CONSTITUTIONAL COURT OF SOUTH AFRICA

THE STATE

versus

WESSEL ALBERTUS VERMAAS Case CCT 1/94

THE STATE

versus

JOHAN PETRUS LAFRAS DU PLESSIS Case CCT 2/94

Heard on 28 February 1995
Decided on 8 June 1995

JUDGMENT

DIDCOTT J:

[1] A question that came to the fore in recent years, sparking a lively controversy in our law, was whether persons standing trial on criminal charges who could not afford to pay for their legal representation were entitled to be provided with it at public expense once its lack amounted to a handicap so great that to try them on their own lay beyond the pale of justice. The controversy, one marked by such cases as *S v Khanyile and Another* 1988(3)SA 795(N), *S v Davids; S v Dladla* 1989(4)SA 172(N) and *S v Rudman and Another; S v Mthwana* 1992(1)SA 343(A), has been settled decisively by our new Constitution (Act 200 of 1993), section 25(3)(e) of which declares that :

Pg. 2/"Every .....

> "Every accused person shall have the right to a fair trial, which shall include the right .... to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights".

[2] We now have before us for simultaneous adjudication the cases of Vermaas and Du Plessis, where the right thus proclaimed has been invoked in circumstances rather different from those that were generally envisaged while the controversy lasted and we might have expected to encounter when such a matter first appeared on our agenda. For a trial of huge dimensions is a feature of each case, exacerbating the difficulties of both providing legal representation and proceeding with none.

[3] The two cases emanate from the Transvaal Provincial Division of the Supreme Court. Both trials are already in progress there, that of Vermaas before Kirk-Cohen J and the one of Du Plessis before Hartzenberg J. Vermaas faces 140 charges, some of theft, many of fraud and the rest laid under fiscal or commercial legislation. Du Plessis is alleged to have committed 63 offences, fraud on 62 counts and corruption on one. To every charge they each pleaded not guilty.

[4] The trial of Vermaas commenced in August 1991 and, after its interruption by numerous adjournments, reached the stage during March 1994 at which the testimony on both sides and the arguments of the prosecuting team had been completed. It was then adjourned once more so that Vermaas might prepare the argument which he proposed to advance in his

Pg. 3/defence....

defence. By then no lawyer appeared for him. A series of advocates had done so at most earlier phases of the trial, but they had either withdrawn or been dismissed from it in turn because of problems that had arisen, mainly financial. The proceedings were resumed in May 1994, when Vermaas started addressing the court on a record of the oral evidence presented and the documentary exhibits produced which amounted in bulk to about 40 000 pages. Changing tack, however, he applied during June 1994 for an order directing that throughout the remainder of the trial he be furnished with legal representation at the cost of the state. Kirk-Cohen J dealt with the application in a judgment that was delivered on 14 June 1994 and has been reported under the heading of *S v Vermaas* 1994(4)BCLR 18(T).

[5] The trial of Du Plessis got under way during June 1993. It was also adjourned from time to time, and has not gone very far. The only testimony already adduced consists of some taken overseas on commission and that elicited from a number of witnesses for the prosecution whose evidence-in-chief was led locally but who have not yet been cross-examined. The services of successive advocates were obtained by Du Plessis too and, through a shortage of funds, likewise lost. So in May 1994 he sought the same order as the one that Vermaas requested soon afterwards, claiming in addition the right to choose the particular lawyer whom he wanted the state to procure for him. The outcome was a judgment delivered by Hartzenberg J on 19 May 1994, which has been reported as well and, owing to the presence in the case of a co-accused, is cited as *S v Lombard en 'n Ander* 1994(3)SA 776(T); 1994(2) SACR 104(T).

Pg. 4/ Each....

[6] Each trial started well before the Constitution came into operation on 27 April 1994. Whether section 25(3)(e) governed its future conduct in that situation was a question which had to be considered prior to the merits of either application. The issue arose because section 241(8) decreed that :

> "All proceedings which immediately before the commencement of this Constitution were pending before any court of law ...., exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed ...."

Both judges thought that the question should be answered in the negative. To obtain certainty on the point, however, they referred the issue to us, together with the merits in the event of our taking the opposite view. For the time being the trials were adjourned again.

[7] A further question, and a preliminary one, confronted us when the cases were argued here. It was whether the referrals had been, in themselves, constitutionally competent. Section 102(1) stipulates that :

> "If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall

Pg. 5/hear....

> hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court."

