then have been apparent immediately that the accusation of an irregularity was unsustainable. Regrettably, that was not done. Accordingly, a substantial part of this judgment will have to be devoted to setting out the contents of the correspondence that was exchanged, in some detail, adding unfortunately to the length of this judgment.

[17] The factual position is as follows. After the application for leave to appeal was filed on 10 November 2021, mindful of avoiding any unreasonable delays, I addressed a letter per email to all the parties<sup>9</sup> on that very same date, referring to the application for leave to appeal and stating in the second paragraph thereof:

‘The parties are invited please to nominate two alternative and earliest dates (preferably not in the same calendar week) suitable to lead counsel who will appear in the application, for the determination thereof. I shall endeavour to make myself available for one of the dates. Please could I hear from you by return.’

[18] Mr Downer, for the State, responded by email on 11 November 2021 indicating that he would ‘revert as soon as possible once counsel have agreed on the dates . . .’ He included the following message which he had addressed to Mr Thusini on the same date which stated:

‘Counsel for the State and counsel for Accused 2, Thales, are available for the hearing of the application for leave to appeal on any date between 15 November and 3 December 2021, except 24 November.

May I suggest that you provide Ms Griffin<sup>10</sup> with two dates on which your counsel are available between 15 November and 3 December,<sup>11</sup> except 24 November, on copy to me.’

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<sup>9</sup> The State, and the attorneys of Mr Zuma and the second accused.

<sup>10</sup> Ms Griffin is the judge's registrar.

[19] The email reply from Mr Thusini on 14 November 2021, as subsequently corrected for a typographical error,<sup>12</sup> was:

'I have consulted with our lead Counsels in the matter.

They are only available to argue the application for leave to appeal as from the 1<sup>st</sup> week of February [2022].'

[20] Mr Downer responded per email on 14 November 2021 at 8.10 pm recording the attitude of the State that Mr Zuma need not be present for the hearing of the application for leave to appeal; that the hearing be held on an online platform; that as is customary in applications of this nature, two hours would be more than sufficient for the hearing, suggesting 40 minutes each for the main addresses on behalf of Mr Zuma and the State, 20 minutes for the reply on behalf of Mr Zuma and 20 minutes for contingencies; that as regards the proposed hearing date, the State believed that, 'if practically possible, the application should be heard before the end of this term', and enquiring whether counsel for Mr Zuma would be available for a two hour online hearing any day except 24 November 2021, between Monday, 22 November and Friday, 3 December 2021. His email importantly concluded:

'If so, the State will deliver its *answering papers* in Mr Zuma's application in terms of section 316(5) of the Criminal Procedure Act and its *heads of argument* on that application and the application for leave to appeal *by close of business this coming Friday, 19 November 2021 or close of business five court days before the hearing date*, whichever is the later.

We look forward to your urgent response.' (emphasis added)

[21] I replied to the correspondence from the parties on Monday, 15 November 2021 expressing my concern at a two and a half month delay if the application for leave to appeal was only to be heard 'as from the first week of February 2022', enquiring whether the hearing could be held on an online platform, and suggesting time limits for argument, and urging counsel 'please to find a date for the application to be heard before the end of the year'.

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<sup>11</sup> 3 December 2021 was the last day of the court term. I would be on recess duty from 4 to 19 December 2021.

<sup>12</sup> 'February 2022' was substituted for 'February 2020'.



[22] Mr Thusini responded by letter six days later on 21 November 2021 reaffirming that 'both our Senior Counsel are unavailable to argue the application for leave to appeal this year as they are in different matters requiring virtual and physical hearings until the end of the term'; that Mr Zuma required 'a physical appearance and hearing is his preferred mode, depending of course on the date and his health condition', and that he wished 'his current Senior Counsel to continue representing him in his trial of the plea and would be seriously prejudiced should hearing be insisted upon in his Counsel's absence'. He concluded with a 'request for a direction to the effect that the parties should agree on any date from 31 January 2022 onwards, always subject to the approval thereof by the court'.

[23] In his reply, Mr Downer shared the concern about the further delay if the application for leave to appeal was only to be heard on or after 31 January 2022; that 'given Mr Zuma's very full application for leave to appeal, there would be no need for his counsel to prepare and deliver full heads of argument as well', and that '[t]he State submits that a fair pre-hearing procedure would be for it to deliver its answering papers in Mr Zuma's application in terms of section 316(5) of the Criminal Procedure Act and its heads of argument on that application and the application for leave to appeal, and for Mr Zuma then to deliver his replying affidavit in the application in terms of section 316(5) and his counsel's heads of argument in reply in both applications.'

It continued:

'if that is done, the oral hearing of the application will assume less importance than would be the case if there were no answering and replying heads of argument.'

And further:

'The State further believes that if neither of Mr Zuma's senior counsel is available for a two hour virtual hearing this term, one of his junior counsel can and should present his side's oral argument on the application.'

And finally concluded:

'The State undertakes to deliver its answering papers in Mr Zuma's application in terms of section 316(5) and its heads of argument on that application and the application for leave to appeal by close of business *five court days before the hearing date*.

If, in the circumstances, the Court decides against directing the hearing of Mr Zuma's application for leave to appeal this term, and that it be heard on or after Monday, 31 January 2022 instead, then the State request that the hearing date be any of Monday 31 January, Tuesday 1 February, Wednesday 2 February or Friday, 4 February 2022.' (emphasis added)

[24] My reply dated 22 November 2021 is set out in full below:

'Mr Thusini's reply<sup>13</sup> to my letter of 15 November 2021 and Mr Downer's response dated 22 November 2021 refer.

In view of the further delays that have ensued, it regrettably has now become impossible for me to accommodate the hearing of the application for leave to appeal in the remainder of this term. That is unfortunate.

The application for leave to appeal shall be heard on Monday, 31 January 2022. It shall be heard in open court, whether with Mr Zuma is present or absent.

I also fix the following dates:

(a) The State must file its answering papers to Mr Zuma's application on or before 15 December 2021, and Mr Zuma's replying affidavit, if any, on or before 03 January 2022.

(b) Mr Zuma must deliver his heads of argument on or before 17 January 2022 and the State its heads on or before 26 January 2022.

In their heads of argument counsel must please also address the issue whether the order sought to be appealed, is appealable at this stage of the proceedings.'

[25] The date for the filing of the replying affidavit was subsequently, on the written request of Mr Thusini on 2 December 2021 seeking a further indulgence, altered from 3 January 2022 to 12 January 2022, and the date for the filing of his heads of argument altered from 17 January 2022 to 19 January 2022. The other dates remained unaltered. In a subsequent letter dated 20 January 2022, Mr Thusini advised me that Mr Zuma's heads of argument would not be filed on 19 January 2022, but only on Monday morning, 24 January 2022.

[26] It will be apparent from the above chronology, that the complaint of an 'irregularity' is factually flawed, unfounded, and possibly opportunistic. Patently, the fixing of the dates for the exchange of an answering affidavit and a replying affidavit, if

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<sup>13</sup> That is Mr Thusini's letter dated 21 November 2021.

necessary, related to the exchange of affidavits to the founding affidavit by Mr Thusini in the application for further evidence. Mr Downer had previously made the proposal in respect of that application, being the application for further evidence, based on it and the application for leave to appeal still being heard during 2021, that the State would deliver 'its answering papers in Mr Zuma's application in terms of section 316(5) and its heads of argument on that application and the application for leave to appeal by close of business five court days before the hearing date.' When agreement on the date for the hearing during 2021 was not forthcoming and I determined the date for the hearing of the application for leave to appeal and the application for further evidence, by acceding to the request of Mr Thusini, that both would be heard on 31 January 2022, it was simply prudent for me to fix not only the date by which the State should file its answering affidavit in the application for further evidence (previously suggested to be five days before the hearing) to be 15 December 2021, but also to provide for the filing of a replying affidavit, if any, just over two weeks later by 3 January 2022 (which was later changed, as requested by Mr Thusini, to 12 January 2022). That is what I did.

[27] There was no 'founding affidavit' in the papers, other than the founding affidavit by Mr Thusini in support of the application for further evidence in terms of s 316(5), to which an answering affidavit could have been filed in the application for leave to appeal. In the context of the correspondence, the only application in respect of which affidavits were required to be exchanged, was the application to lead further evidence on appeal. The only dates being mooted for the filing and exchange of affidavits, were in relation to the application to lead further evidence on appeal.

[28] The directives in my letter of 22 November 2021 could only have related to the dates for filing of answering papers and Mr Zuma's replying affidavit in 'Mr Zuma's application' to lead further evidence on appeal. My letter specifically referred to the 'application' (in the singular), in respect of which such an exchange of affidavits was required. No dates for the exchange of affidavits were fixed in respect of the 'applications' (plural) i.e. to refer not only the application for further evidence *but also* to include the application for leave to appeal. As already indicated, there was no founding

affidavit in the application for leave to appeal to which an answering affidavit, and a replying affidavit, if any was required, could be filed. There could have been no doubt to any reasonable reader, in the context of that correspondence, that the fixing of the dates for exchanging affidavits related to the application (singular noun) for further evidence only.

[29] Mr Thusini furthermore had unrestricted access to contact me to have the directive clarified, if it required any clarification. As indicated above, he subsequently wrote to me to request extensions of the dates fixed for the filing of a replying affidavit, and for filing Mr Zuma's heads of argument, which indulgences were granted. The fourth court term for 2021 ended on 3 December 2021, but I was on recess duty thereafter from 6 December 2021 until 19 December 2021. Mr Thusini has not shied away from addressing correspondence to me requesting indulgences in the past, and more recently, advising me that agreement had been reached with the State that Mr Zuma's heads of argument would be filed late on 24 January 2022. On 2 December 2021, I had received a request from him for the dates for filing of the replying affidavit and the heads of argument to be altered to later dates, to suit Mr Zuma. No enquiry was made or objection raised regarding the affidavits to be filed in respect of the 'application' (singular), because the application to which the affidavits related, was clear in the context. Applications for leave to appeal are not determined on the contents and an exchange of affidavits. If there was any doubt about what the dates fixed for the exchange of affidavits related to, or whether contrary to established practice, it should possibly be construed as affidavits being required also in respect of the application for leave to appeal, then that could easily have been confirmed by a simple enquiry being directed to me. I was available even after 19 December 2021 for such an enquiry to be made. No such enquiry was made.

[30] It is so that the State in its answering affidavit in part dealt with the merits of the application for leave to appeal. But that was not at the direction of this court. And obviously what a party might wish to include in an affidavit, even if possibly irrelevant, but if considered necessary to answer the allegations in a founding affidavit, is not

within the control of any court. At best, if allegations are included in the State's answering affidavit in the application for further evidence that are scandalous, vexatious, or more importantly for present purposes, irrelevant, then application could be made for such allegations to be struck out. No such application was made.

[31] Further, even if a construction was justified that this court had fixed dates in both applications (plural) for the filing of affidavits, that is including the application for leave to appeal as well, this is not an 'irregularity', or even if it is, one of any consequence which affects the proceedings. It certainly does not taint the proceedings which culminated in the main judgment, as 'the irregularity' only arose after the main judgment had been delivered. Mr Zuma has not demonstrated any prejudice occasioned by the direction. Nor could he, given that the State's answering affidavit gave him and his legal representatives early notice of the State's defences to his application for leave to appeal, and to his application for further evidence on appeal. That granted him ample time, from 15 December 2021 until 12 January 2022, and an opportunity to respond by means of a replying affidavit. Indeed, it allowed him to introduce a 'conditional counter application' to his own applications, albeit only in reply, raising additional issues in reply. No legally cognizable prejudice was occasioned to him.

[32] Further, if Mr Zuma is to pursue any petition to the Supreme Court of Appeal (SCA), rule 6 of the SCA rules provides for the delivery of answering and replying papers in petitions for leave to appeal where a high court has refused leave. Rule 19 of the Constitutional Court rules also makes provision for the delivery of a written response to applications to that court for leave to appeal.

[33] The State in its heads of argument also advanced a further alternative argument on this issue.<sup>14</sup> I do not consider it necessary to deal with this argument in this judgment.

<sup>14</sup> The submissions advanced, quoting the heads, was that:

'While the first accused is right in saying no law or rule of court provides for the delivery of answering and replying affidavits in an application in the High Court for leave to appeal – our law and rules of court are silent as to the manner in which an application for leave to appeal in the High Court is to be answered – no law or rule of court prevents the Court, in the exercise of its inherent power to regulate its own process conferred by section 173 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), from requiring the delivery of answering papers and permitting the delivery of a replying affidavit in such an application.

My directive was never intended to require, and properly construed in its context, never required the exchange of affidavits in the application for leave to appeal. The objection by Mr Zuma, which is advanced simply as an additional ground of appeal, falls to be dismissed.

### **Mr Downer's alleged conflict of interest**

[34] In paragraphs 10 to 12 of his replying affidavit Mr Zuma alleges that Mr Downer should not have deposed to the State's answering affidavit in these proceedings, because the special plea in terms of s 106(1)(h) CPA concerned him, Mr Downer.

[35] Mr Downer had deposed to the State's main answering affidavit in response to the special plea, without any objection from Mr Zuma, and correctly so, because Mr Downer was the person best equipped to answer the allegations against him. In the

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In *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) ("*Phillips*") para 49 the Constitutional Court ("CC") said:

"It may be that the High Court could legitimately claim inherent power of holding the scales of justice where no specific law directly provides for a given situation or where there is a need to supplement an otherwise limited statutory procedure .... This can wait for a decision in the future when such a case presents itself" (underlining added).

