IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO 65/04
245/04

In the matter between

WESTERN AREAS LIMITED	**First Appellant**
ROGER BRETT KEBBLE	**Second Appellant**
HENDRIK CHRISTOFFEL BUITENDAG	**Third Appellant**
ROGER AINSLEY RALPH KEBBLE	**Fourth Appellant**

and

THE STATE	**Respondent**

CORAM: **HOWIE P, SCOTT, FARLAM, MTHIYANE et CLOETE JJA**

Date Heard: 1 March 2005

Delivered: 31 March 2005

Summary: **Dismissal of objection to indictment – whether appealable before close of trial – interpretation of s 21(1) of the Supreme Court Act of 1959 – subsection can permit appeal before end of trial if interests of justice so require – not shown to be so required in the instant case.**

J U D G M E N T

HOWIE P

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[1] A criminal trial cuts across a number of an accused person's fundamental rights. Attendance at the trial, even if on bail, limits freedom of movement and even the right to liberty is curbed to an extent. Those are some of the negative consequences. On the other hand the accused is afforded a number of what are collectively called fair trial rights. One of these is the right to appeal. The primary question in the present instance is whether this Court has jurisdiction to hear an appeal at this stage. The question arises in the following way.

[2] The four appellants, a company and three individuals, have been charged in the High Court, Johannesburg on an indictment containing twelve counts alleging their commission of a variety of offences. Before pleading they formally objected to each of seven counts as disclosing no offence.

[3] Six of the counts (counts 1, 2, 3, 4, 6 and 7 in the indictment) each comprises a charge of fraud and some have alternative charges of contravening the Riotous Assemblies Act 17 of 1956 – conspiracy to commit fraud as one alternative and incitement to commit fraud as another. Each fraud count alleges, as an element of the offence, the non-disclosure of facts which the State says it was the appellants' statutory and common law duty to disclose in respect of certain share-dealings. The notice of objection points to the fact that the statutory and regulatory provisions which pertain to share-dealings and impose a duty of disclosure, fail to criminalise non-disclosure. The nub of the objection is that non-disclosure in that situation cannot as a matter of law constitute the misrepresentation element of fraud. (It is not disputed that non-disclosure amounts to a misrepresentation that the undisclosed facts do not exist.) Consequently, so the objection continues, each of the six fraud charges in question is bad in law. That being so the alternative charges, being inextricably linked to the alleged fraud, are also bad.

[4] The seventh count objected to (count 12 in the indictment) alleges a contravention of s 2(1) of the Insider Trading Act 135 of 1998, again with

conspiracy and incitement charges as alternatives. The objection is that s 4(1)(d) of that Act creates a specific defence and the conduct attributed to the appellants in the charge is the very conduct which constitutes that defence.

[5] At the start of the hearing in the High Court, but before plea, argument was heard on the objection. The presiding Judge (Labuschagne J) reserved his decision and subsequently dismissed the objection. Later he granted leave to appeal to this court and also granted a certificate in terms of Rule 18 of the Constitutional Court in respect of a possible appeal to that Court.

[6] Turning to the jurisdictional issue, usually referred to in the present context as appealability, the case for the appellants is that this Court has jurisdiction at this juncture, firstly, by reason of the provisions of s 168(3) of the Constitution,[1] secondly, as a matter of discretion and, thirdly, by virtue of the provisions of s 21(1) of the Supreme Court Act.[2]

[7] Section 168(3) of the Constitution (omitting irrelevant words) reads as follows –

'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) … '

[8] The first submission by counsel for the appellants in regard to this subsection is that it altered the pre-existing position by conferring plenary appellate jurisdiction. Before the coming into operation of the constitution on 4 February 1997 this court's jurisdiction had to be conferred by statute.[3] Questions of appealability went to jurisdiction and had to be decided by reference to the

[1] The Constitution of the Republic of South Africa, Act 108 of 1996.
[2] Act 59 of 1959.
[3] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7D-G.