Section 102(2) follows, going thus :

> "If, in any matter before a local or provincial division, there is any issue other than an issue referred to the Constitutional Court in terms of sub-section (1), the provincial or local division shall, if it refers the relevant issue to the Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court."

None of the referred issues fell within our exclusive jurisdiction. So section 102(1) did not authorise the referrals that occurred. They purported to have been ordered under section 102(2), however, which each judge construed in such a way that it provided for a scheme of referrals distinct from and additional to the one sanctioned by section 102(1), a scheme allowing him in the middle of the trial to seek from us a ruling on a point that he was empowered to decide for himself.

[8] No reasons for that interpretation were furnished in either of the judgments delivered at the time, the reported ones which I mentioned a moment ago. It seems on both occasions to have been regarded as a construction that spoke for itself. Marais J criticised it trenchantly in *S v Coetzee and Others* 1994(4) BCLR 58(W) (at 64E - 67A); 1994(2) SACR 791(W) (at 798b - 800h). Hartzenberg J responded to the criticism in *S v Lombard* 1994(3) BCLR 126(T) (at 134C - 135F). Kirk-Cohen J and he then explained their reasoning in detailed

Pg. 6/expositions....

expositions of it which they kindly let us have at the request of Chaskalson P.

[9] Such reasoning, to summarise it, went like this. Sub-sections (1) and (2) of section 102 both differentiated between a "matter" and an "issue". The choice of those words was not fortuitous. The wording drew a deliberate distinction between an entire case, called the "matter", and a specific question arising in it, which was labelled as the "issue". Sub-section (1) provided for the referral to us of no limited "issue", but of the "matter" and accordingly of the case as a whole. No portion or aspect of it remained in the provincial or local division after the referral. So nothing had to be suspended there, and that accounted for the silence of the sub-section on the point. The "matter" or its residue would return later to the provincial or local division, if and when we remitted it to its initial forum. Sub-section (2), by comparison, dealt with the referral of a particular "issue" alone. The rest of the "matter" was left lying before the provincial or local division. The suspension of the proceedings there thus became necessary. The "issue" so referred, the one identified as "the relevant issue", was not any "issue referred to the Constitutional Court in terms of sub-section (1)", but some "issue other than" that, and therefore an "issue other than" the kind which lay within our exclusive jurisdiction. So much was demonstrated by the part going "if it refers the relevant issue to the Constitutional Court". The use there of the word "if", rather than "when", was apt in relation only to a referral which might or might not eventuate, at the discretion of the provincial or local division. None ordered under sub-section (1) could have been contemplated, since every such referral became compulsory once the provincial or local division found it to be in the interests of justice. Nor did "if" fit the bill of a referral predicated already. It introduced the hypothesis of one that had yet

Pg. 7/to....

to be considered. The reasoning that I have outlined, I should add in parenthesis, is not attributable in all respects to each of the two judges. It serves well enough, I hope however, as a composite paraphrase of their individual views.

[10] My comments on all that are these. Too much was read, I believe, into the nuances of a "matter" on the one hand and an "issue" on the other. Nor is the usage of those words in section 102 quite as uniform or consistent as it was apparently thought to be. One notices that the "matter" referred for decision under sub-section (1) is called an "issue" in the proviso to it, and that sub-section (2) describes the subject of a referral in terms of sub-section (1) as an "issue" instead of a "matter". There at least, so it seems, the words are used synonymously and interchangeably. Nothing could emerge with greater clarity from sub-section (1) in any event, and however fastidiously it is analysed, than this. What we have to decide on a referral ordered under the sub-section is a specific "issue" falling within our exclusive jurisdiction which has arisen in the "matter" so referred, and not the "matter" in its entirety. To solicit a decision on an "issue" of that sort is the very purpose of any such referral, after all, and the only one. The sub-section recognises the restricted ambit of the enquiry when it directs the referring court to hear and make findings on any evidence needed "for the purposes of deciding such issue". The restriction stands to reason, furthermore, once one reminds oneself that the "matter" as a whole will frequently, indeed usually, raise other questions too that lie outside our province, those questions of fact and of general law on which the last word rests not with us but with the Appellate Division. I therefore consider that we must construe the word "matter", where it appears for the second time in sub-section (1), as if its place had been taken by

Pg. 8/"issue"....