In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) paras 35-36, the CC added:

"The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that Courts in exercising this power must take into account the interests of justice" (underlining in the original).

In *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) para 30, the CC, citing section 173, went further than what it had envisaged in *Phillips* may validly be done, saying:

"Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules" (underlining added).' (Formatting as per the heads of argument.)

It was also pointed out in the State's heads that Mr Zuma's attorney, in his replying affidavit to the application in terms of section 316(5) of the CPA, at para 5, conceded that the State is entitled to file an answering affidavit in such an application. It was further submitted that '[n]owhere in the CPA or any rule of court is provision made for the State to do so, or for the applicant to reply'. It is further pointed out that this is what happens in practice where the State is permitted to file answering affidavits in applications 'under section 316(5) of the CPA (*S v Ngavondueza* 1997 (1) SACR 203 (NmH) at 205i-209h), just as it may be permitted by the Court to do so in an application under section 316(1)'.

The State accordingly submitted that the issuing of the direction was a proper exercise of this court's inherent power to regulate its own process.

present proceedings, Mr Downer has no conflict of interest with the State; on the contrary, they make common cause in opposing the grant of the application for leave to appeal and the other applications. Mr Downer has been designated and is authorised by the Director of Public Prosecutions for the KwaZulu-Natal Division of the High Court of South Africa to exercise, in all courts within her area of jurisdiction, the powers to prosecute Mr Zuma and Thales until the finalisation of the trial.<sup>15</sup>

[36] There is no substance to this objection and it falls to be dismissed.

### **The appealability of the order dismissing the plea in terms of s 106(1)(h) of the CPA**

[37] A decision in a criminal case before a single judge may be submitted to the SCA in four ways: as an appeal against the conviction or sentence with the leave of the trial court (s 316 of the CPA); as a special entry of an irregularity or illegality (s 317 of the CPA); where a question of law has been reserved for consideration by the SCA (s 319 of the CPA); and the instances in s 323 of the CPA (which do not arise in this judgement). Generally in regard to appeals, s 316 of the CPA provides for appeals only after conviction. It reads:

'Subject to section 84 of the Child Justice Act 75 of 2008<sup>16</sup> any accused *convicted* of any offence by a High Court may apply to that court for leave to appeal against such *conviction* or against any resultant sentence or order.'<sup>17</sup> (emphasis added).

[38] It has accordingly been stated, inter alia by Marais J in *S v Rosslee*<sup>18</sup> that:

'The general rule is plain. What are alleged to be wrong decisions made in the course of a criminal trial, and which are capable of correction by way of appeal or review *after the trial has*

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<sup>15</sup> This includes the powers to institute and conduct such criminal proceedings on behalf of the State (section 20(1)(a) of the NPA Act) and to carry out any necessary functions incidental to instituting and conducting such criminal proceedings (section 20(1)(b) of the NPA Act). Depositing to the State's answering affidavit in the present application would be incidental to such criminal proceedings.

<sup>16</sup> Which is not relevant to the present discussion.

<sup>17</sup> The phrase 'resultant order' was discussed in *S v Mkhonza* 2010 (1) SACR 602 (KZP) paras 26 – 33 in the context of s 309 of the CPA dealing with appeals from lower courts, which, apart from the provisos is substantially similar to s 316. It was concluded at para 28, referring to the decision of the Appellate Division in *S v Marais* 1982 (3) SA 988 (A), that 'a resultant order is an order that follows upon the conviction of the accused, either in lieu of or in addition to the sentence of the court, and that it should be penal in nature.'

ended, should not be permitted to be challenged before the trial has run its course unless there is a compelling reason justifying it.’ (emphasis added)

This is also consistent with the remark by Ogilvie Thompson JA in *Wahlhaus and others v Additional Magistrate, Johannesburg and another*<sup>19</sup> that ‘each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal’. Since the advent of the Constitution, Cachalia JA, in *S v Delport*,<sup>20</sup> also said:

‘To conclude this discussion on the appealability of legal questions — which include constitutional questions — arising from uncompleted criminal proceedings, the general rule, underpinned by s 35(3)(d) of the Constitution, is against permitting piecemeal appeals. It is therefore in the interests of justice that criminal trials should commence and be completed without unreasonable delay and that appeals should not be entertained before the trial is completed.’

The above statements recognized that the hearing of appeals in stages could thwart the speedy and final disposal of criminal proceedings.<sup>21</sup>

[39] Although leave to appeal before sentencing was therefore not readily granted because of the strong opposition to the hearing of appeals in a piecemeal fashion, in exceptional circumstances the Supreme Court of Appeal however did grant leave to appeal prior to sentence, or was prepared to hear an appeal in stages. It held in *Universal City Studios Incorporated and others v Network Video (Pty) Ltd*<sup>22</sup> that it could direct a piecemeal hearing of an appeal, in terms of its inherent powers to regulate its procedures in the interests of the proper administration of justice.<sup>23</sup>

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<sup>18</sup> *S v Rosslee* 1994 (2) SACR 441 (C) at 445F-H. *Rosslee* involved an issue regarding jurisdiction (see at 443A-D, as well as the headnote for a summary of the facts). Orders regarding jurisdiction in criminal matters are regarded as final order - see *S v Mamase and others* 2010 (1) SACR 121 (SCA) para 16 and *S v De Beer and another* 2006 (2) SACR 554 (SCA) para 5. See also *S v Acting Regional Magistrate, Boksburg, and another* 2011 (1) SACR 256 (GSJ) – held that the upholding of an objection on a charge sheet is a final order and thus appealable (para 23).

<sup>19</sup> *Wahlhaus and others v Additional Magistrate, Johannesburg and another* 1959 (3) SA 113 (A) at 120E. See also *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA) para 20.

<sup>20</sup> *S v Delport and others* [2014] ZASCA 197, 2015 (1) SACR 620 (SCA) para 27.

<sup>21</sup> *S v Majola* 1982 (1) SA 125 (A) t 132F-G.

<sup>22</sup> *Universal City Studios Incorporated and others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G.

<sup>23</sup> S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p11. But see para 42 below.



[40] The question of appealability before conviction has however become one of some controversy and complexity<sup>24</sup> due to a change in legislation in 2013. In *Director of Public Prosecutions, Gauteng v KM*,<sup>25</sup> the SCA<sup>26</sup> rightly observed that:

'The introduction of the definition of an appeal in s 1 of the Superior Courts Act has given rise to a new situation. This must prompt fresh enquiries on matters settled under the previous legislation. Certain appeals are now excluded from the operation of ch 5 of the Superior Courts Act. This was not the position under the Supreme Court Act.'

That was why, in my letter of 22 November 2021, quoted above, I requested the parties to 'also address the issue whether the order sought to be appealed, [that is the dismissal of the special plea that Mr Downer lacks the title to prosecute], is appealable at this stage of the proceedings.'<sup>27</sup>

[41] The State has submitted that an appeal against the dismissal of the special plea is not available to Mr Zuma at this stage, having regard to the wording of s 316(1)(a) of the CPA providing for appeals after *conviction*, alternatively that if available prior to conviction in the discretion of this court, that such an appeal should not be entertained in respect of the main judgment. The issue whether the main judgment is appealable at this stage of the proceedings, which includes the legal basis for such an appeal, accordingly needs to be addressed. If the main judgment is not appealable at this stage, then the merits of the application for leave to appeal would be unnecessary to decide.

[42] Since the advent of our Constitution, the rule of law and the principle of legality, being at the foundation of our Constitution, pertinently require that all rights and powers must be founded on the Constitution. In as much as *Universal City Studios Incorporated and others v Network Video (Pty) Ltd*<sup>28</sup> suggested that piecemeal appeals could be entertained based on a court's 'inherent powers' to regulate its procedure, neither the SCA, nor a full court has inherent jurisdiction to hear appeals in criminal matters. In the

<sup>24</sup> S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p8 calls s 316 'an involved piece of legislation'.

<sup>25</sup> *Director of Public Prosecutions, Gauteng v KM* [2017] ZASCA 78; 2017 (2) SACR 177 (SCA) para 34.

<sup>26</sup> In the majority judgment.

<sup>27</sup> The issue is not that there is no right to appeal against the dismissal of the special plea. The question is when an appeal is permitted prior to finalization of a trial.

<sup>28</sup> *Universal City Studios Incorporated and others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G.

absence of a statutory basis for such appeal, and the statutory requirements being met, a court of appeal cannot hear an appeal on the assumption of an inherent jurisdiction to that effect.<sup>29</sup> In *S v Fourie*<sup>30</sup> the SCA held that its inherent power to regulate its procedure did not include the power to hear a matter which was not the proper subject of an appeal, the reason being that the court's appellate jurisdiction was not an inherent jurisdiction.<sup>31</sup>

[43] The enquiry accordingly is on what legislative basis Mr Zuma is prosecuting his appeal at this stage. His application for leave to appeal did not identify the legal basis on which the appeal is being prosecuted. In his replying affidavit,<sup>32</sup> Mr Zuma seemingly relied on the provisions of s 316(1) of the CPA. He said in his replying affidavit that:

'I am advised that it will be argued that in addition and/or alternatively to *the section 316 grounds*, leave to appeal to the Supreme Court of Appeal ought to be granted on the grounds of section 319 and/or 317 of the CPA.' (emphasis added)

An appeal in terms of s 316(1)(a), *ex facie* the wording thereof, however only arises after *conviction*.

In the alternative, and further, Mr Zuma invoked the provisions of s 35(3)(o) of the Constitution. I accordingly turn to consider the provisions of s 35(3)(o).

[44] Section 35(3)(o) of the Constitution provides that:

'Every accused person has a right to a fair trial, which includes the right ... of appeal to, or review by, a higher court.'

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<sup>29</sup> *S v Fourie* 2001 (2) SACR 118 (SCA); S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act (2021 – Revision Service 66)* at ch31-p3 and ch31-p25.

<sup>30</sup> *S v Fourie* 2001 (2) SACR 118 (SCA); S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act (2021 – Revision Service 66)* at ch31-p25.

<sup>31</sup> That position was not changed by s 168 of the Constitution.

<sup>32</sup> Mr Zuma's replying affidavit paras 15 and 16.1.

[45] The right in s 35(3)(o) is not an absolute right<sup>33</sup> and its purpose is aimed at reversing an incorrect conviction. There are limitations on that right and the scope of its application. In *Mbambo v Minister of Defence*<sup>34</sup> it was said that:

'The right enshrined in s 35(3)(o) contributes to the minimisation of the risk of a wrong conviction. To that end it does not enshrine a right of appeal or review in a technical sense, but the right to the meaningful reconsideration by a higher court of a conviction and sentence.' (emphasis added)

Proceedings of high courts, as opposed to magistrate's courts, are furthermore not subject to review,<sup>35</sup> notwithstanding the provisions of s 35(3)(o) granting a right of review, demonstrating that the right is limited. And in many appeals, leave to appeal must first be obtained. These limitations on the rights in s 35(3)(o) have been accepted as constitutionally justifiable.<sup>36</sup> The provision must furthermore be read in conjunction with other provisions of the Constitution, notably s 171 thereof which provides that:

'All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.'

[46] The CC in *S v Twala (South African Human Rights Commission Intervening)*<sup>37</sup> made the following findings about the purpose and meaning of s 35(3)(o):

'The purpose of s 35(3) read as a whole is to minimise the risk of wrong convictions and the consequent failure of justice, and section 35(3)(o) is intended to contribute towards achieving this object by ensuring that any decision of a court of first instance convicting and sentencing

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<sup>33</sup> Section 35 is subject to s 36 of the Constitution which explicitly provides for reasonable and necessary limitations on the right entrenched in s 35. See also S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p102.

<sup>34</sup> *Mbambo v Minister of Defence* 2005 (2) SA 226 (T) at 229E-G.

<sup>35</sup> Chapter 31 of the Criminal Procedure Act 51 of 1977 generally. See also *Pretoria Portland Cement Co Ltd and another v Competition Commission and others* 2003 (2) SA 385 (SCA) para 35, see also S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch30-p2.

<sup>36</sup> *S v Rens* [1995] ZACC 15; 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC), although under the Interim Constitution, held that qualification of the right of appeal through the leave to appeal process was constitutionally justifiable. See also *Mshudulu v The State* [2014] ZAWCHC 198 para 17 for a comment under the Final Constitution. *S v Rens*, *S v Twala (South African Human Rights Commission Intervening)* [1999] ZACC 18, 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC) paras 9 – 10 and *Shinga v The State and another (Society of Advocates, Pietermaritzburg Bar, as amicus curiae); O'Connell and others v The State* 2007 (4) SA 611 (CC) all held that the procedures as set out in the Criminal Procedure Act 51 of 1977, specifically s 316 (ie appeals from high courts) to be in line with the provisions of the Constitution.

