THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 10/06
REPORTABLE

In the matter between:

DOUW DE BEER
FIRST APPELLANT
DYLLAN DOUW DE BEER **SECOND APPELLANT**

and

THE STATE
RESPONDENT

Coram: Harms, Mthiyane, Nugent JJA, Maya et Cachalia AJJA

Heard: 19 May 2006

Delivered: 31 May 2006

Summary: A high court may not assume jurisdiction over offences committed beyond its territorial limits. The extension of territorial jurisdiction of magistrates' courts to four kilometres beyond their boundaries in terms of s 90(2)(a) of the Magistrates' Courts Act 32 of 1944 has no bearing on the territorial jurisdiction of high court as described in s 19(1)(a) of the Supreme Court Act 59 of 1959.

Neutral citation: This judgment may be referred to as *De Beer v The State* [2006] SCA 78 (RSA)

JUDGMENT

CACHALIA AJA

[1] In *Ewing McDonald & Co Ltd v M & M Products Co*[1] this court said that jurisdiction is:

'the power vested in a Court by law to adjudicate upon, determine and dispose of a matter.'

The question raised in this appeal is whether a high court has jurisdiction to try offences allegedly committed within the area of jurisdiction of another high court.

[2] The appellants were indicted on murder and related charges of defeating or obstructing the administration of justice and theft arising from events that had occurred on 11 April 2004 at or near the Boschkop farm. The farm is situated in the northern district of Gauteng Province, just outside the magisterial district of Mankwe in the North-West Province, but within four kilometres of its boundary. (The significance of the four kilometre distance will become apparent later). Because of the farm's location in Gauteng, the Pretoria High Court (Transvaal Provincial Division) has jurisdiction over the offences. This is because s 19(1)(a) of the Supreme Court Act 59 of 1959 (the SCAct) bestows the power upon a provincial division (in this case the Pretoria High Court) to adjudicate over 'all offences triable within its area of jurisdiction'.[2]

[3] The appellants were however indicted in the Mafikeng High Court, which is the provincial division of the North-West Province. This was after they had initially appeared before the Mogwase District Court situated in the district of Mankwe. The trial was to proceed in the Mafikeng High Court, sitting on circuit at Mogwase, on 20 June 2005. However on 10 May 2004 the appellants' legal representatives informed the Deputy Director of Public Prosecutions ('the DDPP') for the North-West Province that the Boschkop farm fell outside the province's jurisdiction, in Gauteng. When the DDPP

[1] 1991 (1) SA 252 (A) at 256G.

[2] Section 19 (1)(a) reads as follows: 'A provincial or local division shall have jurisdiction over . . . all offences triable within its area of jurisdiction . . .. '

realised that this was so, he sought a certificate from the National Director of Public Prosecutions ('the NDPP') in terms of s 111(1)(a) of the Criminal Procedure Act 51 of 1977 ('the CPA')[3] authorising the transfer of the trial from the Pretoria High Court to the Mafikeng High Court. The section grants to the NDPP the authority to remove a trial to the jurisdiction of a Director of Public Prosecutions other than the one in whose area the offence was committed if such removal is in the interests of justice.[4] However on 16 June 2004 the NDPP refused to grant the certificate. Three days earlier the appellants' legal representatives had notified the DDPP[5] of their intention to object to the trial proceeding in the Mafikeng High Court on the basis that the offences had allegedly been committed outside that court's territorial jurisdiction. Undeterred by these events, the DDPP decided to proceed with the prosecution in that court.

