REPORTABLE

CASE NO. CC 104/2005

IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

THE STATE

and

DOUW DE BEER ACCUSED 1
DYLLAN DOUW DE BEER ACCUSED 2

JUDGMENT ON THE SPECIAL PLEA

MOGOENG JP.

[1] The fundamental question to be answered in this matter is whether this Division of the High Court, which would otherwise lack jurisdiction on the grounds that the charges preferred against the accused persons in this matter, relate to crimes which were allegedly committed outside its stipulated territorial boundaries, does have jurisdiction in terms of s 90(1) and (2)(a) of the Magistrates Court Act No. 32 of 1944 read with s 19(1)(a) of the Supreme Court Act No. 59 of 1959. The background is

outlined below.

[2] From the totality of the documents as well as information given to the Court from the bar, it is evident that this case is primarily about the death of two persons, who were both resident at Ramokoka village within the magisterial district of Mankwe. These people disappeared and apparently died on or about 11 April 2004. Consequently, members of the South African Police Service who are responsible for the investigation of violent crimes in that district, began to investigate the disappearance and possible commission of a crime(s).

[3] This culminated in the arrest of the two accused persons on the belief or suspicion that, (i) they are responsible for the death of the deceased persons; (ii) they tried to defeat the ends of justice; and (iii) they stole a cellular phone belonging to one of the deceased persons.

[4] The accused persons subsequently appeared in the Mankwe district court, at Mogwase, which is where this Court is sitting on Circuit right now. Their appearance was in compliance with the provisions of the Criminal Procedure Act No. 51 of 1977 ("the CPA"), particularly s 119. At some stage, the accused persons applied for bail in the same district court. Bail was refused whereafter an appeal against the refusal of bail was prosecuted in this Court.

[5] All this time, the State was labouring under the impression that the scene of the alleged crimes fell within the magisterial district of Mankwe. It was not until 10 May 2005 that the State was informed by the defence that this might not be the case. Investigations into the issue by the State proved the defence to be correct. Accordingly, the Director of Public Prosecutions, ("the DPP") Mmabatho, apparently supported by the DPP, Pretoria, applied to the National Director of

Public Prosecutions ("the NDPP") for a certificate in terms of s 111 of the CPA, so as to clothe this Court with the jurisdiction it apparently did not have. The certificate, if granted, would have effectively obviated any possible objection to this Court's territorial jurisdiction. In the exercise of his discretion, the NDPP refused to grant the certificate on 16 June 2005. However, that did not deter the DPP, Mmabatho, from persisting in handling the trial which was already set down for hearing on 20 June 2005 at Mogwase.

[6] By then, the defence had already given notice in terms of s 106(1)(f) of the CPA on 13 June 2005 that it would object to the trial being proceeded with on the basis that this Court does not have jurisdiction to adjudicate this case since the alleged offences were committed outside the area of jurisdiction of this Court. On 20 June 2005, the defence did take a special plea in terms of s 106(1)(f) of the CPA on the aforestated ground. Both counsel, duly assisted by their juniors, made the submissions set out below.

[7] In the State's endeavour to discharge the onus that it bears (See *R v Radebe* 1945 590(A)) to show that the Court in which it has arraigned the accused persons does have jurisdiction, it relies on s 90(1) and (2)(a) of the Magistrates Court Act No. 32 of 1944 which provides as follows:

> "**90. Local limits of jurisdiction**
>
> (1) Subject to the provisions of section eighty-nine, any person charged with any offence committed within any district or regional division may be tried by the court of that district or of that regional division, as the case may be.
>
> (2) When any person is charged with any offence –

> (a) committed within the distance of four kilometres beyond the boundary of the district or of the regional division."

[8] Whereas it is common cause between the parties that the alleged crimes were committed outside the Mankwe district, it is also common cause that the alleged crimes were committed within the distance of 4 kilometres beyond the boundary of the Mankwe district. The defence further concedes that if the district court of Mankwe had substantive jurisdiction over all the offences with which the accused are charged, then there would, in law, be no objection to that district court hearing the matter.

[9] Based on the foregoing, Mr Molefe, for the DPP, Mmabatho, submitted that since the district court of Mankwe has territorial jurisdiction in this matter then logic dictates that this High Court, which has jurisdiction over the Mankwe district court, should also have jurisdiction to hear the matter as a Court of first instance. This really is the gravamen of his case.

[10] In support of the accused's special plea in terms of s 106(1)(f), Mr Engelbrecht, for the defence, submitted that s 90 of Act 32 of 1944 relates and applies exclusively to the Magistrates Courts. Furthermore, so went the submission, there is no equivalent of this section in the Supreme Court Act 59 of 1959 nor is s 90 referred to in s 19 of the Supreme Court Act No. 59 of 1959. Meaning that s 90 may not be relied on to found jurisdiction for the High Court where it otherwise does not exist particularly in circumstances where Parliament, though it had ample opportunity to do so if it wanted to, chose not to extend the 4 kilometre rule to the High Court. Mr Engelbrecht went on to say that the only section which deals with the jurisdiction of the High

Courts is s 19 of Act 59 of 1959. It is convenient at this stage to quote s 19(1)(a)(i) and (ii) which reads thus:

> **"**(1)(a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognisance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power −
>
> (i) to hear and determine appeals from all inferior courts within its area or jurisdiction;
>
> (ii) to review the proceedings of all such courts."

