THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 175/08

MAXWELL MAMASE	**First Appellant**
NEO MOERANE MAMASE	**Second Appellant**
QUICKVEST 54 (PTY) LTD	**Third Appellant**

and

THE STATE	**Respondent**

Neutral citation:	Mamase v The State (175/08) [2009] ZASCA 114 (25 September 2009)
Coram:	MPATI P, FARLAM, SNYDERS JJA, KROON and LEACH AJJA
Heard:	20 MAY 2009
Delivered:	25 SEPTEMBER 2009
Summary:	Jurisdiction – validity of direction of National Director of Public Prosecutions in terms of s 22(3) of the National Prosecuting Authority Act 32 of 1998.

ORDER

On appeal from: Bhisho High Court (Miller J sitting as court of first instance).

The following order is made:

1. The appeal is upheld;

2. The order of the court below is set aside and replaced with the following: 'No order is made on the application.'

JUDGMENT

SNYDERS JA: (Mpati P, Farlam JA, Kroon and Leach AJJA . concurring)

[1] The appellants were given special leave by this court to bring this appeal. The three appellants appeared in the Bhisho High Court (Miller J presiding) on several counts of contravening the provisions of the Prevention and Combating of Corrupt Activities Act[1] and one count of fraud. The indictment reveals that the charges are alleged to have arisen in various jurisdictions within and outside the area of jurisdiction of the Bhisho High Court. This gave rise to a notice by the appellants in terms of s 106(3) of the Criminal Procedure Act (CPA)[2] that they intended to raise a plea in terms of s 106(1)(f) that the court had no jurisdiction to try the offences allegedly committed outside the jurisdiction of the Bhisho High Court.[3] The respondent attempted to cure this difficulty by amending the indictment to include an allegation that the events that constitute the charges occurred in various places 'and/or in Bhisho'. The appellants persisted in their notice which motivated the respondent to hand in a direction,[4] dated 15 September 2006, issued by the national director of public prosecutions in terms of s 22(3) of the

[1] 12 of 2004.
[2] 51 of 1977.
[3] Section 106(1)(f): 'When an accused pleads to a charge he may plead – . . .(f) that the court has no jurisdiction to try the offence;'
Section 106(3): 'An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea: Provided that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.'
[4] I use the word used in the judgment of the court a quo and in s 22(3) of the National Prosecuting Authority Act 32 of 1998.

National Prosecuting Authority Act (NPAA),[5] the essential part of which reads as follows:

'Whereas I, Vusumuzi Patrick Pikoli, National Director of Public Prosecutions, . . . hereby direct that the criminal proceedings against the [appellants] in respect of the said offences, be commenced in the area of jurisdiction of the Director of Public Prosecutions, Bhisho.'

[2] The parties then approached the trial court on 18 September 2006 to decide, prior to plea, whether the direction, issued well after the indictments were served on the appellants, validly conferred jurisdiction on the Bhisho High Court.[6] Miller J decided that the direction had been issued 'at a later stage than what is provided for in the legislation', but as the direction is not 'an essential constituent element of the jurisdiction conferring process', this was not a fatal shortcoming which rendered the direction invalid or ineffective; that an overly technical approach achieves nothing and should be avoided; and that any prejudice that the accused may have suffered could be cured by the granting of a postponement of the trial. He proceeded to make the following order:

'I, in the circumstances, rule that the direction issued by the National Director of Public Prosecutions on 15 September 2006 is valid and of effect.'

Upon the appellants' immediate application for leave to appeal he granted leave to the full bench of the Bhisho High Court.

[3] Subsequently, however, this court was approached on petition for leave to appeal to it, the applicants contending that they were appealing a point of law. They motivated their petition as follows:

'15 I respectfully submit that the application for leave to appeal to the Full Bench of the Bhisho Division of the High Court was erroneously sought and granted because, in terms of section 315(1) read with section 319(2) of the Act, the above Honourable Court has exclusive jurisdiction to entertain appeals pertaining to questions of law and that, in terms of section 316 of the Act, the Full Bench of a

[5] 32 of 1998.

[6] The indictments were dated 26 August 2005 and served on the appellants on an unknown date prior to their appearance on 18 September 2006.

Provincial Division only has appeal jurisdiction in criminal matters after accused persons have been convicted and sentenced.'[7]

Not only was the petition not opposed, it was supported by the respondent.

[4] In this way the matter came before us. At the hearing the parties focussed on their opposing contentions on the interpretation of s 22(3) of the NPAA. Two issues arose during the hearing which were not addressed by the parties in their heads of argument. Counsel were invited to submit further written submission on these two issues, namely whether the ruling made was appealable and whether the court a quo had the power to make a ruling of the nature that it did, prior to the appellants' having pleaded.

[5] The procedure adopted by the court below was a peculiar one, well illustrated by the difficulty the parties had to explain the procedure by which this matter came on appeal.