[4] The matter came before Mogoeng JP in the Mafikeng High Court, sitting at Mogwase. The appellants, as they indicated they would, pleaded in terms of s 106(1)(f) of 'the CPA' that the Court had no jurisdiction to try the offences. When such a plea is entered, and it appears that the court does not have jurisdiction to try the offences, as is the case in the present matter, the court is, in terms of s 110(2) of the CPA obliged to 'adjourn the case to the court having jurisdiction'.[6] The learned judge however dismissed the objection. He held that on a proper construction of s 19(1)(a) of the SCAct, read together

[3]Section 111 provides as follows:
(1) (a) 'The direction of the National Director of Public Prosecutions . . . shall state . . . the Director in whose area of jurisdiction the relevant . . . criminal proceedings shall be conducted and commenced.
(b) . . .
(2) The court in which the proceedings commence shall have jurisdiction to act with regard to the offence in question as if the offence had been committed within the area of jurisdiction of such court'.

[4]See Du Toit De Jager Paizes Skeen Van Der Merwe *Commentary on the Criminal Procedure Act* '16-5'. The section is usually applied when it is expedient to try multiple acts committed in different jurisdictions in a single trial, or when the witnesses may be resident in another jurisdiction area and that it would be costly and inconvenient to conduct the trial in the jurisdiction of the court where the offence was committed.

[5]Section 106(1) reads as follows: 'When an accused pleads to a charge he may plead –
(a) . . .
(f) . . . that the court has no jurisdiction to try the offence . . ..'

[6]Section 110(2) provides: 'Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.'

with s 90(2)(a) of the Magistrates' Courts Act 32 of 1944, the Mafikeng High Court had jurisdiction to try the offences because they were alleged to have been committed within four kilometres of the boundary of the district of Mankwe. The court below also refused leave to appeal against that finding. Leave was, however, granted by this court.

[5] Clearly an order made by a court that is final and definitive in its effect is capable of being appealed against.[7] Decisions relating to a court's jurisdiction have traditionally been considered appealable because they are definitive of the question whether a court has the competency to adjudicate upon a matter.[8] And in *S v Basson*,[9] the Constitutional Court recently held that an order dismissing or upholding an exception (which a plea objecting to a court's jurisdiction in terms of s 106(1)(f) is), is appealable before the conclusion of a trial. In the present case the appeal ought to be entertained at this stage because it is clear that the court has no jurisdiction and also because it is manifestly in the interests of justice to permit an appeal against the ruling without the appellants first having to be exposed to the prejudice of an irregular trial. This court therefore has jurisdiction to entertain the appeal.

[6] Before dealing with the trial court's reasons for dismissing the plea that it does not have jurisdiction to try the offences, it is necessary to discuss the source of the high court's authority to try offences committed within its territorial jurisdiction. Section 169(b) of the Constitution[10] confers authority on a high court to decide only those matters that have not been assigned to another court by an Act of Parliament. By this provision, the position that prevailed before the Constitution was adopted, that a high court's jurisdiction in criminal matters is determined by statute,[11] is now underpinned by the Constitution. As the high court has been created by statute, its jurisdiction

[7] *Zweni v Minister of Law & Order* 1993 (1) SA 523 (A).
[8] *Steytler NO v Fitzgerald* 1911 (A) 295, 303. *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 LAC 680A-E.
[9] *S v Basson* 2005 (12) BCLR 1192 (CC) para 152.
[10] The Constitution of the Republic of South Africa 108 of 1996.
[11] *R v Milne and Erleigh (6)* 1951 (1) SA 1 (A) p 5H and 6E; *Sefatsa & Others v Attorney-General, Transvaal, & Another* 1989 (1) SA 821 (A) at 834E.

cannot extend beyond what is conferred on it by statute.[12] In the *Ewing MacDonald*[13] case, quoted above, it is emphasised that the essence of jurisdiction is territorial:

'Such power is purely territorial; it does not extend beyond the boundaries of, or over subjects or subject-matter, not associated with, the Court's ordained territory.'

Accordingly, as the learned author *Pollak*[14] succinctly states, when the question relates to the jurisdiction of the high courts of South Africa, the only question which concerns any division of that court is what right or authority has been granted to it by the state. Or put another way, the question is what statutory authority does a high court have to adjudicate over a matter?