<sup>37</sup> *S v Twala (South African Human Rights Commission Intervening)* [1999] ZACC 18, 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC) paras 9 and 10. See also *S v Thebus and another* 2003 (6) SA 505 (CC).

any person of a criminal offence would be subject to reconsideration by a higher court.<sup>138</sup>  
(emphasis added)

and

'... s 35(3)(o) requires that provision be made for an appropriate reassessment of the issues by a court higher than that in which the accused was *convicted*, provided that the prescribed procedure is fair as demanded by s 35(3) ...'<sup>139</sup> (emphasis added)

and

'This conclusion is compatible with art 14(5) of the International Covenant on Civil and Political Rights which South Africa has ratified. The article says:

"Everyone *convicted* of a crime shall have the right to his *conviction and sentence* being reviewed by a higher tribunal according to law"<sup>140</sup> (emphasis added)

[47] It follows that s 35(3)(o) of the Constitution, as interpreted, does not provide a right to appeal by an accused person at a stage prior to conviction. It applies to appeals against a conviction, or resultant sentence, and then 'as provided in terms of national legislation.' A right to appeal after conviction is provided in national legislation, specifically in s 316(1)(a) of the CPA.

[48] As s 35(3)(o) of the Constitution does not assist Mr Zuma's argument, the question arises whether any other provision of the Constitution, not identified by him, might find application. The application for leave to appeal in these proceedings being specifically concerned with a prospective appeal to the SCA,<sup>41</sup> the only other provisions that might conceivably be relevant, might be the provisions in the Constitution dealing specifically with the SCA. Section 168 of the Constitution deals with the SCA and its powers. It provides:

'Supreme Court of Appeal. —

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<sup>38</sup> *S v Twala (South African Human Rights Commission Intervening)* [1999] ZACC 18, 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC) para 9.

<sup>39</sup> *S v Twala (South African Human Rights Commission Intervening)* [1999] ZACC 18, 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC) para 10.

<sup>40</sup> *S v Twala (South African Human Rights Commission Intervening)* [1999] ZACC 18, 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC) para 11.

<sup>41</sup> Although the application for leave to appeal also refers to leave to appeal being sought to the full court of this division, that would be futile exercise in view of the relevant case authorities to which reference will be made below, all being legally binding on any full court, as much as they are binding on this court.

(1) The Supreme Court of Appeal consists of a President, a Deputy President and the number of judges of appeal determined in terms of an Act of Parliament.

(2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.

(3) (a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.

(b) The Supreme Court of Appeal may decide only—

(i) appeals;

(ii) issues connected with appeals; and

(iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.’

[49] Section 168(3) does not however prescribe what orders are appealable. The SCA confirmed in *S v Western Areas Ltd and others*<sup>42</sup> that:

‘. . .nothing in [s 168(3)]<sup>43</sup> suggests the conferment of jurisdiction to hear as an appeal that which, by established statutory construction and practice is not appealable.’<sup>44</sup>

The SCA also commented that:

‘. . . no reason suggests itself why the framers of the Constitution would have wanted to render decisions such as rulings on evidence or interlocutory procedure appealable. More importantly, if the argument under consideration were right, the prosecution could appeal against any acquittal. Understandably that has never been regarded as the correct legal position.’<sup>45</sup>

The judgment continued and confirmed that *when* an appeal lies, ‘as the Constitution shows, is a question for legislative interpretation and application, not for s 168(3)’.<sup>46</sup>

<sup>42</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) (SCA).

<sup>43</sup> Albeit prior to its substitution, which substitution does not affect the conclusion expressed by the SCA, by s 4 of the Constitution Seventeenth Amendment Act of 2012. Prior to its amendment subsection (3) read as follows:

‘(3) The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only—

(a) appeals;

(b) issues connected with appeals; and

(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.’

<sup>44</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) para 10.

<sup>45</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) para 12.

<sup>46</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) para 13.

When an appeal referred to in s 168 of the Constitution will be available, is dependant on national legislation. In the words of Howie P:<sup>47</sup>

'An appeal court becomes seized of an appeal when it has been duly prosecuted in terms of the rules of that court, and *in accordance with any applicable statutory provision.*' (emphasis added)

[50] Specifically, as was said by the SCA in *Minister of Safety and Security v Hamilton*:<sup>48</sup>

'Though s 168(3) of the Constitution provides without qualification that this Court may decide "appeals in any matter", this must obviously be read in the light of the Supreme Court Act 59 of 1959.'<sup>49</sup>

In other words, in accordance with national legislation. That conclusion is also in accordance with the dictates of s 171 of the Constitution quoted earlier,<sup>50</sup> that all courts function in terms of national legislation.

[51] Turning to the national legislation which governs appealability, apart from the provisions of the Supreme Court Act referred to in *Hamilton*, regard must be had to the provisions of the CPA which regulates appeals in criminal matters. Reference has already been made earlier to the provisions of sections 316, 317, and 319 of the CPA.<sup>51</sup> Section 315(4) of the CPA provides that:

'An appeal in terms of this Chapter<sup>52</sup> shall lie *only* as provided in sections 316 to 319 inclusive, and not as of right.' (emphasis added).

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<sup>47</sup> *Director of Public Prosecutions and another v Phillips* [2012] ZASCA 140, [2012] 4 All SA 513 (SCA) para 30.

<sup>48</sup> *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) para 4 relied upon by the SCA in *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) para 14.

<sup>49</sup> In *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) Howie JP at para 16 held:

'Not only am I not persuaded that the statement in *Hamilton* is wrong, I am satisfied it is right. The reasons for my view have really been stated already. What the quoted statement in *Hamilton* clearly meant was that one cannot look at s 168(3) alone because it does not bear on appealability. One has to look at s 171 of the Constitution and that leads one, inter alia, to the Supreme Court Act. That approach does not involve using statutory interpretation to aid constitutional interpretation; it is based solely on construction of the Constitution itself.'

<sup>50</sup> See end of para 45 above.

<sup>51</sup> See para 37 above.

<sup>52</sup> That is chapter 31 of the CPA. Chapter 31 is titled 'Appeals in cases of criminal proceedings in the superior courts'.

[52] Appeals against ‘interlocutory’ orders were generally never entertained. The test in *Zweni v Minister of Law and Order*<sup>53</sup> came to be applied to determine which orders were final in effect, and hence appealable, and which interlocutory. Many of these instances however related to the era before our constitutional democracy with its strong emphasis on the principle of legality and the rule of law. Appeals against decisions made during a criminal trial before the trial had run its full course and concluded in a ‘conviction’, contrary to what is provided in s 316(1)(a), came to be and were recognised also in the constitutional era by the SCA in *S v Western Areas Ltd and others*.<sup>54</sup> In *S v Western Areas Ltd and others* the requirements of the *Zweni* test<sup>55</sup> were not satisfied, but it was nevertheless said, that an accused should be allowed to exercise a right of appeal against the findings of a trial court prior to conviction, where the ‘the interests of justice’ so required.

[53] As the statutory basis for such an appeal in the ‘interests of justice’, the SCA in *S v Western Areas Ltd and others*<sup>56</sup> invoked and gave a wide meaning to the word ‘decision’ in s 21(1) of the former Supreme Court Act,<sup>57</sup> to include ‘criminal pronouncements’ where these should be reviewed or appealed, where no other procedure is available, but ‘the interests of justice’ demand such an appeal.<sup>58</sup> Howie P held:

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<sup>53</sup> *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

<sup>54</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) paras 19-28.

<sup>55</sup> *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A). *Zweni* dealt with a decision refusing an application for an order compelling the respondent to disclose the contents of a police docket for the purposes of the applicant’s damages. The *Zweni* test determined which decisions, traditionally referred to as ‘simply interlocutory orders’, would or would not amount to a ‘judgment or order’ for the purposes of s 20(1) of the Supreme Court Act. In *Phillips v NDPP* 2003 (6) SA 447 (SCA) paras 18 – 23 Howie P used the *Zweni* test in coming to the conclusion that a restraint order, made in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA), was only of interim operation, and similar to interim interdicts and attachment orders, was not definitive of and did not dispose of the matter. See also *NDPP v Braun* 2007 (4) SA 72 (C) paras 11 – 12 which dealt with a search and seizure application in terms of POCA. In *NDPP v King National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA), paras 41 – 47, the respondent had successfully obtained an order in the court a quo, in which he would receive an index of all the documents contained in section B and C of the police docket. On appeal, at the instance of the NDPP, Harms DP held that this order is appealable as it is ‘final in substance’ because the trial can only continue once there has been compliance therewith. These were instances relating to pending criminal trials, and not findings during the criminal trials themselves.

<sup>56</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) paras 19-28.

<sup>57</sup> Act No 59 of 1959.

'I am accordingly of the view that it would accord with the obligation imposed by s 39(2) of the Constitution to construe the word "decision" in s 21(1) of the Supreme Court Act to include a judicial pronouncement in criminal proceedings that is not appealable on the *Zweni* test but one which the interests of justice require should nevertheless be subject to an appeal before termination of such proceedings.'<sup>59</sup>

What the interests of justice require will depend on the facts of each particular case.<sup>60</sup> But the statutory foundation in national legislation for such an appeal was to be found in the provisions of s 21(1) of the Supreme Court Act.

[54] Section 21(1) of the Supreme Court Act, provided:

'In addition to any jurisdiction conferred upon it by this Act or any other law, the appellate division shall, subject to the provisions of this section and any other law, have jurisdiction to hear and determine an appeal from *any decision* of the court of a provincial or local division.'  
(emphasis added).

[55] The piecemeal disposal of issues in criminal trials prior to conviction, and resultant unreasonable delays, and potential for abuse, however remained a matter of concern commented on by various courts and commentators, post the decision in *S v Western Areas Ltd*. In *Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma and another v National Director of Public Prosecutions and others*<sup>61</sup> Langa CJ re-iterated that appeals are not to be dealt with in a piecemeal fashion, stating:

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<sup>58</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) paras 25 – 28. Although not (some are related to) criminal proceedings, the approach has been applied, alternatively referred to in *Philani-Ma-Afrika and others v Mailula and others* [2009] ZASCA 115, 2010 (2) SA 573 (SCA), [2010] 1 All SA 459 (SCA); *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6, 2012 (4) SA 618 (CC), 2010 (5) BCLR 457 (CC), *Nova Property Group Holdings Ltd and others v Cobbett and another* [2016] ZASCA 63, 2016 (4) SA 317 (SCA), [2016] 3 All SA 32 (SCA); *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and others* [2017] ZASCA 134, 2018 (6) SA 440 (SCA), [2017] 4 All SA 605 (SCA); *Jojwana v Regional Court Magistrate and another* [2018] ZAECMHC 54, 2019 (6) SA 524 (ECM); *National Commissioner of Police and another v Gun Owners South Africa* [2020] ZASCA 88, 2020 (6) SA 69 (SCA).

<sup>59</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) para 28.

<sup>60</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) para 28. Notwithstanding the aforesaid statement, the SCA nevertheless concluded, on the facts of that matter, dealing with the dismissal of objections to charges in the indictment that it was not in the interests of justice to grant leave to appeal in that case.

<sup>61</sup> *Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma and another v National Director of Public Prosecutions and others* [2008] ZACC 13, 2009 (1) SA 1 (CC), 2008 (12) BCLR 1197 (CC), 2008 (2) SACR 421 (CC) para 65.



'I nevertheless do agree with the prosecution that this court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5). Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The courts' doors should never be completely closed to litigants. If, for instance, a warrant is clearly unlawful, the victim should be able to have it set aside promptly. If the trial is only likely to commence far in the future, the victim should be able to engage in preliminary litigation to enforce his or her fundamental rights. But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interests of all concerned. If that approach is generally followed the State would be sufficiently constrained from acting unlawfully by the application of s 35(5) and by the possibility of civil and criminal liability. The nature and degree of unlawfulness of the search warrant are important factors to be borne in mind for the purposes of a decision under s 35(5). It is for this reason that the same court should consider the unlawfulness of the warrant and its impact.'

[56] The CC has reiterated this principle fairly recently and in more specific terms as follows:<sup>62</sup>

'In any event, this court has held that in considering whether to grant leave to appeal, it is necessary to consider whether "allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or costs". Similarly, in *TAC /* this court stated that "it is undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance". This

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<sup>62</sup> *Cloete and another v S*; *Sekgala v Nedbank Limited* [2019] ZACC 6; 2019 (4) SA 268 (CC); 2019 (5) BCLR 544 (CC) para 57, see also *South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) para 5; *Ex Parte Minister of Safety and Security and others: In Re S v Walters and another* 2002 (4) SA 613 (CC) paras 63 – 64; *Minister of Health and others v Treatment Action Campaign and others (No 1)* 2002 (5) SA 703 (CC) para 10; *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and another* 2006 (6) SA 103 (CC) para 23; *Economic Freedom Fighters v Gordhan and others; Public Protector and another v Gordhan and others* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) para 49.

is one of the main reasons why interlocutory orders are generally not appealable while final orders are.'