[6] In the petition the parties sought, by their reliance on s 319(2) of the CPA, to bring before this court a point of law. Section 319(1) pertains only to questions of law that arise 'on the trial'. The trial commences with the evidence and ends with conviction.[8] The plea is a procedure that initiates the trial and serves to define the issues that are submitted to the court for adjudication. If there is no plea there is no *lis* between the state and the

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[7] Section 315(1): '(1)*(a)* In respect of appeals and questions of law reserved in connection with criminal cases heard by a High Court, the court of appeal shall be the Supreme Court of Appeal, . . .'
Section 319: (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.'

[8] In *Director of Public Prosecutions, Natal v Magidela* 2000 (1) SACR 458 (SCA) at 465d-e the meaning of 'on the trial' was not decided, but a clear indication relevant to the present context is given. See also *S v B* 2003 (1) SACR 52 (SCA) paras 6 and 7; *S v Perskorporasie van Suid-Afrika Bpk* 1979 (4) SA 476 (T) at 478E-479H. In view of the decision in *S v Basson* 2007 (1) SACR 566 (CC) paras 145 to 152 it is important to stress the distinction between the issue decided in that matter – that a point of law reserved at the trial need not await the conclusion of the trial before it is taken on appeal – and the issue presently under discussion – whether the point of law is one that falls within the ambit of s 319 at all.

accused.[9] Issues that arise prior to plea, being objections to the indictment, that could give rise to a question of law, are dealt with by the legislature in s 319(2), in that they are deemed to be 'questions of law'. The issue in this case is not 'an objection to [the] indictment': it is a challenge to the court's jurisdiction and the direction purporting to confer jurisdiction. As the reliance on s 319(2) raised in the petition, was not pursued in this court, it is not necessary to motivate further the obvious conclusion that there was no objection to the indictment.

[7] At the time that the issue was raised and decided in the court below the appellants had not been asked to plead. Thus there was no plea in terms of s 106(1)(f) of the CPA that raised the absence or presence of jurisdiction as a justiciable issue for decision. A plea in criminal proceedings is peremptory in terms of s 105 and it is done in terms of s 106(1) and (2).[10] It is therefore clear that the point that was decided was not an objection to the indictment, was not a reservation of a question of law and was not a plea of lack of jurisdiction.

[8] The procedure of placing before a criminal court, prior to the trial commencing, an issue relevant to the validity of a step taken by the prosecuting authority in terms of the NPAA or an issue relevant to jurisdiction, but not amounting to a plea is unknown and unprecedented. No reasons were advanced, and I dare say none exist, why it might be necessary for such a procedure to be accommodated when perfectly adequate structures and procedures are in place to determine issues of that nature: the criminal trial and the civil courts. This much was recognised by Nepgen J in the matter *S v Mpanbaniso*,[11] to which the appellants' counsel has referred us. That matter was decided in the same division and with reference to the decision of Miller J

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[9] *S v Mbokazi* 1998 (1) SACR 438 (N) at 442h-i.

[10] Section 105: 'The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106.' The references in the section to sections 77, 85 and 105A are not relevant to the facts in this case.
Section 106(1) and (2) lists the nature of the various pleas that could be entered, including, in subsec 1(f), that the court has no jurisdiction to try the offence.
Section 106(3) has been quoted in note 3 above.

[11] Case number 32/06 decided in the Bhisho High Court.

in the court a quo in the current matter. When Nepgen J was faced with the same request, at the same stage and on similar facts, he recorded in his judgment that he dealt with the matter as follows:

'On 13 October 2006 the matter was, for the first time, called in open court. Counsel for the State handed in the original written direction. Mr Quinn, who appears on behalf of the accused, then indicated that he intended to address me on the validity of the written direction. I asked him on what basis I could consider the matter without a plea having been entered by the accused. After a brief discussion both Counsel indicated their agreement that a plea would first have to be entered before I could consider the point mentioned.'

Once the accused in that matter entered a plea of lack of jurisdiction Nepgen J proceeded to consider whether, as a result of a direction similar to the one in this case, the court had jurisdiction or not.

[9] The trial court, prior to the trial commencing, had no power to decide the issue that was placed before it. However, it did, and in doing so it assumed jurisdiction in circumstances where it had none.

[10] The high courts derive their jurisdiction from the Constitution[12] and legislation which gives effect to the provisions of the Constitution.[13] In this case the high court could only have had jurisdiction in one of three ways:[14] One, in terms of s 169(b) of the Constitution, read with s 19 of the Supreme Court Act,[15] jurisdiction is conferred on a high court over all triable offences within its area of jurisdiction that have not been assigned to another court by an Act of Parliament. Two, in terms of s 110 of the CPA a court is deemed to have jurisdiction when an accused pleads to a charge and does not plead that the court has no jurisdiction. Three, a direction issued in terms of s 22(3) of the NPAA, could confer jurisdiction where none exists. On the facts of this case the court below could only have had jurisdiction if the direction issued - the third instance mentioned above – was valid and effective. The court does

[12] The Constitution of the Republic of South Africa 108 of 1996.
[13] The Supreme Court Act 59 of 1959. See *Phillips v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 47.
[14] *S v De Beer* 2006 (2) SACR paras 6 and 7.
[15] 59 of 1959.