[7] As mentioned above, the source of the high court's statutory authority to adjudicate over offences committed within its geographical territory is the SCAct.[15] Sections 19(1)(a) and 19(3) read as follows:

'(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 cognizance, 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 of jurisdiction;

(ii) to review the proceedings of all such courts;

(iii) 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.

. . .

(3) The provisions of this section shall not be construed as in any way limiting the powers of a provincial or local division as existing at the commencement of this Act, or as

[12] *R v Milne and Erleigh* (above).

[13] See fn 1.

[14] David Pistorius *Pollak on Jurisdiction* 2ed p 2.

[15] The provincial and local divisions and their areas of jurisdiction are set out in the First Schedule to the SCA 1959. (Sections 2 and 6(1).) Under the Interim Rationalisation of Jurisdiction of High Courts Act, 41 of 2001, the Minister may, in terms of s 2(1)(a), after consultation with the Judicial Services Commission alter the area of jurisdiction for which a High Court has been established by including therein or revising therefrom any district or part thereof.

depriving any such division of any jurisdiction which could lawfully be exercised by it at such commencement.'

[8] I turn to consider the first of the court *a quo's* reasons for dismissing the appellants' objections to it exercising jurisdiction, ie, that it is absurd for a lower court to exercise jurisdiction over an offence that is committed within its jurisdiction but to deny such jurisdiction to a high court as a court of first instance. The absurdity, in the view of Mogoeng JP, stems from the fact that provincial and local divisions have the power to 'to hear and determine appeals from all inferior courts within its area of jurisdiction' (s 19(1)(a)(i)), 'review the proceedings of all such courts' (s 19(1)(a)(ii)), and entertain committals from the regional court for sentence in terms of the Criminal Law Amendment Act 105 of 1977 but may not act as a court of first instance simply because s 19(1) of the SCAct does not extend the territorial jurisdiction of the high court by four kilometres beyond the province's boundary, as s 90(2)(a) of the Magistrates' Court Act 32 of 1944 ('the MCA')[16] does in respect of district and regional courts.

[9] It is important to examine the genesis of the '4 km rule'. The 4 km rule predates the SCAct and can be traced back to Ordinance No 73 of 1830 where the Governor of the Cape Colony extended the jurisdiction of magisterial districts to try offences committed within a distance of two miles of its boundaries. It was later consolidated in the Resident Magistrate's Court Act 20 of 1856. It is apparent that the purpose of the enactment was to deal with practical problems that arose in confining the territorial jurisdiction of the district strictly to offences that were committed inside the boundaries of the multiple districts that had come into existence in the Cape Colony at the time. After the creation of the Union of South Africa in 1910 the law relating to

[16]Section 90 provides:
(1) . . .
(2) when any person is charged with any offence –
(a) committed within the distance of four kilometers beyond the boundary of the district, or of a regional division; or
(b) . . .
(c) . . .
Such person may be tried by the court of that district or of the regional division, as the case may be, as if he had been charged with an offence committed within the district or within the regional division respectively.

magistrates' courts was again consolidated by Act 32 of 1917. Section 87 (2) (a) of that Act made provision for the two mile rule. And when the MCA was enacted in 1944, the rule was again included, this time in s 90(2)(a). When South Africa changed from imperial to metric, the reference to two miles was changed to four kilometres.[17]

[10] As stated earlier, the areas of jurisdiction of the provinces have been determined by statute.[18] So too the areas of jurisdiction of magisterial districts. The fact that the legislature has extended the territorial jurisdiction of magistrates' courts to four kilometres beyond their boundaries, to overcome practical problems referred to above does not, in my view, carry with it any necessary implication that the area of jurisdiction of the high court is similarly extended. On the contrary, if the 4 km rule was extended to the boundaries of the provinces, thus causing areas of overlapping jurisdiction between them, serious jurisdictional disputes would arise. There is in any event no indication, either in the MCA or the SCAct, that the legislature intended the boundaries of the provinces and those of magisterial districts to be coterminous.[19] All that s 90(2)(a) of the MCA does, is to provide for extra-territorial jurisdiction in certain circumstances. It does not extend the boundaries of magisterial districts. There is no reason to read s 90(2)(a) of the MCA with s 19(1)(a) of the SCAct, as the court below did, so as to harmonise them. Indeed such a reading manifestly conflicts with s 19(3) of the SCAct which prohibits the section from being construed in a way that deprives any provincial division from lawfully exercising jurisdiction conferred upon it by statute (para 7).