[57] Other courts, including the SCA, have also criticized and discouraged piecemeal litigation:

'The same considerations must apply in this case. It was well-established before the present constitutional era that a criminal trial is not to be conducted piecemeal, and that continues to apply today. An accused is not entitled to have the trial interrupted – or to have it not even begin – so as to have alleged irregularities reviewed by another court in the course of the trial. It is important to bear in mind that while the Constitution guarantees to an accused a fair trial that does not mean that the prosecution must satisfy the accused in advance that the trial will indeed be fair. It is the duty of the trial court to try a charge, and to ensure that the trial is fair, and if it turns out that it was not, then any conviction that followed might be set aside. It might even turn out that the accused is acquitted, in which case the alleged irregularities will be irrelevant. Litigation of the kind that is before us falls squarely into the category of preliminary litigation that ought to be avoided and discouraged.'<sup>63</sup>

and

'It is therefore my considered view that this court, at this stage, not being the court before which the trial had commenced, would not be the appropriate forum to decide whether an application for separation should be granted to the applicants. In my view, such an application should be dealt with by the court before which the trial has commenced. Our courts have through the years expressed our displeasure with this type of procedure followed in criminal matters, and have been averse to dealing with such applications in this manner, because it would lead to piecemeal adjudication of disputes and would cause undue delays, and our courts have ruled that such applications are best left to the trial court dealing with the criminal matter. It has also been used by unscrupulous accused to unduly delay the proceedings, because it would usually be followed by an appeal to the Supreme Court of Appeal, and thereafter to the Constitutional Court.'<sup>64</sup>

and

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<sup>63</sup> *Van der Merwe v National Director of Public Prosecutions and others* [2010] ZASCA 129; 2011 (1) SACR 94 (SCA); [2011] 1 All SA 600 (SCA) para 32.

<sup>64</sup> *Williams and others v Director of Public Prosecutions: Western Cape* [2021] ZAWCHC 187; [2022] 1 All SA 269 (WCC) para 53.

'Lastly, the applicants submit that they intend to prevent the criminal trial from being heard, hence the application to have their trial permanently stayed. What is evident from this interlocutory application is that they want the court hearing the application for the permanent stay to decide on the admissibility of documents not yet presented to the trial court. In my view, it will lead to a piecemeal trial process. I echo the sound advice of the Constitutional Court in *Savoi v NDPP*, where the court emphasised that it is pre-eminently the duty of the trial court to decide on the admissibility of evidence, including deciding on whether the admission of evidence of a particular type would render the trial unfair. The applicants will indeed be able to challenge evidence illegally obtained during the criminal trial. If there had been any abuse of obtaining evidence, then the trial court would be the best forum to decide on allegations of abuse.'<sup>65</sup> (footnotes omitted).

and

'Generally an accused person's remedy in the case of a wrong conclusion would be to appeal after the case has been concluded. In principle, High Courts are reluctant to interfere with untermiated proceedings since it leads to piecemeal finalisation of cases. In *Lawrance v Assistant Resident Magistrate of Johannesburg* Innes J said:

"This is really an appeal from the magistrate's decision upon the objection, and we are not prepared to entertain appeals piecemeal. If the magistrate finds the applicant guilty, then let him appeal, and we shall decide the whole matter."<sup>66</sup> (footnotes omitted).

[58] Section 21(1) of the Supreme Court Act, being the statutory basis for an appeal prior to conviction on the basis that it was 'in the interests of justice' to do so, was removed when s 55(1)(a) of the Superior Courts Act 10 of 2013 read with Schedule 1 thereto repealed the whole of the Supreme Court Act, with effect from 23 August 2013.

[59] In the light of, inter alia, comments such as those by Langa CJ in *Thint (Pty) Ltd v NDPP*,<sup>67</sup> the omission of a similar provision to s 21(1) from the text of the Superior Courts Act, should perhaps come as no surprise. Not is there only no equivalent

<sup>65</sup> *Savoi and others v National Prosecuting Authority and another* [2021] ZAKZPHC 7; 2021 (2) SACR 278 (KZP); [2021] 2 All SA 578 (KZP) para 58.

<sup>66</sup> *Naidoo v Regional Magistrate, Durban and another* [2017] ZAKZPHC 19; 2017 (2) SACR 244 (KZP) para 9.

<sup>67</sup> *Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma and another v National Director of Public Prosecutions and others* [2008] ZACC 13, 2009 (1) SA 1 (CC), 2008 (12) BCLR 1197 (CC), 2008 (2) SACR 421 (CC) para 65.

provision to s 21(1) of the Supreme Courts Act in the Superior Courts Act, but s 1 of the Superior Courts Act introduces a definition of ‘appeal’ which reads as follows:

“‘appeal’ in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or in terms of any other criminal procedural law.”<sup>68</sup>

There was no definition of ‘appeal’ in the Supreme Court Act 59 of 1959. *Du Toit*<sup>69</sup> opines that s 21(1) of the Supreme Court Act was repealed completely due to the addition of the definition of appeal that excludes appeals in a matter regulated in terms of the CPA, or any other relevant criminal procedural law.

[60] As already pointed out above, in *Director of Public Prosecutions, Gauteng v KM*,<sup>70</sup> the SCA rightly observed that the introduction of the definition of ‘appeal’ in s 1 of the Superior Courts Act gave rise to a new dispensation, requiring fresh enquiries on matters settled under the Supreme Court Act, as appeals regulated in terms of the CPA, or in terms of any other criminal procedural law, were now excluded from the operation of chapter 5 of the Superior Courts Act. That had not been the position under the Supreme Court Act, or at the time when *S v Western Areas Ltd and others* was decided.

[61] Chapter 5 (sections 15 to 20) of the Superior Courts Act regulates amongst others appeals from a high court. Section 16(1)(a) provides that:

‘Subject to section 15 (1), the Constitution and any other law—

(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted—

(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17 (6); or

(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal; and

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<sup>68</sup> This definition was also not contained in the original Superior Courts Bill 7 of 2010, but was seemingly introduced by the Portfolio Committee on Justice and Constitutional Development during the legislative process.

<sup>69</sup> S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p9 – ch31-p11.

<sup>70</sup> *Director of Public Prosecutions, Gauteng v KM* [2017] ZASCA 78; 2017 (2) SACR 177 (SCA) para 34.

(c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.’

Section 17 regulates the granting of leave to appeal, and directions regarding the court which will hear the appeal. It provides:

‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

(2) (a) . . .’

Section 18 regulates that under exceptional circumstances a court may order the suspension of the operation and execution of the decision which is the subject of an application for leave to appeal, or of an appeal. Section 19 regulates the powers on the hearing of appeals.

[62] Both the Constitutional Court and the Supreme Court of Appeal have dealt with the interpretation and the effect of the definition of ‘appeal’ in the Superior Courts Act, but confined to the facts specific to the instances arising for decision before them.

[63] In *S v Van Wyk and another*<sup>71</sup> the SCA held that sections 16 and 17 of the Superior Courts Act did not find application in appeals from a Magistrate’s Court. *Du Toit* concludes that this is generally not the case when the trial took place in a high court, as s 316 provides for more appeal remedies, including petitions to the SCA.<sup>72</sup>

[64] In *S v Liesching and others*,<sup>73</sup> Musi AJ held:

<sup>71</sup> *S v Van Wyk and another* 2015 (1) SACR 584 (SCA) para 18.

<sup>72</sup> S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p8 – ch31-p9.

<sup>73</sup> *S v Liesching and others* [2016] ZACC 41; 2017 (2) SACR 193 (CC) from para 33 (*Liesching I*).

[33] “Appeal” is defined in s 1 of the SC Act. Where a word is defined in a statute, the meaning ascribed to it by the legislature must prevail over its ordinary meaning. The definition makes plain that the word “appeal” would only bear the meaning ascribed by the legislature if the context so requires. If, however, there are compelling reasons, based on the context, to disregard the ascribed meaning, then the ordinary meaning of the word must be used. If a defined word or phrase is used more than once in the same statute must be given the same meaning, unless the statutory definition result of such injustice or incongruity or absurdity as to lead to the conclusion that the legislature could never have intended the statutory definition to apply.

[34] Where the definition section provides that the definition should be applied, “unless the context otherwise indicates”, “context” should be given a wide and not a narrow meaning. In *Hoban* it was said that-

“(c)ontext includes the entire enactment in which the word or words in contention appear . . . In its widest sense would include enactments *in pari materia* [on the same subject], sought to be remedied . . . The moment one has to analyse context in order to determine whether a meaning is to be given which differs from the defined meaning one is immediately engaged in ascertaining legislative intention. One remains so engaged until the interpretation process is concluded.”

[35] A definition in an Act therefore applies to the entire Act, unless its meaning is specifically confined to particular section or chapter. The definition of appeal in s 1 of the SC Act is confined to its use in ch 5. Where it is used in other chapters of the SC Act it would have its ordinary grammatical meaning.

[36] The reason for the exclusion of appeals regulated in terms of the CPA or any other criminal procedural law from the purview of ch 5 is to avoid duplication. It would be senseless to have two statues regulate the same subject matter. The legislature recognised that, although the CPA deals comprehensively with appeals and criminal matters, it does not do so exhaustively. Chapter 5 of the SC Act, insofar as it deals with appeals, complements and supplements the CPA. The purpose of the definition is therefore not only to harmonise the provisions of the CPA and the SC Act, but also to supplement the provisions of the CPA.

[37] “Appeal” for purposes of ch 5 does not include an appeal in a matter regulated in terms of the CPA or any other criminal procedural law. The converse is also true; if it is not a matter regulated by the CPA or any other criminal procedural law it would be an appeal for the purposes of ch 5.

[38] The CPA regulates appeals in criminal proceedings, in respect of Superior Courts, in ss 315 – 324. These provisions regulate various matters, including applications for leave to appeal, petitions, applications to adduce further evidence and special entries.’

[65] In *Director of Public Prosecutions, Gauteng v KM*,<sup>74</sup> the SCA<sup>75</sup> held that:

[34] . . . The enquiry which must be made prior to concluding that s 16(1)(b), which requires special leave to appeal, applies, is whether the appeal in question is subject to the provisions of ch 5. I now turn to that enquiry.

[35] Section 1 of the Superior Courts Act provides that an appeal in ch 5 “does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, . . . or in terms of any other criminal procedural law”. Chapter 5 of the Superior Courts Act comprises ss 15 – 20. This means that, if an appeal is “regulated in terms of” the CPA, the provisions of s 16(1)(b) requiring special leave to appeal do not apply. The crisp issue in this regard is whether an appeal under s 311 is one “regulated in terms of the Criminal Procedure Act”.’ (Footnotes omitted.)

[40] . . . Most other sections of the CPA which allow for an appeal require applications for leave to appeal. These include s 309(1)(a), s 309B(1)(a), s 310A(1), s 316(1)(a) and s 316B(1) of the CPA. It is clear that these are appeals ‘regulated in terms of’ the CPA. They give the right of appeal and deal with the procedure for the exercise of that right. In all cases the procedure requires an application for leave to appeal.’

The majority judgment of the SCA concluded that as the s 311 proceedings (appeals by the State in certain circumstances) was ‘*a matter regulated in terms of the [CPA] . . . , or in terms of any other criminal procedural law*’, thus excluded from the operation of chapter 5 of the Superior Courts Act, that the provisions of the Superior Courts Act did not apply, and accordingly, that leave to appeal required by s 16(1)(b) of the Superior Courts Act, was not necessary.<sup>76</sup>

[66] The conclusion to be drawn from the above decision is this. If appeals arise in respect of decisions and orders ‘in a matter regulated in terms of the Criminal Procedure Act . . . or in terms of any other criminal procedural law’, then they are excluded from the definition of ‘appeal’ in the Superior Courts Act, and the provisions of

<sup>74</sup> *Director of Public Prosecutions, Gauteng v KM* [2017] ZASCA 78; 2017 (2) SACR 177 (SCA).

<sup>75</sup> In the majority judgment. The minority judgment did not differ on this issue.

<sup>76</sup> *Director of Public Prosecutions, Gauteng v KM* [2017] ZASCA 78; 2017 (2) SACR 177 (SCA) para 35. (emphasis added).

chapter 5 (sections 15 to 20) of the Superior Courts Act do not apply, and do not afford a basis for an appeal. The definition of ‘appeal’ does not however provide that the appeal must not be an appeal provided for in the CPA, for the provisions of chapter 5 of the Superior Courts Act to apply, but that it must be ‘an appeal in a matter’, where the ‘matter [is one] regulated in terms of the [CPA].’ Special pleas are matters regulated in terms of the CPA. Hence an appeal in respect of a special plea is an ‘appeal in a matter regulated in terms of the [CPA].’

[67] The provisions of s 316(1)(a), thus construed in its context, include decisions made during a criminal trial, and they may be appealed, but only after conviction. Hence, no appeal against any decision, including the dismissal of a special plea in terms of s 106(1)(h) of the CPA, would generally, on the aforesaid interpretation, be possible prior to conviction, and for good reason, namely to prevent the piecemeal disposal of criminal trials. It does not mean that there is no appeal against the dismissal of the special plea, or that an appeal against the dismissal of a special plea is an appeal against something not ‘regulated in terms of the [CPA].’ Section 316(1)(a) provides for such an appeal. It remains an appeal in respect of ‘a matter regulated in terms of the [CPA].’ All it means is that such appeal cannot be prosecuted when the special plea is dismissed, but that the prosecution of any appeal in respect of such ‘matter’ is held over until the accused is convicted, that is if the accused is convicted at all. If the accused is acquitted, then the merits of a possible incorrect decision regarding the special plea become irrelevant. But it does not become an appeal not regulated in terms of the CPA simply because there is no provision for its immediate prosecution. Accordingly, there is no scope for the provisions in chapter 5 (sections 15 to 20) of the Superior Courts Act to apply to allow an immediate appeal before the criminal trial is completed.<sup>77</sup>

[68] A number of considerations, apart from the wording of the applicable provisions which I endeavoured to deal with briefly above, favour such a construction. Firstly, s 315(4) states in unequivocal terms, that an appeal in a criminal matter ‘shall lie *only* as

<sup>77</sup> This position is not affected by the decision in *S v Liesching and others* [2018] ZACC 25; 2019 (4) SA 219 (CC); 2018 (11) BCLR 1349 (CC) (*Leisching II*) which dealt with an appeal to the CC against the refusal by the President of the SCA of a request for reconsideration of a decision of that court in terms of s 17(2)(f) of the Superior Courts Act, on the basis that there were exceptional circumstances present.



provided in sections 316 to 319', that is, in no other manner. If the present appeal is not one in terms of s 316(1)(a) then, if properly presented, it might afford a remedy under s 317 or 319, but regardless, it remains an appeal in respect of a matter 'regulated in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977), or in terms of any other criminal procedural law', as provided in the definition of 'appeal' in the Superior Courts Act - hence not an appeal in terms of chapter 5 of the Superior Courts Act, and therefore not available at this stage.