Supreme Court Act[4], the Criminal Procedure Act[5] and other legislation specifically material to appeals to this court. Now, said counsel, the appealability questions that pre-dated 1997 have fallen away; every High Court order is appealable in principle and no Rule of this Court restrains that otherwise limitless jurisdiction. In this regard counsel relied on *Chevron Engineering (Pty) Ltd v Nkambule*.[6]

[9] In evaluating this contention the following considerations are of importance. First, there is a significant background history. The Interim Constitution[7] specifically stated that this Court had no jurisdiction in matters falling within the jurisdiction of the Constitutional Court viz constitutional matters.[8] The intention in s 168(3) was to remove that restriction. The words 'any matter' accord jurisdiction not only in matters that were subject to the court's jurisdiction before but, now, also constitutional matters. In effect the jurisdiction bestowed is to decide appeals on any subject matter. The words 'any matter' also appear in s 170 of the Constitution which empowers magistrates' courts and all other courts [9] to decide 'any matter determined by an Act of Parliament'. Here, again, the intention in my view is to refer to subject matter because the section goes on to say that a court of lower status than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President. These are instances of subject matter. The appellants' reliance on *Chevron* [10] is misplaced. The question there was not whether the decision in issue was appealable but whether, in respect of a decision that clearly was appealable, an appeal lay to this court.

[10] Secondly, nothing in the subsection suggests the conferment of jurisdiction to hear as an appeal that which, by established statutory construction and practice,

[4] Sections 20 and 2.
[5] Act 51 of 1977.
[6] 2003 (5) SA 206 (SCA).
[7] The Constitution of the Republic of South Africa Act 200 of 1993.
[8] Section 101(5)
[9] Other, that is, than superior courts and magistrates' courts.
[10] Footnote (6)

is not appealable. On the contrary, quite apart from subject matter, the words ‘decide appeals’ plainly means that the cases to be decided are appeals. A decision which is not appealable is not justiciable as an appeal. The subsection therefore means an appeal properly before the court as such.

[11] Thirdly, a dispute on the question of appealability is not itself an appeal. It falls contextually and linguistically within the meaning of the words ‘issues connected with appeals’ in s 168(3)(b).

[12] Fourthly, 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.

[13] Finally, s 171 of the Constitution states that all courts function in terms of national legislation and their rules and procedures must be provided for in terms of national legislation. Here is a very clear indication that the framers had no intention to speak in s 168(3) of matters of forensic rules, procedures and function. Appealability – when to appeal and what to appeal against – is essentially a subject within the ambit of rules, procedures and function. The respondent does not argue that there is no right to appeal against the findings of the Court below. The question is: when to appeal? That, as the Constitution shows, is a question for legislative interpretation and application, not for s 168(3).

[14] In conjunction with the appellants’ argument on s 168(3) their counsel advanced certain submissions in regard to *Minister of Safety and Security v Hamilton*[11]. That case concerned the appealability of an order dismissing an exception in a civil case. In the majority judgment the following statement appears –

[11] 2001 (3) SA 50 (SCA)

'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.'[12]

(Nothing in the minority judgment conflicts with this statement.)

[15] Counsel urged that the quoted statement is clearly wrong. The reasons proffered for that contention were that s 168(3) of the Constitutions warrants no such qualification; that one cannot employ the construction of a statute to interpret the Constitution; and that the Constitution contemplates a hierarchy of courts which would be disregarded if an appeal would proceed to the Constitutional Court without first being dealt with in this court.

[16] 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. Finally, in this connection, it is so that the Constitution contemplates a hierarchy of courts but it has been recognised that a matter can be appealable to the Constitutional Court before being appealable to this court.[13]

[17] For these reason the appellants' argument pertaining to s 168(3) of the Constitution cannot be sustained.

[18] It was argued in the alternative to the appellants' first submission that if this Court should find that it had a discretion to exercise its appellate jurisdiction then there were circumstances present which warranted the exercise of that discretion in their favour. I do not think that there is a discretion in the context of this court's

[12] at 52B-E par 4 per Cameron JA.
[13] *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) at 409F-411B paras 6 to 8.

jurisprudence based on construction of the relevant provisions of the Criminal Procedure Act and the Supreme Court Act or any discretion conferred by those provisions themselves. The only possibly relevant provision of the Criminal Procedure Act is s 319[14] which concerns reservation of a question of law. It is true that ss (2) deems the grounds of objection to an indictment to be questions of law but in terms of the provisions of ss (3) read with s 317(2),[15] application for reservation of such a question can only be made after conviction or acquittal.[16]