"issue", a notional substitution which is not out of tune with the text since a "matter" in its ordinary sense often denotes an "issue" and lends itself readily to that construction in a context suitable for such. Turning to sub-section (2), I express next my firm disagreement with the meaning ascribed to "the relevant issue". That "issue", as I read the wording in what appeals to me as the natural way, is the particular one "referred to the Constitutional Court in terms of sub-section (1)", not a separate and different "issue" arising in the "matter". I accept that, if I am right there, the sub-section would have been improved by the use of "when", rather than "if", at the start of the clause alluding to "the relevant issue". To set great store by the chosen word sounds, however, somewhat pedantic. The choice may safely be dismissed as a mere repetition, inappropriate perhaps, of the conditional phraseology employed in sub-section (1).

[11] Some further observations of mine concern not so much the wording contained in section 102 as several omissions from it. One would have expected to find three material provisions in sub-section (2), had it really been intended to establish its own system of referrals apart from and in addition to those ordained by sub-section (1). All three provisions are absent. Sub-section (2) lacks, in the first place, a clear empowerment of the provincial or local division to order such extra referrals, an empowerment produced explicitly like the one seen in sub-section (1), not left to be engendered by a process of dubious implication. The second omission is this. Sub-section (2) sets no test for the exercise of the power, either along the lines prescribed by sub-section (1) when it mentions the potential decisiveness of the point and the interests of justice or by the adoption of some other criterion or criteria. Nor, in the third place, does sub-section (2) echo the proviso to sub-section (1) by catering for evidence and findings on questions

of fact. No less telling is a fourth omission, this time from sub-section (1) if my treatment of its text holds good. Directions which the sub-section does not contain are then needed, directions corresponding to those given in sub-section (2) for the suspension in the meantime of the proceedings before the provincial or local division.

[12] I accordingly conclude that sub-section (2) of section 102 does not in itself provide for any referrals. It merely supplements sub-section (1) by regulating the procedure which the provincial or local division must follow in ordering a referral under that sub-section. The result is that no issue which the division has the power to decide may properly be referred to us while the litigation raising it remains in progress there. The judge hearing the case must determine the issue for himself or herself. It may be presented to us on appeal, should it fall within our field, when the litigation has ended in the court below. Or, in the special situation covered by section 102(8), the judge may refer it to us after disposing of the case. The referrals now before us were therefore, in my opinion, incompetent.

[13] The conclusion thus reached, we were warned in argument, would sometimes have unfortunate results. A long and complicated trial might be vitiated in the end by an infringement of the Constitution that was first rated as such on appeal. All the time, effort and money expended on it would then turn out to have been wasted. The wastage could be avoided by seeking an authoritative ruling on the point as soon as the need for that became apparent, and by obtaining one while the opportunity still existed to comply with it or to repair any damage done in its absence. Such a course was opened by the construction which Kirk-Cohen J and

Hartzenberg J had placed on section 102(2). The answer, I believe, is this. The solution to the problem posed does not depend on that construction. It lies in rule 17(1) of our rules which was promulgated under section 100(2), a section stating that :

> "The rules of the Constitutional Court may make provision for direct access to the Court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction."

Alluding to the Constitutional Court simply as "the Court", rule 17(1) then provides that :

> "The Court shall allow direct access in terms of section 100(2) of the Constitution in exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government."

That, though framed narrowly, sounds like a formulation general enough to cater in appropriate circumstances for a situation of the sort postulated by counsel. True it is that, in contrast with a referral by the trial court, direct access has to be requested by a party to the proceedings. It seems to be a mechanism no less effective, however, on that account. The advantages of piecemeal adjudication, once they look strong in any given trial, will surely strike the parties, or one side at least, with a force equal to that felt by the judge. In a heavy criminal matter, for instance, the prosecution will be no more eager than he or she to run the risk of an abortive trial, and the defence no less anxious about its financial toll. Nor, even so early in the

Pg. 11/operation....

operation of rule 17(1), is recourse to it unprecedented in a state of affairs comparable with the one that has now developed. I have in mind *S v Zuma and Others* 1995(4) BCLR 401(SA), where an application for direct access was made and granted so that an issue wrongly referred to us might nevertheless, and in the interests of justice, be determined here at once. Paragraph [11] of the judgment which Kentridge AJ wrote in that case explains why, and describes the special circumstances in which, direct access happened then to be allowed. The decision was not intended, I emphasise, to encourage a resort to rule 17(1) in any setting but the truly exceptional kind mentioned there. Worth repeating in that regard are some remarks passed by Kentridge AJ in paragraph [11] of another judgment that he has prepared, the judgment written in *S v Mhlungu and Others* which will be delivered simultaneously with this one. They have to do with referrals, but are no less pertinent to applications for direct access. What Kentridge AJ said on that occasion, which I underline because of its important bearing on constitutional litigation, was this:

> "Where the case is not likely to be of long duration it may be in the interests of justice to hear all the evidence or as much of it as possible before considering a referral. Interrupting and delaying a trial, and above all a criminal trial, is in itself undesirable, especially if it means that witnesses have to be brought back after a break of several months. Moreover, once the evidence in the case is heard it may turn out that the constitutional issue is not after all decisive. I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

[14] In neither of the present matters was direct access sought in case the referrals were ruled out of order. How we would have reacted to such a request on this occasion, and in its

Pg. 12/circumstances....

circumstances, is a question that calls for no answer. The question is by the way, in any event, since the earlier uncertainty about the effect of section 241(8) will not be perpetuated by the failure to present us properly with that issue in these particular cases. It has now been dispelled by the definite and definitive interpretation given to the section in *S v Mhlungu and Others*, the one favoured by the majority of this Court. According to that, it transpires, Kirk-Cohen J and Hartzenberg J erred in believing the future conduct of their trials to be untouched by section 25(3)(e).

[15] That outcome shifts the spotlight onto the other issue put to us, the question whether Vermaas and Du Plessis were, or either of them was, now entitled on the strength of section 25(3)(e) to obtain legal representation at the cost of the state. There too, in my opinion, no answer should be ventured by us. I say that because, besides the incompetence of the referrals, we are ill equipped for the factual findings and assessments which the enquiry entails. Such a decision is pre-eminently one for the judge trying the case, a judge much better placed than we are by and large to appraise, usually in advance, its ramifications and their complexity or simplicity, the accused person's aptitude or ineptitude to fend for himself or herself in a matter of those dimensions, how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be "substantial injustice". Kirk-Cohen J expressed some scepticism about the inability of Vermaas to present unaided an adequate argument at the end of his trial, observing that he was an attorney by profession who had displayed

Pg. 13/a....

a lively interest and taken an active part in the earlier management of his defence, while Hartzenberg J commented in passing on the personal position of Du Plessis. No firm or final conclusion appears to have been reached in either case, however, on the merits of the claim lodged under section 25(3)(e) if that turned out not to be hit by section 241(8). Kirk-Cohen J and Hartzenberg J will now have to consider the topic more fully and dispose of it one way or the other. A single point has already been decided by Hartzenberg J in that connection, which concerns the right claimed by Du Plessis to pick the lawyer appointed for him. Hartzenberg J held that no such right was derived from section 25(3)(e) when the state supplied the lawyer's services. That is certainly so. The effect of the disjunctive "or", appearing in the section immediately before the reference to the prospect of "substantial injustice", is to differentiate clearly between two situations, the first where the accused person makes his or her own arrangements for the representation that must be allowed, the second in which the assistance of the state becomes imperative, and to cater for the personal choice of a lawyer in the first one alone.

[16] A word or two had better be added, as I draw to a close, on a subject of public importance which prompted some discussion when the present cases were argued. No counsel on either side could then tell us of any steps taken yet to establish the financial and administrative structures that were necessary to give effect to the part of section 25(3)(e) providing for legal representation at the expense of the state. We gained the impression that nothing of much significance had been done in that direction since the Constitution came into force a year ago. The impression, if true, is most disturbing. We are mindful of the

Pg. 14/multifarious....

multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform. But the Constitution does not envisage, and it will surely not brook, an undue delay in the fulfilment of any promise made by it about a fundamental right. One can safely assume that, in spite of section 25(3)(e), the situation still prevails where during every month countless thousands of South Africans are criminally tried without legal representation because they are too poor to pay for it. They are presumably informed in the beginning, as the section requires them peremptorily to be, of their right to obtain that free of charge in the circumstances which it defines. Imparting such information becomes an empty gesture and makes a mockery of the Constitution, however, if it is not backed by mechanisms that are adequate for the enforcement of the right.

[17] The cases of Vermaas and Du Plessis are both remitted to the Transvaal Provincial Division so that their trials may be resumed and completed there.

Chaskalson P, Ackermann J, Kentridge AJ, Kriegler J, Langa J, Madala J, Mahomed J, Mokgoro J, O'Regan J and Sachs J all concur in the judgment of Didcott J.

Counsel for Vermaas	:	S C Jacobs
Counsel for Du Plessis	:	C R Jansen and D Unterhalter
Counsel for the State	:	J A Swanepoel SC, D F de Beer SC, S C Jordaan and W H Moore