[69] An appeal against the dismissal of a special plea prior to conviction will, on this construction, only be possible, if the provisions of s 316(1)(a) of the CPA can be interpreted, notwithstanding its clear wording, to include such an appeal being prosecuted prior to conviction, or if it is concluded that such an appeal is not an appeal in 'a matter regulated in terms of the [CPA] or in terms of any other criminal procedural law', hence that the provisions of the Superior Courts Act are not excluded in respect of such an appeal, which might then make such an appeal competent in terms of some provision of chapter 5 of the Superior Courts Act.

[70] An interpretation of s 316(1)(a) of the CPA to allow an appeal against an order dismissing a special plea, prior to conviction, would be in conflict with the wording of the CPA. Mr Zuma's contention in his replying affidavit<sup>78</sup> that the word 'convicted' in this provision must be interpreted purposively and widely 'so as to include a refusal to acquit' under sections 106(1)(h) and (4), is unsustainable. Where the special plea is dismissed and an accused has pleaded not guilty in terms of s 106(1)(b) of the CPA, as Mr Zuma has done, then the accused is not convicted but the matter will proceed to trial on the accused's plea of not guilty, and at the end of the trial he or she will either be acquitted or be convicted. The dismissal of the special plea alone would not have resulted in a conviction.

[71] That leaves in the alternative then the remaining argument, namely that an appeal against the refusal of a special plea, if not an appeal concerning a 'matter

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<sup>78</sup> Mr Zuma's replying affidavit para 15.

regulated in terms of the [CPA] . . . , or in terms of any other criminal procedural law', hence that it would not be excluded from the definition of 'appeal' in the Superior Courts Act, has a statutory basis permitting its prosecution at this stage of the criminal trial, in terms of the provisions of chapter 5 of that Act. That raises the issue whether there is an empowering provision in the Superior Courts Act or any other national legislation, akin to the repealed s 21(1) of the Supreme Court Act, which would permit such an appeal prior to conviction.

[72] Nothing in the text or context or purpose of s 16(1)(a)(i), or elsewhere in chapter 5 of the Superior Courts Act, indicates in unqualified terms that the word 'appeal' in that chapter includes an appeal against the dismissal of a plea in terms of s 106(1)(h) of the CPA at a stage prior to the accused person's conviction by the high court. There is no equivalent in the Superior Courts Act to the former s 21(1) of the Supreme Court Act. If the legislature's intention was to preserve the possibility of an appeal to the SCA against a decision by a high court in a criminal matter, prior to the conviction and sentencing of the accused, on the basis of it being in the 'interests of justice' to do so, then the Superior Courts Act would have contained a provision with wording similar to that of section 21(1) of the Supreme Court Act, or another provision providing expressly for that eventuality, and/or would not have excluded criminal appeals in respect of matters regulated in terms of the CPA from chapter 5 of the Superior Courts Act.

[73] Instances, allowing appeals in criminal matters, but in terms of the provisions of chapter 5 of the Superior Courts Act have been recognized. In *S v Liesching and others*<sup>79</sup> the CC held in regard to a refusal of an application to adduce further evidence after conviction in the high court and during the petition stage before the SCA, that the CPA regulates applications for further evidence only in two instances, namely in s 316(5) and in sections 316(13)(d) and (e). It was concluded<sup>80</sup> that the CPA or any other criminal procedural law does not regulate an application by an accused who has been convicted, to adduce further evidence on appeal, after a petition had been refused. The

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<sup>79</sup> *S v Liesching and others* [2016] ZACC 41; 2017 (2) SACR 193 (CC) (*Liesching I*) para 36 to 38.

<sup>80</sup> *S v Liesching and others* [2016] ZACC 41; 2017 (2) SACR 193 (CC) para 44.

SCA held that the proviso to s 17(2)(f)<sup>81</sup> in chapter 5 of the Superior Courts Act, which is broadly phrased,<sup>82</sup> was applicable and regulated such an application, but subject to the limitation in that provision that ‘exceptional circumstances’ must be present. But on the facts in *Liesching* the accused had already been convicted, as contemplated in s 316 of the CPA, and ordinarily would have been entitled to an appeal pursuant to s 316(1)(a), with the necessary leave being granted. All that occurred subsequently was that such leave was refused also on petition, which meant that the matter had achieved finality. No considerations of delay, or other adverse consequences which would arise in allowing an appeal prior to conviction, arose. The provisions of s 17(2)(f) of the Superior Courts Act were specifically suitable for that situation.

[74] The question remaining is whether there are alternative statutory bases in the Superior Courts Act which might permit an appeal of the main judgment at this stage.

[75] Mr Mpofu submitted that s 16 of the Superior Courts Act also refers to a ‘decision’, like the former s 21 of the Supreme Court Act. Section 16 does not however afford a statutory basis for the recognition of an appeal prior to conviction. It does not provide a general right of appeal against any decision, even prior to conviction, of a high court, but deals with to which court and with what leave appeals lie. The provisions of s 16 presuppose that an appeal lies. But at what stage of a criminal trial an appeal lies, must and can only be determined in accordance with national legislation.

[76] *Hiemstra’s* discussion of the decision in *Western Areas Ltd*,<sup>83</sup> proceeds on the basis that the word ‘decision’ in s 17(1)(c) of the Superior Courts Act, like the word

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<sup>81</sup> Section 17(2)(f) provides that the President of the SCA may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision of the judges refusing a petition, refer the decision refusing a petition to the court (SCA) for reconsideration and, if necessary, variation. It reads:

‘The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.’

<sup>82</sup> *S v Liesching and others* [2016] ZACC 41; 2017 (2) SACR 193 (CC) para 54.

<sup>83</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA).

‘decision’ in s 21(1) of the Supreme Court Act, would include ‘criminal pronouncements.’<sup>84</sup> The relevant provisions of s 17(1) of the Superior Courts Act provide:

‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

... .

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[77] If s 17(1)(c) of the Superior Courts Act affords the required statutory basis for an appeal prior to conviction, then, as with the requirement of ‘exceptional circumstances’ in s 17(2)(f) in *Liesching*, the subsection must be read subject to its own built in limitations, namely that the decision sought to be appealed, although it ‘does not dispose of all the issues in the case’ must be an appeal which ‘would lead to a *just and prompt resolution* of the *real issues* between the parties’ (emphasis added). Plainly, an appeal against the incorrect dismissal of an objection to a court’s jurisdiction in terms of s 106(1)(f), where it is clear that the court dismissing the plea had no jurisdiction and, in addition, where it is clearly in the interests of justice to permit an appeal against the ruling without an appellant first having to be exposed to the prejudice of an irregular trial,<sup>85</sup> would be such an appeal and an exception to the general rule.

[78] On the peculiar facts relating to this matter however, an appeal against the dismissal of the special plea, if successful, would not lead to a ‘just and prompt resolution of the real issues between the parties’ before this court, in this instance Mr Zuma’s guilt or innocence. In the absence of a prompt resolution of that real issue between the parties, there is no scope for an appeal prior to conviction, based on s 17(1)(c) of the Superior Courts Act. Significantly, the SCA in *Zweni* had remarked that ‘[t]he fact that a decision may cause a party an inconvenience or place him at a

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<sup>84</sup> A Kruger *Hiemstra's Criminal Procedure* (May 2021 – Service Issue 14) at 31-3 – 31-4.

<sup>85</sup> *S v De Beer & another* 2006 (2) SA 554 (SCA) para 5.

disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability.<sup>86</sup>

[79] It is also significant that even when there was a statutory basis for an appeal to be entertained prior to conviction, reliance having been placed on the provisions of s 21(1) of the Supreme Court Act, the SCA in *S v Western Areas (Pty) Ltd* required that any appeal prior to conviction had to be in the ‘interests of justice.’

[80] Insofar as an appeal against the main judgment would be competent at this stage, even if the requirements and inherent limitations in s 17(1)(c) of the Superior Courts Act are not satisfied, but on some unspecified statutory basis, provided it is in the ‘interests of justice’, the following is apposite.

[81] Recognising such an appeal will offend against the principle of legality, if it is without a statutory basis.

[82] If such an appeal is to be entertained then it will require a weighing up of interests.

In *S v Western Areas (Pty) Ltd* Howie P cautioned that:<sup>87</sup>

‘[25] . . . in general it is in the interests of justice that an appeal await the completion of a case whether civil or criminal. Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary course.

[26] It is clear, however, that the general rule against piecemeal appeals in criminal proceedings could conflict with the interests of justice in a particular case . . . As an instance when such conflict might arise, this Court referred to in that matter to the position where a law point is involved which, if decided on the accused favour, *would dispose of the criminal charge against*

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<sup>86</sup> *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 533B-C. The SCA relied as authority for that proposition on the decision in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 550D-H.

<sup>87</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA).

*him or a substantial portion of it.* By that example I understand it to be implied that there would be no trial or a substantially shortened trial.

[27] . . . Those considerations by themselves do not warrant giving “decision” a more extended meaning than before. What does do so, however, is the possibility of conflict between the general rule against piecemeal appeals in the interests of justice in a particular case, even if the *Zweni* requirements are not met. It is surely not in the interests of justice to submit an accused person to the strain, expense and restrictions of a lengthy criminal trial *if that can be avoided*, in appropriate circumstances, by allowing on appeal to be pursued out of the ordinary sequence and *so obviating the trial or substantially shortening it.*’ (footnotes omitted, emphasis added)

Similarly, Cachalia JA, in *S v Delport*,<sup>88</sup> after remarking that regarding the appealability of legal questions arising from uncompleted criminal proceedings, the general rule, underpinned by s 35(3)(d) of the Constitution, is against permitting piecemeal appeals, said:

‘[27] . . . However, the interests of justice may also require — in unusual circumstances — a departure from the general rule. The general rule therefore requires a remittal order not to be appealable, unless unusual circumstances warrant this.

[28] What amounts to unusual circumstances obviously depends on the facts. In this regard *considerations of convenience, delay and prejudice* must all be weighed to decide whether the advantages of entertaining the appeal outweigh the disadvantages. This analysis does not require the court to give a decision on the merits. But it must consider the efficacy of the points raised to assess *whether there is a reasonable likelihood that the advantages will materialise.*’ (footnote omitted, emphasis added)<sup>89</sup>

[83] An appeal against the dismissal of Mr Zuma’s special plea at this stage will not achieve these objectives or advantages: it will not dispose of the criminal charge against him or a substantial part thereof; it will not avoid a lengthy criminal trial; and it will not obviate the trial or substantially shorten it.

[84] Denying an appeal at this stage of the proceedings, would accord with the legislative intent having regard to the context in which and the purpose for which the Superior Courts Act was enacted, the general undesirability of piecemeal appeals, the

<sup>88</sup> *S v Delport and others* [2014] ZASCA 197, 2015 (1) SACR 620 (SCA).

<sup>89</sup> This appeal was heard by the SCA on 26 November 2014, but originated from the court a quo prior to 23 August 2013, the order appealed being dated 20 March 2012.

delays that will be avoided in pending or incomplete criminal trials, and introduce a sound jurisprudential policy which the legislature intended to apply, and which should apply in criminal trials. Allowing appeals on interim orders, where an acquittal might follow is, at best, of academic value only, irrelevant, and will amount to a waste of time and limited judicial resources.

[85] The competing rights of an accused<sup>90</sup> would also not be ignored by such an approach. It is trite law that in an appeal on fact, ‘the presumption is that the decision of the court below on the facts was right, unless it can be shown that the court misdirected itself. Courts of appeal should not seek anxiously to discover reasons adverse to the conclusions of the trial court.’<sup>91</sup> Appeals on fact are normally best left to the end of a trial. And in deserving instances, such as ‘where a law point is involved which, if decided in the accused’s favour, would dispose of the criminal charge against him or a substantial portion of it’,<sup>92</sup> an accused would always still also have remedies in terms of s 317 or s 319 of the CPA, if the requirements of either of those is satisfied. Mr Zuma has already pursued those in his conditional counter application. Sections 317 and 319 are discussed later in this judgment.

[86] In summary:

(a) The grant of Mr Zuma’s special plea would not have the effect of disposing of at least a substantial portion of the relief claimed in the criminal trial. The relief sought by the State in the criminal trial would be his conviction. The special plea had no bearing on that relief. Mr Zuma has pleaded not guilty to all the charges and he remains to be tried.

(b) The appeal will delay the criminal trial unreasonably, specifically as concerns Thales.