not have the power to assume jurisdiction if it does not have it by reason of one of the three provisions mentioned.[16]

[11] Section 22(3) of the NPAA provides:

'Where the National Director or a Deputy National Director authorised thereto in writing by the National Director deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one Director be investigated and tried within the area of jurisdiction of another Director, he or she may, subject to the provisions of section 111 of the Criminal Procedure Act, 1977 (Act 51 of 1977), in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other Director.'[17]

[12] Section 76(1) of the CPA provides when criminal proceedings commence:

'Unless an accused has been summoned to appear before the court, the proceedings at a summary trial in a lower court shall be commenced by lodging a charge-sheet with the clerk of the court, and, in the case of a superior court, by serving an indictment referred to in section 144 on the accused and the lodging thereof with the registrar of the court concerned.'[18]

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[16] *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) paras 85 to 92.

[17] Section 111: '(1)(a) The direction of the National Director of Public Prosecutions contemplated in section 179(1)(a) of the Constitution of the Republic of South Africa, 1996, shall state the name of the accused, the relevant offence, the place at which (if known) and the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced. (b) A copy of the direction shall be served on the accused, and the original thereof shall, save as is provided in subsection (3) be handed in at the court in which the proceedings are to commence. (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. (3) Where the National Director issues a direction contemplated in subsection (1) after an accused has already appeared in a court, the original of such direction shall be handed in at the relevant proceedings and attached to the record of the proceedings, and the court in question shall – (a) cause the accused to be brought before it, and when the accused is before it, adjourn the proceedings to a time and a date and to the court designated by the Director in whose area of jurisdiction the said criminal proceedings shall commence, whereupon such time and date and court shall be deemed to be the time and date and court appointed for the trial of the accused or to which the proceedings pending against the accused are adjourned; (b) forward a copy of the record of the proceedings to the court in which the accused is to appear, and that court shall receive such copy and continue with the proceedings against the accused as if such proceedings had commenced before it.'

[18] See also *Nhlabathi v Adjunk Prokureur-Generaal, Transvaal* 1978 (3) SA 620 (W) at 631E and *S v Swanepoel* 1979 (1) SA 478 (A) at 490D.

The jurisdiction of a court is determined at the stage that proceedings are commenced.[19]

[13] On the common cause facts: the alleged actions that formed the basis of the relevant charges were not committed within the territorial jurisdiction of the Bhisho High Court; when the indictment was served and proceedings therefore commenced, that court did not have jurisdiction; the direction that purported to confer jurisdiction on the court was issued after proceedings had commenced, after the point in time that the NPAA empowers the issue thereof and thus after the time that jurisdiction is determined.

[14] In *Mpanbaniso*, a carefully reasoned judgment, Nepgen J rightly concluded that 'no court other than the court in which the criminal proceedings commenced . . . can have jurisdiction in terms of a written direction, which of necessity requires such written direction to have been issued prior to the commencement of the criminal proceedings'.

[15] In coming to this conclusion Nepgen J also made a valid and convincing analogy between s 111 of the CPA and its predecessor which provided for a direction that 'the trial' takes place at a particular venue that would not otherwise have had jurisdiction. This clear change in the relevant wording indicates the intention of the legislature to ensure that the proceedings - and not the trial - are commenced in a particular jurisdiction pursuant to a direction.

[16] Clearly, therefore, the direction could not and did not have the effect of conferring jurisdiction on the Bhisho High Court. Once Miller J concluded that the direction did not meet the requirements of s 22(3)he did not have jurisdiction to deal with the matter in any way whatsoever. It was not within the powers of the court a quo to exercise a discretion and decide that the direction should be held to be effective despite the fact that it did not comply

[19] *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 310D; *Transnamib Bpk v Voorsitter, Nasionale Vervoerkommissie* 1993 (1) SA 457 (A) at 473-474.

with the empowering provisions of the relevant statute. Having done so, it finally and definitively assumed jurisdiction. No doubt Miller J would have continued to hear the trial if the matter had not been taken on appeal. An order made by a court that is final and definitive in its effect is capable of appeal.[20] Decisions on jurisdiction are traditionally appealable.[21]

[17] What is alarming about this case is that considerable delay and costs could have been avoided if a simple and practical solution to the problem was adopted: the charges could have been withdrawn, another direction issued and the appellants served with a fresh indictment. There was no apparent reason why such a course could not be followed and completed in a matter of hours. Counsel on behalf of the respondent could not offer any reason why such a course was not open to it.

[23] What remains is to make the following order:

1. The appeal is upheld;

2. The order of the court below is set aside and replaced with the following: 'No order is made on the application.'

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S SNYDERS

Judge of Appeal

[20] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

[21] *Steytler NO v Fitzgerald* 1911 AD 295 at 303; *De Beer*, note 10 above, para 5. *Minister of Finance v Paper Manufacturers Association of South Africa* 2008 (6) SA 540 (SCA); *Gutsche Family Investments (Pty) Ltd v Mettle Equity Group (Pty) Ltd* 2007 (5) SA 491 (SCA).

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