CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 30/03

THE STATE

versus

BASSON

Heard on : 21 – 25 February 2005

Decided on : 9 September 2005

JUDGMENT

INDEX

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THE COURT:

INTRODUCTION

[1] In 1999, Dr Basson, the respondent in this Court, was charged in the High Court on 67 counts, including murder, fraud, certain drug offences and conspiracy to commit various crimes. The majority of the offences were allegedly committed before 1994 when the respondent worked in a division of the South African Defence Force (the SADF) called the Civil Co-operation Bureau and headed South Africa's bacterial and chemical warfare programme. In April 2002, at the end of a long trial, the respondent was acquitted on all counts. This application for leave to appeal which is brought by the state against a judgment of the Supreme Court of Appeal (SCA) arises from these criminal proceedings. In essence, it concerns three central issues: whether the conduct of the judge during the trial proceedings was such as to give rise to a reasonable perception of bias; secondly, whether the trial court was wrong to exclude the evidence led in bail proceedings from the criminal trial; and thirdly,

whether the state is entitled effectively to appeal against the quashing of certain charges at the outset of the proceedings at this stage; and if it is, whether those charges were wrongly quashed. Each of these issues gives rise to further supplementary issues which will be elucidated in the course of this judgment.

[2] A preliminary hearing in respect of this application for leave to appeal was held in November 2003 after which this Court handed down a judgment in which it held that all three issues under consideration concerned constitutional matters within the jurisdiction of this Court.[1] Leave to appeal was not granted, however, as it was held to be premature at that stage to deal fully with the second requirement for leave to appeal, namely whether it is in the interests of justice for leave to be granted. Following upon the preliminary hearing, the relevant portions of the record of the criminal proceedings and proceedings on appeal, amounting to some 22 000 pages, were lodged with the Court. Full argument on the application and its merits was heard from 21 to 25 February 2005.[2]

Background to the three issues raised in this Court

(a) Bias

[3] Just more than three months into the trial in the High Court, on 14 February 2000, the state applied for the recusal of the judge on the grounds that he was biased and had prejudged the case. On 16 February 2000, the judge refused this application

[1] *S v Basson* 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) (Constitutional Court judgment).

[2] At this second hearing the Court was differently constituted as in the intervening period Justice Ackermann retired from, and Justices Skweyiya and Van der Westhuizen were appointed to the Court.

holding that a reasonable person would not have believed that he was biased against the state.[3] The trial then continued and ran until 26 September 2001. Judgment was handed down on 11 April 2002.

[4] Immediately after judgment was handed down, the state applied to have a question of law relating to the failure by the judge to recuse himself reserved for decision by the SCA. On 3 May 2002, the High Court handed down judgment in which it reserved a single question of law for consideration by the SCA and three further questions conditional upon that question being answered in favour of the state. The single question reserved was whether the state was barred from seeking the reservation of the question of law as to whether the trial judge ought to have recused himself in February 2000 because it had failed to indicate in February 2000 that it intended to seek such reservation. If that question were answered in favour of the state, the court reserved a further question for consideration by the SCA: whether the trial judge had erred in law when he refused to recuse himself on the grounds of bias in February 2000.

[5] The SCA held that the question whether a judge was biased gave rise to a question of fact not law, and could not be reserved under the provisions of section 319 of the Criminal Procedure Act, 51 of 1977. It accordingly struck both questions relating to bias from the roll. In its preliminary hearing on the application for leave to appeal, this Court held that the question of whether the trial judge was biased did give

[3] This judgment is reported as *S v Basson* [2000] 3 All SA 59 (T) (recusal judgment).

rise to a question of law, not fact, and that such question did give rise to a constitutional matter. The Court did not decide, however, whether in delaying its application to reserve the question of law the state became barred from seeking the reservation of the question later. Nor did it decide whether the recusal issue should be determined on the basis of the trial record up until February 2000 only, or whether it should be determined on the full record of the trial. These are matters to be determined in this case.