(c) The special plea was based on the proposition that Mr Downer lacks the independence and impartiality necessary for a lawful prosecution, more specifically to ensure that Mr Zuma’s trial is constitutionally fair, and that he is an essential witness on

<sup>90</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) para 27.

<sup>91</sup> *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 700ff.

<sup>92</sup> Per Howie P in *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) para 26.

the issue whether there was political interference in the prosecution which allegedly violated his right to a fair trial as provided in s 35 of the Constitution.<sup>93</sup> The infringement of Mr Zuma's fair trial rights, is the true basis of Mr Zuma's complaints. But, as the main judgment held:

'[a]ny infringement of fair trial rights, is an ongoing interlocutory issue, best determined when the evidence in the criminal trial has been heard, digested in the light of conflicting evidence, and the credibility to be attached to the evidence has been properly assessed.'<sup>94</sup>

(d) If

'the alleged lack of objectivity or independence, whether due to alleged political interference, or influence by outside intelligence agencies, or any other cause, is such that he might not receive a constitutionally fair trial, then a variety of remedies might be available, in the discretion of the court, in terms of s 172(1)(b) of the Constitution, as the circumstances may demand...'<sup>95</sup>

But until determined, usually but not necessarily invariably on a conspectus of all the evidence at the end of the trial, an appeal should not be entertained. No determination has been made in the trial to date regarding Mr Zuma's fair trial rights, because the issue has not been properly raised.

(e) Any finding whether Mr Zuma would have received a fair trial as provided by s 35(3) of the Constitution, when properly raised as an issue, should be determined at the end of the trial after the evidence on both sides has been heard, unless this court, in the exercise of its discretion, decides that it would be appropriate to determine any such question earlier during the trial. Such a discretionary determination has not yet been made.

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<sup>93</sup> Both the special plea and Mr Zuma's affidavits in support of it, make it clear that the issue arising from the questions of prosecutorial misconduct raised by the special plea is '*whether Mr Zuma will receive a fair trial*'.

<sup>94</sup> *S v Zuma and another* [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP) para 77.

<sup>95</sup> *S v Zuma and another* [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP) para 108, para 119 and see para 135(f) where I concluded:

'Ultimately, the enquiry at the end of every criminal trial must be whether the accused had received a constitutionally fair trial. That imperative remains even if on the evidence adduced in the affidavits to date, it is concluded that it has not been established that Mr Zuma has or will suffer trial related prejudice which might result in him not receiving a constitutionally fair trial. This judgment cannot stand in the way of possible fresh evidence emerging later. The enquiry is one most best answered by the trial court at the end of the trial, when the materiality of all the evidence adduced can be assessed properly . . .'



(f) Should Mr Zuma be convicted and sentenced at the end of the trial, he could apply for leave to appeal against any adverse determination, and he may also then appeal against the dismissal of the plea in terms of s 106(1)(h) of the CPA. Should he be acquitted, then the enquiry into fair trial rights would be academic and will fall away.

(g) Resorting to appeals prior to finalisation of a trial can result in delay, fragmentation of the process, determination of issues based on an inadequate record, and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary course.<sup>96</sup>

(h) Accordingly, what could be a piecemeal appeal, was allowed in the past only in those '*rare cases where grave injustice might otherwise result or where justice might not by other means be attained*'.<sup>97</sup> An appeal at the end of the trial against the dismissal of the special plea, should Mr Zuma be convicted, would be a means by which justice will be assured to him and attained.

(i) It is inimical to the interests of justice to permit an appeal, if the applicant for leave to appeal has poor prospects of success in the intended appeal. Mr Zuma's prospects of success in respect of the special plea are poor, for reasons already briefly alluded to in the introduction above and which will be amplified below.

(j) The prosecution and resultant trial have already been delayed considerably and unreasonably, which makes an intermediate appeal, which will cause even further delay, contrary to the interests of justice, as it will prejudice the interests of the general public represented by the State, and the interests of Thales, impairing its rights in s 35(3) of the Constitution. A speedy trial and finality in litigation, are vital constitutional imperatives.<sup>98</sup>

(k) Allowing an appeal at this stage would be contrary to this court's duty to actively discourage preliminary and piecemeal litigation, but obviously always within the confines of fairness.<sup>99</sup>

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<sup>96</sup> *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), [2005] 3 All SA 541 (SCA) para 25.

<sup>97</sup> *Ismail and others v Additional Magistrate, Wynberg and another* 1963 (1) SA 1 (A) at 5H-6A, quoting *Walhaus and others v Additional Magistrate, Johannesburg and another* 1959 (3) SA 113 (A) at 120A-B.

<sup>98</sup> *S v Zuma and another* [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP) para 128.

<sup>99</sup> *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) para 5. Compare *Thint (Pty) Ltd v National Director of Public Prosecution and others; Zuma and Another v National Director of Public Prosecution and others* 2009 (1) SA 1 (CC) para 65.

[87] I accordingly conclude that an appeal, and hence an application for leave to appeal in respect thereof, should not be entertained at this stage of the criminal trial against Mr Zuma. If that was the only issue in the application for leave to appeal, I might have been disposed to granting leave to appeal to the SCA on the basis that the law might be uncertain on this issue. However, I consider the lack of any prospects of success in the appeal to be dispositive of the application for leave to appeal, even assuming an appeal in respect of the main judgment is available at this stage. I turn then to deal with the prospects of success of the appeal.

### **The merits of the application for leave to appeal**

[88] This part of the judgment proceeds on the basis that it is accepted for the purposes of argument, that a dismissal of a plea in terms of s 106(1)(h) is appealable at this stage of the proceedings. I am satisfied that the appeal has no reasonable prospects of success. I refer for that conclusion to what was set out at the commencement of this judgment. Briefly restated, Mr Zuma raises various factual complaints which he maintains point to an alleged lack of independence and objectivity on the part of Mr Downer, and which he contends will result in him not receiving a fair trial. That was the basis also advanced by the accused in *Porritt* in support of their plea in terms of s 106(1)(h).<sup>100</sup> Their special plea was dismissed by the SCA.

[89] Mr Zuma's special plea in terms of s 106(1)(h) was the sole issue before me for decision.<sup>101</sup> My primary finding in the main judgment was that the word 'title' in s 106(1)(h) should be assigned the narrow meaning of a prosecutor's standing or authority to prosecute, and not the wider meaning for which the first accused contended. That primary finding was based firstly on the findings in *Ndluli v Wilken NO en andere*<sup>102</sup> that in the case of a prosecution at the instance of the State, the word 'prosecutor' in

<sup>100</sup> *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA).

<sup>101</sup> *S v Zuma and another* [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP) para 69. Mr Zuma's plea specifically designated his plea as a 'plea in terms of section 106(1)(h) and 106(4) of the Criminal Procedure Act 51 of 1977'. It was followed by what was termed his 'plea explanation in terms of sections 106(1)(h) and 106(4) of the Criminal Procedure Act 51 of 1977'.

<sup>102</sup> *Ndluli v Wilken NO en andere* 1991 (1) SA 297 (A).

s 106(1)(h) refers not to the State, but to the person who acts as prosecutor in the court,<sup>103</sup> and that the objection in a plea in terms of s 106(1)(h) is an objection, not to the right or power of the State to prosecute the accused, but the right of that person to act as prosecutor in the case.<sup>104</sup> Secondly, the primary finding was based on the *ratio decidendi* in *Porritt and another v National Director of Public Prosecutions and others*<sup>105</sup> that a special plea under s 106(1)(h) does not avail an accused who believes the retention of a person as prosecutor would infringe his right to a fair trial provided in s 35(3) of the Constitution. That is the *ratio*, regardless of the factual basis on which it is believed that the fair trial rights might be infringed. The impairment of fair trial rights, on the authority of *Porritt*, does not affect a prosecutor's title to prosecute.<sup>106</sup>

[90] That unanimous finding by the SCA disposed of the word 'title' having a wider meaning to include a lack of impartiality or a lack of independence, for whatever reason and specifically those complained of by Mr Zuma. The SCA in effect approved of the narrow meaning of the phrase 'title to prosecute'.

[91] The judgment in *Porritt* is not only dispositive of the special plea which served before me, but, in addition, is binding on me. Similarly, the ratio in *Porritt* is also dispositive of this application for leave to appeal. Indeed the interpretation of 'title' in *Porritt*, would be equally binding on a full court of this division, and will be binding on the SCA unless that court is satisfied that its interpretation in *Porritt* was clearly wrong.<sup>107</sup> I am not persuaded that the SCA in *Porritt* was clearly wrong. I have no discretion in the matter. It is not incumbent on me to second-guess the SCA and whether it might want to conclude that it was clearly wrong in *Porritt*, and wishes to revisit that decision. That is not how our system of judicial precedent operates. If Mr Zuma is advised that the SCA

<sup>103</sup> *Ndluli v Wilken NO en andere* 1991 (1) SA 297 (A) at 305H-306C.

<sup>104</sup> *Ndluli v Wilken NO en andere* 1991 (1) SA 297 (A) at 306F-H and *S v Zuma and another* [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP) paras 72 – 73.

<sup>105</sup> *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168, 2015 (1) SACR 533 (SCA), [2015] 1 All SA 169 (SCA) paras 7 – 8.

<sup>106</sup> *S v Zuma and another* [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP) paras 99-103, 109 and 113.

<sup>107</sup> *Camps Bay Ratepayers' and Residents' Association and another v Harrison and another* 2011 (4) SA 42 (CC) paras 28 – 30.

should and will revisit its decision, then the appropriate procedure is for him to petition the SCA, assuming, of course, that the main judgment is appealable at this stage.

[92] In the alternative to my primary finding,<sup>108</sup> and on the assumption that the word ‘*title*’ in s 106(1)(h) bears the wider meaning for which Mr Zuma contended and/or that the issue before me extended to a separate independent application for Mr Downer’s removal as the prosecutor, I also found against Mr Zuma. I do not intend repeating that argument in this judgment but simply refer to the main judgment, as the primary finding which I made is conclusive regarding the merits of the application for leave to appeal.

[93] The application for leave to appeal accordingly falls to be dismissed on its merits.

### **Section 108 of the CPA and having the special plea ‘tried’**

[94] The argument was advanced, seemingly as a further ground for the grant of leave to appeal, that the special plea should have been referred to a *viva voce* trial, with witnesses to be subpoenaed, testifying, being cross examined, re-examined, and so forth, because of the wording of s 108 of the CPA.

[95] Section 108 of the CPA provides:

‘108. Issues raised by plea to be tried.—If an accused pleads a plea other than a plea of guilty, he shall, subject to the provisions of sections 115, 122 and 141 (3), by such plea be deemed to demand that the issues raised by the plea be tried.’

Emphasis was placed by Mr Zuma’s counsel on the word ‘tried’.

[96] Section 173 of the Constitution provides:

‘Inherent power – The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.’

[97] Section 108 of the CPA read with s 173 of the Constitution entrust a court with a discretion to decide how special pleas should be ‘tried’. It was decided, that being the

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<sup>108</sup> *S v Zuma and another* [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP) para 133.

basis also on which Mr Zuma presented his special plea, that the special plea would be tried on affidavits, for reasons advanced in the main judgment at paragraphs 46 to 60. These include, that the special plea was raised, in the first place, by Mr Zuma by way of an affidavit; Mr Zuma chose to substantiate his special plea by means of a lengthy plea explanation in the form of a founding affidavit, and that he thereafter agreed with the State that his plea would be tried on the exchange of affidavits, without demur. It clearly was appropriate to decide the special plea in this manner. Consequently, it was ordered by this court when the special plea was entered on 26 May 2021, that further affidavits would be exchanged to define the contentions of the parties. Resolving the plea on affidavits was in the best interests of justice, because, as it turned out, Mr Zuma's special plea was excipiable. It was unsustainable in law on his own version, because the word 'title' in s 106(1)(h) has been held in case authority, which is binding on this court, to bear the meaning of a prosecutor's standing or authority to prosecute, for which the State contended, and not the wider meaning for which Mr Zuma contended.

[98] No basis has been advanced to contend that my discretion to have the special plea tried on the affidavits was not exercised judicially, or falls to be set aside. Mr Zuma has not pointed to any legally cognizable prejudice.

[99] Insofar as this argument constitutes a separate and additional ground of appeal, it too lacks merit.

### **The application to adduce further evidence on appeal**

[100] Mr Zuma has applied, in terms of s 316(5) of the CPA, for leave to adduce further evidence in respect of the prospective appeal. The further evidence relates to his affidavit dated 21 October 2021 in support of a criminal complaint against Mr Downer which he lodged with the South African Police Service in Pietermaritzburg on that day.

[101] Section 316(5) of the CPA provides as follows:

'(5) (a) An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.

- (b) An application for further evidence must be supported by an affidavit stating that—
- (i) further evidence which would presumably be accepted as true, is available;
  - (ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and
  - (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
- (c) The court granting an application for further evidence must—
- (i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
  - (ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.' (emphasis added.)

[102] The CPA regulates applications to adduce further evidence, after conviction in the High Court, in two instances. First, in s 316(5) and, second, in ss 316(13)(d) and (e).<sup>109</sup> The application for leave to appeal 'under subsection (1)' is one *after conviction*. As Mr Zuma has not been convicted and sentenced, his application for leave to appeal is not brought under s 316(1) of the CPA, and his application for further evidence is consequently not permitted by s 316(5). That disposes of the application for further evidence.