[19] As regards the material provisions of the Supreme Court Act, they are contained in s 21(1).[17] They confer on this court jurisdiction to hear and determine an appeal from 'any decision' of a Provincial or Local Division not conferred by s 20(1) of that Act. The latter section, which does not apply to criminal proceedings, provides for appeals against a 'judgment or order' and does not refer to a 'decision'. Nonetheless this court has construed 'decision' in s 21(1) to have the same meaning as that which it has attributed to 'judgment or order'.[18]

[20] The appealability decisions of this court are based on the 'salutary general rule that appeals are not entertained piecemeal'.[19] Appeals are, generally, precluded

[14] Section 319 reads
'(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.
(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 section 317(2), (4) and (5) and 318(2) shall apply *mutatis mutandis* with reference to all proceedings under this section.'

[15] Section 317(2) reads
'(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 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.

[16] *R v Adams and others* 1959 (3) SA 753 (A) at 760F-761G.

[17] Section 21(1) of Act 59 of 1959 reads
'(1) 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 other law, have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division.'

[18] *Moch's* case, footnote (3)

[19] *Wahlhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A) at 120E.

before final determination of a case unless the judicial pronouncement sought to be appealed against, whether referred to as a judgment, order, ruling, decision or declaration, has three attributes. First, it must be final in effect. That means it must not be susceptible of alteration by the court appealed from. Second, it must be definitive of the rights of the parties, for example, because it grants definite and distinct relief. Thirdly, it must have the effect of disposing of at least a substantial portion of the relief claimed.[20] Clearly, whether these criteria are met does not depend on judicial discretion.

[21] Counsel for the appellants sought, then, to contend that the decision of the Court below was final in effect because it was based on the factual allegations contained in detailed further particulars furnished by the prosecution and did not merely decide an abstract legal issue. Counsel went on to say that the learned judge was seized with the trial and no purpose could be served by treating his judgment as open to reconsideration. It was the intention of all the parties, said counsel, that the decision of the judge should be final and that had the case been a civil one it would have lent itself to a separation of issues in terms of rule 33(4) and therefore an appealable judgment.[21]

[22] Counsel for the respondent adamantly disputed that the prosecution intended that the decision of the Court below would be regarded as final. Moreover, there is nothing on record, or relied on by the appellants' counsel, to show that any such common intention existed even assuming, in the appellants' favour, that the existence of a mere intention, as opposed to a recorded agreement or stated case, could impose finality not imposed by law and further assuming that a legal issue in criminal proceedings can indeed be decided on agreed facts or a stated case. In the circumstances the decision of the learned judge was not final in law however much

[20] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533B*; Hamilton's* case (footnote (11)) at 52E-F par 4.

[21] Cf *Maize Board v Tiger Oats Ltd and Others* 2002 (5) SA 365 (SCA) 374A-B.

he might be disinclined to alter his view if he were to preside at the trial. His decision is open to reconsideration at the end of the trial. In addition, it must be borne in mind that his decision was made before plea, that is to say, before the trial commenced. It might have been the intention that the learned judge should preside at the trial but, as a matter of law, he is not seized of the trial as yet. It follows that all the requirements set in *Zweni's* case are not met.

[23] The final argument for the appellants was that if the case was not appealable on the construction of s 21(1) adopted in *Zweni* and later cases that followed it, the subsection had to be re-interpreted in the light of s 39(2) of the Constitution.[22]

[24] Before dealing with the effect of s 39(2) it should be observed that this court said in *Moch* that the requirements for appealability laid down in *Zweni* were not intended to be exhaustive or to cast the relevant principles 'in stone'.[23] In *Moch* the trial judge refused to recuse himself. This court held, on appeal against such refusal, that dismissing a recusal application was comparable with dismissal of an objection to jurisdiction. As the latter was clearly appealable, so was the former.[24] The dismissal of an objection to an indictment is not comparable with either. It is much the same as dismissal of an exception in a civil case and nothing said in relation to these topics serves to indicate that an objection or an exception constitute, in effect, a challenge to jurisdiction.