[11] The court below considered it anomalous for a provincial division to exercise appellate and review jurisdiction over district and regional courts within its geographical area without exercising original jurisdiction over the extended four kilometre area. The appellate and review jurisdiction that provincial divisions exercise over lower courts in terms of s 19(1)(a)(i) and

[17]Section 8(a) of the Lower Courts Amendment Act 91 of 1977 amended s 90 of the Magistrates' Court Act 32 of 1944 by substituting in ss 2(a)(b) and (c) the words 'four kilometres' for 'two miles'.
[18]See fn 15 above.
[19]See fn 15 above.

s 19(1)(a)(ii) respectively relate essentially to the supervisory function that provincial divisions exercise over lower courts that operate within their geographical area of jurisdiction. Such jurisdiction is unrelated to and different from the territorial jurisdiction over offences that are committed within the geographical area of a provincial division that is provided for in s 19(1)(a) of the SCAct.[20] There is therefore no anomaly between s 19(1)(a) on the one hand, and ss 19(1)(a)(i) and 19(1)(a)(ii) on the other.

[12] Turning to the high court's other example of an 'anomaly', that a high court may entertain a committal from a regional court for sentence but not exercise original jurisdiction over the same offence, it is apparent that Parliament, when enacting that law (para 8), was concerned to limit the penal jurisdiction of the regional court to a maximum of 15 years' imprisonment. It was not concerned with the territorial jurisdiction of the high court. I am therefore unable to agree that it is anomalous for a high court to entertain a committal from a regional court for sentence, but not exercise original jurisdiction over the same offence.

[13] The second reason advanced by the high court for assuming jurisdiction over this matter was for 'practical considerations'. These relate to the proximity of the court to the scene of the crimes, its accessibility to the accused and also members of the victims bereaved family and the interest of the local community in the matter. Taking such considerations into account the high court concluded that it was in the interests of justice for it to assume jurisdiction over the matter. No authority was cited to support an assumption of jurisdiction on this, or any other basis. Such authority as does exist is explicitly against any such assumption of jurisdiction.[21]

[14] As mentioned earlier, the authority to transfer a case from the jurisdiction of one high court to another vests in the NDPP by virtue of s 111 of the CPA where the NDPP is of the opinion that it is in the interests of justice to

[20] *Ex Parte Die Minister van Justisie: In Re S v De Bruin* 1972 (2) 623 A at p 632A-B.
[21] *R v Milne and Erleigh (6)* (see above) p 6A-E; *S v Absalom* 1989 (3) SA 154 (A) at p 164C-D.

do so. It is not a power vested in the high court. Once the NDPP had exercised its discretion not to remove the trial from the jurisdiction of the Pretoria High Court, that was the end of the matter. The high court, had no discretion, as it thought it had, to assume jurisdiction over the matter. It was obliged, as mentioned above, to adjourn the proceedings to a court having jurisdiction.

[15] It follows that the court below erred in dismissing the appellants' plea. The appeal is therefore upheld. The order of the court below is amended to read:

(i) The plea in terms of s 106(1)(f) of the Criminal Procedure Act 51 of 1977 is upheld.

(ii) The proceedings are adjourned in terms of s 110(2) of the Criminal Procedure Act 51 of 1977 to the Pretoria High Court.

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A CACHALIA
ACTING JUDGE OF APPEAL

CONCUR:
HARMS JA
MTHIYANE JA
NUGENT JA
MAYA AJA