[103] Alternatively, as the application for leave to appeal falls to be dismissed on its merits, the application to adduce further evidence should meet a similar fate for that reason alone, as there is no prospective appeal in respect of which such evidence could be adduced.

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<sup>109</sup> *S v Liesching and others* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC) para 38.

[104] Furthermore, the application for further evidence is ill-founded. The affidavit sought to be introduced seeks to deal with Mr Downer allegedly ‘unlawfully providing information about the trial to persons who are not authorised to be in possession of that information’. This is alleged to be ‘material to the consideration of the s 106(1)(h) plea as it adds “further grounds” that were not considered by the court at the time when the matter was adjudicated. . .’.

[105] None of the evidence in Mr Zuma’s affidavit of 21 October 2021 however relates to the issue of whether or not Mr Downer lacks the title to prosecute the accused in this matter based on the test as set out in *Porritt*.<sup>110</sup>

[106] The three requirements in s 316(5)(b) of the CPA have also not been met. Much of what is contained in Mr Zuma’s affidavit of 21 October 2021 is not ‘further evidence’ but a repetition of matters raised in his affidavits in support of the special plea. In view of my earlier conclusions regarding the prospects of success of the appeal in respect of the main judgment, I do not deal further with these requirements in this judgment, save for the following brief comments:

(a) As regards the requirement in s 316(5)(b)(i), as appears from Mr Downer’s main answering affidavit in response to the special plea, he denied the allegation and the main judgment rejected the allegation.<sup>111</sup> Further, regarding the intended evidence concerning Mr Downer’s alleged leaks to Mr Sole, it is among the allegations which Mr Zuma, through his counsel, at the hearing of the permanent stay application, expressly disavowed and accordingly waived.<sup>112</sup> The alleged leaks to Mr Sole are accordingly no longer an issue on which reliance can be placed in this matter.

(b) Regarding the requirements in s 316(5)(b)(ii), even if they were accepted, none of the three allegations in Mr Zuma’s affidavit of 21 October 2021 concerning Mr Downer – namely, the allegations referred to above, and the further allegation in para 15 of that affidavit that the prosecution team authorised Prof Sarkin to send his life partner to handle sensitive medical information without the necessary authorization,

<sup>110</sup> *Porritt and another v National Director of Public Prosecutions and others* [2014] ZASCA 168; [2015] 1 All SA 169 (SCA); 2015 (1) SACR 533 (SCA).

<sup>111</sup> *S v Zuma and another* [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP) para 235.

<sup>112</sup> *S v Zuma and another* [2021] ZAKZPHC 89; [2022] 1 All SA 533 (KZP) para 234.

would justify a finding in Mr Zuma's favour on the special plea, or his acquittal in terms of s 106(4). At best for Mr Zuma, if these allegations were accepted, they might constitute irregularities, but not irregularities affecting the merits of the prosecution or, on the evidence presently before this court, the fairness of the trial. The laying of the criminal charge against Mr Downer is not a fact which could reasonably lead to a different verdict or sentence in Mr Zuma's criminal trial, and would not lead to a different outcome in relation to his special plea under s 106(1)(h), as it is irrelevant to both.

(c) Regarding the requirement in s 316(5)(b)(iii), insofar as Mr Zuma's affidavit of 21 October 2021 contains evidence about matters not already canvassed in his affidavits in support of the special plea, there is no acceptable explanation for it not having been produced previously or at least before the main judgment was delivered on 26 October 2021. There is also no explanation why Mr Zuma did not adduce evidence in support of his allegation concerning Prof Sarkin's life partner. If Mr Zuma was not available to raise these in an affidavit, then Mr Thusini could have made an affidavit on his behalf explaining the circumstances. Mr Thusini has previously made numerous affidavits on Mr Zuma's behalf, including detailed supplementary founding and supplementary replying affidavits concerning events after the special plea was first raised in May 2021.

[107] The application to adduce further evidence accordingly is dismissed. The refusal of that application does not require an application for leave to appeal. Mr Zuma has his remedies in terms of s 316(8) of the CPA.<sup>113</sup>

### **The relief sought on the grounds of s 317 of the CPA**

[108] In paragraph 30 of his 'conditional counter-application' Mr Zuma states:

*'I am advised that it will be argued that in addition and/or alternatively to the 316 grounds, leave to appeal to the Supreme Court of Appeal ought to be granted on the grounds of section 319 and/or section 317 of the CPA.'* (emphasis added)

[109] The relevant provisions of s 317 of the CPA provide:

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<sup>113</sup> S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p23.



(1) If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made *bona fide* or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court; and

(2) Save as hereinafter provided, an application for condonation or for a special entry shall be made to the judge who presided at the trial or, if he is not available, or, if in the case of a conviction before a circuit court the said court is not sitting, to any other judge of the provincial or local division of which that judge was a member when he so presided.

(3) . . .

(4) . . .

(5) If an application for condonation or for a special entry is refused, the accused may, within a period of 21 days of such refusal or within such extended period as may on good cause shown, be allowed, by petition addressed to the President of the Supreme Court of Appeal, apply to the Supreme Court of Appeal for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law, as the case may be, and thereupon the provisions of subsections (11), (12), (13), (14) and (15) of section 316 shall *mutatis mutandis* apply.'

[110] Section 318 of the CPA provides that:

(1) If a special entry is made on the record, *the person convicted may appeal to the Appellate Division against his conviction* on the ground of the irregularity stated in the special entry if, within a period of twenty-one days after entry is so made or within such extended period as may on good cause be allowed, notice of appeal has been given to the registrar of the Appellate Division and to the registrar of the provincial or local division, other than a circuit court, within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he so presided.

(2) *The registrar* of such provincial or local division shall forthwith after receiving such notice give notice thereof to the attorney-general and *shall transmit to the registrar of the Appellate Division* a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial and of the special entry: Provided that with the consent of the accused and the attorney-general, the registrar concerned may, instead of transmitting the whole record, transmit copies, one of which shall be certified, of such parts of the record as may be agreed upon by the attorney-general and the accused to be sufficient, in which event the Appellate Division may nevertheless call for the production of the whole record.’ (emphasis added)

[111] The involvement of the trial judge in the appeal process contemplated in s 318 in respect of an entry in terms of s 317, or the reservation of a question of law in terms of s 319, is limited. The registrar of the court has specific duties. As regards the involvement of the trial judge, s 320 simply requires that:

‘The judge or judges, as the case may be, of any court before whom a person is convicted shall, in the case of an appeal under section 316 or 316B or of an application for a special entry under section 317 or the reservation of a question of law under section 319 or an application to the court of appeal for leave to appeal or for a special entry under this Act, furnish to the registrar a report giving his, her or their opinion upon the case or upon any point arising in the case, and such report, which shall form part of the record, shall without delay be forwarded by the registrar to the registrar of the court of appeal.’<sup>114</sup>

[112] The wording of s 318 makes it clear that it is only a ‘person *convicted* who may appeal to the Appellate Division’, now the SCA<sup>115</sup> in respect of an entry pursuant to s 317 of an irregularity or illegality. Mr Zuma has not been convicted, accordingly he may not now appeal to the SCA. Entries of an irregularity are not appealable in the absence of conviction, as findings on appeal on whether there was an irregularity, would be

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<sup>114</sup> Section 320 has become largely redundant because judgements provide not only the findings of the court but also the reasons for the findings made by a court – S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p40.

<sup>115</sup> *S v Nkabinde and others* [2017] ZASCA 75; 2017 (2) SACR 431 (SCA) para 27 were the following was said:

‘The purpose of a special entry is to raise an irregularity in connection with or during the trial as a ground of appeal against conviction under s 318(1) of the Act. The latter section provides, inter alia, that if a special entry is made on the record, *the person convicted* may appeal to this court against his conviction on the basis of the irregularity stated in the special entry.’ (emphasis added)

irrelevant in the event of an acquittal. There can be no appeal at this stage prior to conviction, and accordingly also no application seeking leave to appeal 'on the grounds of section . . . 317 of the CPA', as has been sought in paragraph 30 of Mr Zuma's replying affidavit. That disposes of the application for leave to appeal being granted in respect of any alleged irregularity at this stage of the proceedings.

[113] Any approach to the SCA in respect of an alleged irregularity or illegality in terms of s 317, furthermore does not require that leave to appeal be granted.<sup>116</sup>

[114] Mr Zuma does not however only seek leave to appeal 'on the grounds of section . . .317 of the CPA'. In paragraph 22 of his replying affidavit he states:

'I hereby separately lodge an application in terms of . . .section 317 of the CPA for . . .the making of a special entry.

[115] Apart from the allegations of the alleged 'irregularity' caused by me regarding the fixing of dates for the exchange of affidavits, referred to in paragraph 14 above, and it being contended that Mr Downer should not have been the deponent to the answering affidavit because of a conflict of interest, the basis for Mr Zuma claiming that any further irregularity or illegality has occurred, is not clear. The irregularity is not described in certain terms. To avoid any possible misunderstanding of the contentions advanced in this regard, I can do no better than to quote the paragraphs from Mr Zuma's conditional counter-application on which reliance is placed by him:

'22. In the event that this Honourable Court, nevertheless and in spite of what has already been submitted above, uphold the objection of the NPA, I hereby separately lodged an application in terms of section 319 and/or section 317 of the CPA for the reservation of several questions of law for adjudication and determination by the SCA and/or the making of a special entry.

### **The legal issues**

23. This I do by placing reliance on some of the purely legal grounds of appeal contained in the notice of application for leave to appeal, which must be read as if specifically incorporated herein, as well as spelling out the factual bases, as spelt out below.

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<sup>116</sup> Section 317(5) and/or s 318(2) of the CPA.

24. In any event, the entire special plea proceedings are, by definition, based on a point of law. A special plea or exception always raises a point of law.

25. I am advised that in respect of the section 106(1)(h) proceedings, there is precedence (sic) for this approach, as exemplified in the *Porritt* case and supported by other binding authorities which will be relied upon during legal argument. Academic authorities also sufficiently support this approach.

26. There are no specific timelines within which such an application may be brought and it is now being brought within a reasonable time, alternatively, at the right time.

27. Additional issues which justify referral to the SCA in terms of section 319 and/or section 317 of the CPA are the irregularities identified in my two objections raised above about the irregular procedure and/or the inappropriate deponent.

#### **The factual bases**

28. The factual bases for the special plea are largely common cause. The main application was primarily based on a set of admitted facts extracted from the answering affidavit.

29. Regarding the preliminary objections, the factual bases therefor are spelt out in the earlier part of this affidavit.

30. I am advised that it will be argued that in addition and/or alternatively to the section 316 grounds, *leave to appeal to the Supreme Court of Appeal ought to be granted on the grounds of section 319 and/or section 317 of the CPA.*' (emphasis added)

[116] Insofar as the conditional counter-application is not just only for leave to appeal in respect of an irregularity to be pursued in terms of s 317 at this stage, but is also an application for a special entry to be made, I comment as follows:

(a) Firstly, this is not the relief which Mr Zuma concludes with in his conditional counter-application, as is evident from the content of paragraph 30 of his replying affidavit quoted above.

(b) Secondly, in his replying affidavit, Mr Zuma does not say in what respects he alleges that the proceedings of this court, culminating in its dismissal of his special plea in terms of s 106(1)(h) of the CPA, are irregular and not according to law. The State has pointed out that his heads of argument do not refer to s 317 at all.

(c) Thirdly, the wording of the entry has not been suggested, and I, with respect, find it extremely difficult, if not impossible, to formulate any entry or entries based on the vague allegations made. The legal principles are clear. The entry must not be put in the

form of a question, but in the form of a factual finding accompanied by an allegation that the irregularity amounted to a failure of justice.<sup>117</sup> It must be couched as a positive factual statement accompanied by an allegation by the accused that the irregularity was such that justice was in fact not done. Insofar as the two ‘irregularities’ arising from the fixing of dates for the exchange of affidavits and Mr Downer’s alleged conflict of interest are concerned, although these are identifiable, they are not irregularities. They have been dealt with earlier in this judgment. Even if they are irregularities, they would not require that a special entry be made, as the facts in support thereof appear from the record.<sup>118</sup> The s 317 procedure must not be followed where the alleged irregularity or illegality appears from the record.<sup>119</sup> As regards the remainder of the allegations, I have read and re-read the allegations in the replying affidavit, but am, with respect, unable to formulate any possible irregularity as required by s 317 for consideration by the SCA.

(d) Fourthly, insofar as Mr Zuma in paragraph 27 of his replying affidavit relies on this court’s alleged directive that the State deliver an answering affidavit to his application for leave to appeal, and on Mr Downer’s alleged conflict of interest, as irregularities, if indeed as a matter of law they were irregularities, they occurred subsequent to the dismissal of his special plea and therefore had no bearing on the main judgment. Neither Mr Zuma’s objection to this court’s alleged directive that the State deliver an affidavit in answer to his application for leave to appeal, nor his objection to Mr Downer deposing to the affidavit on behalf of the State, is relevant to the issues whether he should be convicted or acquitted of the criminal charges which he faces.

(e) Fifthly, s 317(1) provides that a special entry shall not be made if ‘the judge to whom the application . . . is made is of the opinion that the application is not made *bona fide* or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court’. As to what the meaning of ‘frivolous’ and ‘absurd’ is, “‘Frivolous” means characterised by a lack of seriousness, as would be a point which is

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<sup>117</sup> *S v Kroon* 1997 (1) SACR 525 (SCA); [1997] 2 All SA 330 (A).