[25] In *Khumalo*[25] the Constitutional Court observed that all the considerations which have led this court to adopt a limited interpretation of 'judgment or order' in construing s 20 of the Supreme Court Act can be accommodated within the expression 'the interests of justice'. That is the criterion set in s 167(6) of the Constitution in relation to access on appeal to the Constitutional Court. It is indeed

[22] Section 39(2) reads
'39(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal of forum must promote the spirit, purport and objects of the Bill of Rights.'
[23] Footnote (3), at 10F
[24] At 10G-11B.
[25] Footnote (13), at 411A-B par 8.

such interests which have led to the limited interpretation in question. Long experience has taught that 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]

[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. The possibility of such a conflict was recognised in *Wahlhaus.* [27] As an instance when such conflict might arise this court referred in that matter to the position 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.[28] By that example I understand it to be implied that there would be no trial or a substantially shortened trial.

[27] Reverting to the provisions of s 39(2) of the Constitution and its influence on the construction of s 21(1) of the Supreme Court Act, it is, as I have said, an inevitable consequence of a criminal trial that an accused's exercise of the right to liberty and freedom of movement is restricted. But those are not the only rights to be considered. It is in the public interest that alleged criminals be subjected to the criminal justice process and that the prosecution and defence cases be fully ventilated. In the tension between these competing interests the restrictions on the accused which I have mentioned remain in place, ameliorated where appropriate by release on bail. Those considerations by themselves do not warrant giving 'decision' a more extended meaning than before. What does do so, however, is the

[26] Cf *R v Duvivier* 6 CCR (2d) 180 cited in *S v Friedman* (2) 1996 (1) SACR 196 (W) at 202e-f.
[27] Footnote (19), at 119A-B.
[28] At 120.

possibility of conflict between the general rule against piecemeal appeals and 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 an appeal to be pursued out of the ordinary sequence and so obviating the trial or substantially shortening it.

[28] 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. The scope which this extended meaning could have in civil proceedings is unnecessary to decide. It need hardly be said that what the interests of justice require depends on the facts of each particular case.

[29] In the present matter the only information relevant to that enquiry is provided in an affidavit deposed to by Mr GL Roberts SC, a Deputy Director of Public Prosecutions and one of the prosecution's counsel in the court below. The affidavit was filed in support of the respondent's opposition to an application in that court by three of the appellants for leave to appeal.

[30] What Mr Roberts says is that 'most if not all of the evidence that will be led to prove the counts against which the accused object, will have to be led in any event in respect of the remaining counts against which the [appellants] have no objection. I refer particularly to count 9, but also the other counts'.

[31] The offence involved in count 9 is a contravention of s 424 of the Companies Act 61 of 1973 by the individual appellants in having allegedly carried on the first appellant's business recklessly. Apart from the fact that the dates covered by this count include the dates stated in the other counts, the transactions

which form the subject matter of this count include the transactions which form the subject matter of counts 1, 2, 3, 4 and 6. As far as count 12 is concerned it involves four transactions. Two of them form part the subject matter of count 1. A third forms part of the subject matter of count 9.

[32] The prosecution of count 9 will alone involve canvassing the facts relevant to all the counts objected to save for count 7. As against that, argument at the end of the trial will obviously be longer if the submissions presented to us on the merits of the objection have to be repeated before the trial judge.

[33] The appellants did not seek to contradict or qualify the deposition by Mr Roberts to which I have referred and analysis of the dates and transactions referred to in the indictment supports what he says.

[34] It is the view on all sides that the trial on the counts to which there was no objection will be a lengthy one. In the circumstances outlined above it will not be extended by a material degree if the prosecution case includes the counts objected to. Consequently it cannot be said, on the record before us, that the interests of justice require that appellants' right of appeal against the findings of the Court below on their objection, be exercised now rather than at the close of the trial.

[35] In concluding it must be pointed out that if facts are present which point to the conclusion that the interests of justice require that an appeal against dismissal of an objection to an indictment or charge be heard out of the ordinary sequence, the accused has a choice. The relevant facts can be canvassed before the court hearing an application for leave to appeal against such dismissal. Alternatively, a declarator that a charge discloses no offence can be sought in terms of s 19(1)(a)

(iii) of the Supreme Court Act[29] as was done in the case of *Attorney-General, Natal v Johnstone & Co Ltd*.[30]

[36] For the reasons given above the decision dismissing the appellants' objection is not appealable at this stage. The case on the merits of the objection is consequently not duly before us.

[37] The matter is struck from the roll.

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:

SCOTT JA
FARLAM JA
MATHIYANE JA
CLOETE JA

[29] This gives the High Court power –
'in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[30] 1946 AD 256.