Mr Engelbrecht submitted that there was nothing in s 19 which seems to suggest that this Court would have jurisdiction over a place such as the scene of the alleged crimes in this matter.

[11] Superficially, and if the provisions of the Magistrates Court Act and the provisions of the Supreme Court Act relating to jurisdiction were to be insulated in some impenetrable compartments, then Mr Engelbrecht's contention would possibly be unassailable. However, this question of jurisdiction has to be examined more closely, practically, purposively and holistically. The latter approach reveals, ***inter alia***, the following:

11.1 If the two accused persons were to appear before the Mankwe district court on counts 3 (defeating the ends of justice) and 4 (theft of a cellular telephone), they would have no valid ground whatsoever to object to that lower court hearing the case;

11.2 had the State decided to refer the two counts of murder

(counts 1 and 2) in this matter to the regional court, whose territorial jurisdiction includes the Mankwe district, no basis would exist for objecting to the territorial jurisdiction of the regional court;

11.3 if the regional court were to find them guilty as charged and form a view that the offences are of such a nature as to warrant a referral of the matter to the High Court in terms of the provisions of the Criminal Law Amendment Act 105 of 1997 for the imposition of a sentence which is beyond the regional court's penal jurisdiction, then there would not be any basis to object to this Court entertaining the matter so referred.

11.4 if either the abovementioned district court or regional court were to convict and sentence the accused and an appeal were to be noted, the defence readily concedes that this Court would be the correct forum to entertain the appeal. Obviously the review from the district court would also have to be referred to this Court.

[12] All this would be legally permissible notwithstanding the fact that there is no reference to s 90 of Act 32 of 1944 in s 19 of Act 59 of 1959. Why? Because for the purpose of s 19(1)(a)(i) and (ii) of Act 59 of 1959, all lower courts must be regarded as being Courts within the area of jurisdiction of a specified Provincial Division in connection with cases wherein they exercise their powers, the exercise whereof is appealable, within the area of jurisdiction of that Division. The Division of the High Court within the jurisdiction whereof the accused is tried by the lower court has jurisdiction to hear the appeal. (***Ex-Parte*** *the Minister of Justice In re:*

S v de Bruin 1972 (2) SA 623 (A) at 632A-B).

[13] In my view and with respect to the defence, it is a rather narrow and overly technical approach to accept, as the defence should and does, that this Court which entertained a bail appeal arising from this matter, would also have the jurisdiction to review a decision of the district court and to entertain a referral from the regional court in terms of the Criminal Law Amendment Act, and to entertain an appeal from either the district or regional court which are within its territorial jurisdiction in respect of this very case, but to maintain that jurisdiction would be objectionable in law as a court of first instance. Just as, according to the Scripture, no servant is greater than his master, no lower court is greater than a High Court in respect of jurisdiction. For the purpose of s 19(1)(a) of Act 59 of 1959, a lower court, including its jurisdiction as extended by the 4 kilometres rule provided for by s 90 of Act 32 of 1944, must be regarded as being a Court within the area of jurisdiction of a specified Provincial Division (*de Bruin* ***supra*** at 632A-B). By parity of reasoning, this High Court does have jurisdiction as a Court of first instance in respect of alleged crimes just as in this case committed within the distance of 4 kilometres beyond its boundary. This conclusion is reinforced by the correct interpretation of the relevant sections as discussed below.

[14] Section 19 of Act 59 of 1959 read with s 90 of Act 32 of 1944 cannot be interpreted in such a way as to produce absurd results that could never have been intended by Parliament. This was aptly captured in *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA), where the Supreme Court of Appeal cites the following dictum

from *Bhyat v Commissioner for Immigration* 1932 AD 125 129 with approval at paragraphs 10 and 11:

> "The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment . . . in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some *absurdity, inconsistency, hardship or anomaly* which from a consideration of the enactment as a whole a court of law is satisfied the legislature could not have intended.
> (Emphasis supplied)
>
> The court (per Schutz JA) then continues:
>
> The effect of this formulation is that the court does not impose its notion of what is absurd on the legislature's judgment as to what is fitting, but uses absurdity as a means of divining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend."

The meaning contended for by the defence would obviously give rise to an inconsistency, an anomaly and an absurdity. No logical and just explanation can be conceived of, as to why this Court would have review and appeal jurisdiction when any of the lower courts under its jurisdiction would have entertained this matter but would not itself have jurisdiction as a Court of first instance. I am satisfied that the intention of Parliament, when enacting s 90 of Act 32 of 1944, was that since all preparations for all criminal trials begin in the Magistrates' Court before they are referred to the High Court, the High Court would enjoy the same jurisdiction as the referring lower court has. For these reasons, this Court does have jurisdiction as a Court of first instance.