<sup>118</sup> In *S v Staggie* 2012 (2) SACR 311 (SCA) para 16 it was held in respect of s 317 that ‘the only purpose it serves today as to record irregularities that affect the trial that do not appear from the record.’ This was also confirmed in *S v Nkabinde and others* 2017 (2) SACR 431 (SCA) para 27. These alleged irregularities do appear from the record.

<sup>119</sup> *S v De Vries* 2012 (1) SACR 186 (SCA) para 29.

obviously insufficient. “Absurd” applies to an application which is inconsistent with reason or common sense and thus unworthy of serious consideration. . .’, being so devoid of merit that no reasonable person would expect it to succeed as a matter of certainty.<sup>120</sup> The objections raised are frivolous and absurd. It is further curious that the allegation that the determination of dates for the filing of affidavits was irregular, was made in a replying affidavit by Mr Zuma, and that a ‘second’ replying affidavit was also filed by Mr Zuma’s attorney. Mr Thusini could as easily have deposed to a single replying affidavit dealing with the contents of the two replying affidavits. He would then have to have made the allegation of irregularity with full knowledge of the context and the contents of what had been conveyed in the exchange of correspondence set out earlier. It would suggest that the separate replying affidavit by Mr Zuma was prepared by design to impute an ‘irregularity’ without the full context being explained. That raises questions as to whether the raising of this ‘irregularity’ by Mr Zuma, and him now seeking a ‘special entry’ in respect thereof, was done in good faith.

(f) Sixthly, an application for a special entry should also not be made if the granting of the application would be an abuse of the process of the court.<sup>121</sup> Having regard to the lack of prospects of success, an application for such an entry would amount to an abuse of the process of this court<sup>122</sup> and should not be made.

[117] Even where an irregularity or illegality has occurred, the question remains whether the irregularity or illegality caused a failure of justice, as provided in the proviso to s 322 of the CPA.<sup>123</sup>

[118] Further, if the application for a special entry is wrongly refused, Mr Zuma’s remedies would lie in terms of s 317(5) of the CPA. That provision does not require

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<sup>120</sup> A Kruger *Hiemstra’s Criminal Procedure* (May 2021 – Service Issue 14) at 31-31, discussing and applying *S v Cooper* 1977 (3) SA 475 (T).

<sup>121</sup> *S v Botha* 2006 (1) SACR 105 (SCA) para 3.

<sup>122</sup> S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p32F.

<sup>123</sup> *S v Botha* 2006 (1) SACR 105 (SCA) para 4. S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p31 which applies this principle also to entries in terms of s 317.

leave to appeal, as Mr Zuma seeks in paragraph 30 of his conditional counter-application.

[119] In conclusion, in an application for leave to appeal against the refusal to note a special entry, it is necessary for an applicant to show a reasonable prospect of success before the court deciding the special entry on appeal.<sup>124</sup> Thus even if the conditional counter-application is construed as an appeal against a refusal to make a special entry, Mr Zuma has failed to show that his appeal has prospects of success.

[120] The application for a special entry of an irregularity or illegality, or for leave to appeal to be granted on the grounds of s 317 in respect thereof, both fall to be dismissed.

#### **The relief sought on the grounds of s 319 of the CPA**

[121] Mr Zuma, with reliance on the same basis quoted above from his replying affidavit in his application for leave to appeal,<sup>125</sup> in his conditional counter-application in support of his application for a special entry in terms of s 317 of the CPA, also applies that '*leave to appeal* to the Supreme Court of Appeal ought to be granted on the grounds of section 319 . . . of the CPA' for the reservation of questions of law.

[122] The response to that relief is similar to that raised in respect of the relief sought on the grounds of s 317 of the CPA.

[123] Section 319 of the CPA provides:

'(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.

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<sup>124</sup> *S v Nkata and others* 1990 (4) SA 250 (A) at 256I-257C, *S v Xaba* 1983 (3) SA 717 (A) at 733D.

<sup>125</sup> Mr Zuma's replying affidavit paras 22 to 30, which have been quoted in para 50 above.

(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law.

(3) The provisions of sections 317 (2), (4) and (5) and 318 (2) shall apply *mutatis mutandis* with reference to all proceedings under this section.'

[124] As regards when the reservation of a legal issue should be raised, it has been said that '[t]he application is not made [or are not normally made<sup>126</sup>] during the trial, but at the end of it',<sup>127</sup> but no time limit is prescribed and questions of law have 'been reserved more than a month after the trial'.<sup>128</sup>

But in *S v Khoza en andere*<sup>129</sup> the Appellate Division held that:

'n Regsvraag kan alleenlik voorbehou word op aandrang van 'n beskuldigde indien hy skuldig bevind is.'<sup>130</sup> (emphasis added)

Mr Zuma has not been convicted.

[125] Insofar as Mr Zuma in paragraph 22 of his replying affidavit has 'lodged an application in terms of section 319 . . . of the CPA for the reservation of several questions of law for adjudication and determination by the SCA . . .' and that it is refused, I respond briefly as follows:

[126] It is not clear which questions Mr Zuma wishes to have reserved. Whatever they may be, if refused, Mr Zuma would have the remedies in s 319(3) read with s 317(5) and s 318(2) of the CPA. These do not require an application for leave to appeal, but an approach to the President of the SCA. *Hiemstra* confirms that:

'There is a possibility of appeal against a refusal because subsection (3) makes the provisions of sections 317(2), (3), (4) and (5) and 318(2) applicable to this procedure, with the result that

<sup>126</sup> *R v Adams and others* 1959 (3) SA 753 (A) 758E-F; S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p35.

<sup>127</sup> A Kruger *Hiemstra's Criminal Procedure* (May 2021 – Service Issue 14) at 31-37.

<sup>128</sup> A Kruger *Hiemstra's Criminal Procedure* (May 2021 – Service Issue 14) at 31-37. See also *R v Willem and others* 1924 TPD 517.

<sup>129</sup> *S v Khoza en andere* 1991 (1) SA 793 (A) at 795J-796A.

<sup>130</sup> My own translation of this statement is: 'A question of law may only be reserved at the insistence of an accused if he is convicted.'



*the President of the Appeal Court can be approached* in terms of section 317(5) to reserve the question of law if the trial court refused to reserve it.<sup>131</sup> (emphasis added)

If a trial court refuses a request to reserve a question of law, then the next step is to petition the President of the Supreme Court of Appeal.<sup>132</sup>

[127] Whether a question of law should be reserved, ‘is a matter of discretion’ and ‘if the discretion was properly exercised, it is unlikely that [an appeal court] will interfere’.<sup>133</sup> *In casu*, no case is made out for a discretion to be exercised in favour of the reservation of any question of law.

[128] As regards the merits of a request for the reservation of a question of law, I comment briefly as follows. In the past, s 319 has at times been ‘used as a device enabling appeals on facts by clothing a question of fact as one of law, for example “whether there was legal evidence to support a conviction”’.<sup>134</sup> It came to be accepted that if a ‘judge found facts proven but did not conclude guilt from those proven facts, the alleged faulty conclusion based on the proven facts is a question of law. The question of law is then whether the proven facts constitute the commission of the crime’.<sup>135</sup> But the procedure under s 319 could not be used when the factual basis is uncertain. And where a question of law is formulated, it must be done clearly and comprehensively.<sup>136</sup>

[129] In *Director of Public Prosecutions, Western Cape v Schoeman and another*<sup>137</sup> the SCA listed the three requirements for section 319 as follows:

‘Before a question of law may be reserved under s 319 three requisites must be met. First, it is essential that the question is framed accurately, leaving no doubt what the legal point is.

<sup>131</sup> A Kruger *Hiemstra’s Criminal Procedure* (May 2021 – Service Issue 14) at 31-38. That happened in *Magmoed v Janse van Rensburg and others* 1993 (1) SACR 67 (A) at 88f-g.

<sup>132</sup> S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p39.

<sup>133</sup> A Kruger *Hiemstra’s Criminal Procedure* (May 2021 – Service Issue 14) at 31-38.

<sup>134</sup> A Kruger *Hiemstra’s Criminal Procedure* (May 2021 – Service Issue 14) at 31-33.

<sup>135</sup> *Magmoed v Janse van Rensburg and others* 1993 (1) SACR 67 (A) at 94a-d.

<sup>136</sup> *S v Khoza en andere* 1991 (1) SA 793 (A); [1991] 3 All SA 971 (A). *S v Boekhoud* [2011] ZASCA 48; 2011 (2) SACR 124 (SCA) paras 34 and 62.

<sup>137</sup> *Director of Public Prosecutions, Western Cape v Schoeman and another* 2020 (1) SACR 449 (SCA) para 39.

Secondly, the facts upon which the point hinges must be clear. Thirdly, they should be set out fully in the record, together with the question of law.’

[130] Mr Zuma has not identified the questions of law to be considered beyond referring to ‘some of the purely legal grounds of appeal contained in the notice of application [for leave to appeal]’<sup>138</sup> but then adds, ‘[i]n any event, the *entire* special plea proceedings are, by definition, based on a point of law’;<sup>139</sup> and, finally, he contends that ‘[a]dditional issues which justify referral to the SCA in terms of section 319 and/or section 317 of the CPA are the irregularities identified in my two objections raised above about the irregular procedure and/or the inappropriate deponent’.<sup>140</sup>

[131] The aforesaid description by Mr Zuma, insofar as it may refer to other questions of law, is too vague to satisfy the legal requirement of certainty which is required for the proper reservation of questions of law.

[132] Insofar as Mr Zuma relies on ‘the entire special plea proceedings’, the question whether there is evidence which support his grounds of complaint, is a question of fact, and not a question of law. This is evident from the distinction which the Constitutional Court drew between questions of fact and questions of law in *S v Basson*.<sup>141</sup> That will not qualify for reservation as questions of law.

[133] It might be, as appears from paragraph 11 of Mr Zuma’s heads of argument, that the application in terms of s 319(1) may now be confined to the first of those objections, namely his contention that this court could not validly direct that answering and replying affidavits be filed in the application for leave to appeal. This issue has however been dealt with earlier in this judgment as being without any substance. Similarly in regard to the point regarding Mr Downer’s alleged conflict of interest.

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<sup>138</sup> Mr Zuma’s replying affidavit para 23 (emphasis added).

<sup>139</sup> Mr Zuma’s replying affidavit para 24 (emphasis added).

<sup>140</sup> Mr Zuma’s replying affidavit para 27.

<sup>141</sup> *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) paras 46-49.

[134] Even where a question of law is involved, a court will not exercise its discretion to reserve a question of law for consideration by the SCA if there is no reasonable prospect of a finding by the SCA that a mistake of law was made.<sup>142</sup> Not one of Mr Zuma's grounds in his application for leave to appeal bears a reasonable prospect of success, for reasons set out earlier. The primary issue in the main judgment has been decided authoritatively by the SCA.

[135] The application to reserve question(s) of law, or for leave to appeal in respect of the refusal to reserve questions of law, accordingly fall to be dismissed.

### **Any possible additional grounds of appeal not dealt with in this judgment**

[136] Any further 'grounds' advanced in the application for leave to appeal, are not dealt with as it is, respectfully, unnecessary to do so. The argument addressed in court had raised only the issues dealt with in this judgment. The reader of this judgment is respectfully referred to the reasons and conclusions contained in the main judgment in answer to any grounds of appeal which I might have not dealt with in this judgment.

### **Conclusion**

[137] To summarize, the application for leave to appeal and related applications which include the application to adduce further evidence on appeal, the application to enter a special entry on the record or for leave to appeal in respect thereof, and the application for the reservation of questions of law for the consideration by the SCA or for leave to appeal in respect of the refusal thereof, are all dismissed.

[138] The interests of justice require that the matter now proceeds to trial in respect of the not guilty pleas of the two accused.

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<sup>142</sup> *S v Basson* 2004 (1) SA 246 (SCA); [2003] 3 All SA 51 (SCA) para 10, a finding which was not overruled in the State's partially successful appeal to the Constitutional Court in *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC). The English translation of *S v Basson* 2004 (1) SA 246 (SCA); [2003] 3 All SA 51 (SCA) para 10 appears in *Director of Public Prosecution: Gauteng Division, Pretoria v Pooe* [2021] ZASCA 55; [2021] 3 All SA 23 (SCA); 2021 (2) SACR 115 (SCA) para 38.

**Order**

[139] I issue the following orders:

1. The application for leave to appeal and all related applications, which include the application to adduce further evidence on appeal in terms of section 316(5)(a) of the Criminal Procedure Act 1977, the application for leave to appeal to the Supreme Court of Appeal on the grounds of section 317 of the Criminal Procedure Act 1977 and/or for a special entry of an irregularity or illegality to be made on the record, and the application for leave to appeal to the Supreme Court of Appeal on the grounds of section 319 of the Criminal Procedure Act 1977 and/or for the reservation of questions of law for consideration by the SCA, are all dismissed.
2. The criminal trial shall proceed during the second and third terms of the 2022 court calendar of this court, where it has been set down, as previously agreed by all the parties, commencing at 10h00 on 11 April 2022, being the date to which the trial was adjourned on 26 October 2021.

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**KOEN J**

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