[15] Over and above the finding that this Court has, at least, the same territorial jurisdiction as the referring lower court (See s 119 of

the CPA), and while one must recognise that the Transvaal Provincial Division ("the TPD") has an undisputable territorial jurisdiction in this matter, a few practical considerations are highlighted below to demonstrate why this court and not the TPD should hear this case:

15.1 The two deceased persons in this matter resided at Ramokoka village which is within the Mankwe magisterial district;

15.2 There is a groundswell, of public interest in the case and of support for the bereaved family from the local communities;

15.3 This Court sitting here at Mogwase is more accessible to the interested public and the members of the bereaved family than would be the case with Pretoria;

15.4 The scene of the alleged crimes, is also a lot closer to this Court than it is to Pretoria and some of the evidential material which is apparently important is said to have been found in and gathered from the area of jurisdiction of this Court. Should a need ever arise for an inspection ***in loco*** to be held, it would be more cost-effective, convenient and feasible to do so for a Court sitting in Mogwase than in Pretoria;

15.5 The accused no. 1 still owns the farm which is allegedly the scene of the crime and should be able to sleep there for easy access to the Court. The accused no.1 is apparently a man of substantial means. He was able to pay bail in the

amount of R40 000.00 for himself and his son. He owns a farm and has enlisted services of senior counsel and a junior. Besides, even if he were to travel from Pretoria, the interested members of the public and the family of the deceased persons also have to travel from Ramokoka village to Mogwase;

15.6 The travel and accommodation expenses of the accused and their legal representatives may be high if the matter is heard here at Mogwase, but that alone cannot override other weighty considerations mentioned in this case. Everybody involved has to make a sacrifice and that is the sacrifice that the accused persons would have to make. Besides, the accused have reasonable and cheaper options;

15.7 Justice must be delivered to the people of this country as speedily as is humanly possible. All the key role-players were here from 20 June 2005 to date. Regrettably, no real progress was made and more of the very financial resources that the accused no. 1 would have the Court believe that he wants to save by taking this matter to Pretoria, were wasted at his instance. All this happens when this matter was estimated to be finalised two days from today. The accused's approach to this matter, though they acted within their rights in bringing this application, is inimical to a desire to have the matter expeditiously and cheaply disposed of;

15.8 The question that the evidence to be led is forensic in nature and that almost half of the witnesses reside either much closer to, or in Pretoria is without merit. All the

people who are apparently going to give forensic evidence will be doing so as part of or as an extension of their duties. They are not just good Samaritans helping the justice system to function. Besides, I am not aware that they have complained nor can they be heard to complain that the matter will be heard at Mogwase and not in Pretoria. On the other hand, not only has the public already expressed its displeasure about the possibility of the matter being moved to Pretoria, but there are also 7 witnesses from Ramokoka village who would have to abandon their responsibilities to come to Court and testify. These are the people who are sacrificing their time and convenience for the good of the system. It is unacceptable to expect of these people to go all the way to Pretoria, away from their homes and families until their turn to testify comes;

15.9 No application has been made in terms of s 153 of the CPA to exclude the public from attending and obviously the Court has not yet decided that the public would be excluded from the hearing and if so, whether the whole or only a certain class of persons should be excluded. The submission by the defence that the trial does not have to be held at Mogwase to accommodate the interested public since they would be excluded from the courtroom is, therefore, not yet a factor to be considered for the purpose of this application but an assumption by the defence that their application in terms of s 153 to exclude the public will be granted;

15.10 As for the previous and possible future demonstrations by members of the public, it is not clear

what the defence thinks is wrong with demonstrations. The Court was not told that previous demonstrations were violent, or that the lives and limbs of the accused are in danger. I do not know what had happened in the past to necessitate police intervention. Be that as it may, Mr Engelbrecht did not report any unbecoming demonstration to the Court on the morning of Monday, 20 June 2005 when this Court first sat here at Mogwase and there is no reason why prior arrangements cannot be made with the South African Police Service to give whatever protection to the accused the situation seems to cry out for;

15.11 Counsel from the DPP, Mmabatho, have been working on the matter from the beginning up to now. They are familiar with the matter and more time and resources would be spared if they were to prosecute this matter to finality as opposed to the State counsel from Pretoria having to take over the case now and start a new familiarisation process.

[16] These practical considerations bear out the practicality, fairness and reasonableness of the approach adopted by both DPPs' in Pretoria and in Mmabatho that this matter be heard in this Court. All things being considered, it is in the interests of justice that this matter be heard by this Court.

[17] In the result, the question raised in paragraph 1 of this judgment is answered in the affirmative and the accused's special plea, that this Court lacks territorial jurisdiction to try this matter, is dismissed.

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M.T.R. MOGOENG
JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	:	20 JUNE 2005
DATE OF JUDGEMENT	:	22 JUNE 2005
COUNSEL FOR THE STATE	:	ADV H.R. MOLEFE (with him ADV S. KHUMALO)
COUNSEL FOR THE ACCUSED	:	ADV ENGELBRECHT SC (with him ADV J.M.C. SMIT)