(b) The admissibility of the bail record

[6] The Office for Serious Economic Offences (OSEO) first started investigating allegations of fraud against the respondent during 1992. OSEO is an institution that was established in terms of the Investigation of Serious Economic Offences Act, 117 of 1991 (the ISEO Act).[4] Section 5(8) of the Act[5] provides that witnesses examined in terms of section 5(6) of the Act[6] may not refuse to answer questions on the ground

[4] The ISEO Act was repealed by the National Prosecuting Authority Act, 32 of 1998 with effect from 16 October 1998, but the relevant provisions of section 5 of the ISEO Act are substantially repeated in section 28 of the National Prosecuting Authority Act.

[5] Section 5(8) of the ISEO Act provided as follows:

> "(8)(a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person in terms of subsection (6): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him to a criminal charge.
>
> (b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (10)(b) or (c), or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955)."

[6] Section 5(6) of the ISEO Act provided as follows:

> "(6) For the purposes of an inquiry—
>
> (a) the Director may summon any person who is believed to be able to furnish any information on the subject of the inquiry or to have in his possession or under his control any book, document or other object relating to that subject, to appear before the Director at a time and place specified in the summons, to be questioned or to produce that book, document or other object;

that the answers may be incriminating, but it also provides that no evidence of such questions or answers may be admitted in subsequent criminal proceedings against the witness concerned.

[7] The allegations against the respondent concerned the financial management of a top secret project of the South African Defence Force code-named Project Coast whose purpose was to develop a chemical and biological warfare capability for South Africa. The respondent who is a cardiologist was the leader of this project. During the OSEO fraud investigation, the respondent was subjected to 39 days of questioning by Advocate Fouché of OSEO in terms of section 5 of the ISEO Act. The respondent was not legally represented during this questioning.

[8] The respondent was first arrested on charges of contravening the Medicines and Related Substances Control Act, 101 of 1965 during 1997.[7] A bail hearing was held and the accused was granted bail. Later in the same year, he was arrested again, this time on charges of fraud related to the OSEO investigation.[8] Once again a bail hearing was held over a series of days at the end of which the accused was granted bail. During these bail proceedings, the state was represented by Advocate Fouché who had conducted the OSEO questioning. The respondent was questioned on the

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(b) the Director or a person designated by him may question that person, under oath or affirmation administered by the Director, and examine or retain for further examination or for safe custody such a book, document or other object."

[7] Of the five drug charges, three were charges of contravening the Medicines and Related Substances Control Act, one of contravening the Drugs and Drug Trafficking Act, 140 of 1992, and one of contravening the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, 41 of 1971. These charges subsequently became counts 25 to 30 in the criminal prosecution.

[8] These charges subsequently became counts 1 to 24 in the criminal prosecution.

subject matter of the fraud charges, and the record of the OSEO questioning was used. It is the admissibility of this bail record which is in issue in this application.

[9] At an early stage, the defence requested the state to indicate whether it intended to rely on the record of the bail proceedings in the criminal trial. The state responded by indicating that it did. The defence then successfully sought a ruling from the trial court that the bail record was inadmissible. This argument was heard before the accused had pleaded, partly to avoid an unnecessary delay in the trial which would otherwise have been occasioned by the defence application to quash certain of the charges. The state argues that the trial court erred in hearing argument on the exclusion of the bail record at this early stage and also in making a decisive ruling on the entire record in circumstances where the state had not indicated in what respects it intended to rely on aspects of the record.

[10] At the end of the trial, the state applied for the reservation of a question of law in respect of the trial judge's decision to refuse to admit the bail record, among other things. The judge conditionally reserved two questions of law in this regard. The first was whether the court had erred in law when it heard argument regarding the admissibility of the bail record before the accused had been called upon to plead; and secondly whether it had erred in law when it ruled that the bail record was inadmissible in the trial.

[11] These two questions of law were made conditional upon the SCA answering a further question reserved by the judge in favour of the state. That question related to whether the state was barred from seeking a reservation of a question of law as to whether the trial judge ought to have recused himself in February 2000 because it failed to indicate in February 2000 that it intended to seek such reservation. It is not immediately clear why the judge should have made the reservation of the two questions concerning the bail record conditional upon the SCA's ruling in the state's favour on the question of whether the state should have indicated that it intended to pursue a remedy in respect of the judge's refusal to recuse himself. The questions do not seem to be inter-related at all. Be that as it may, nothing turns on this, for the SCA did deal with each of the conditionally reserved questions of law.

[12] When the matter came before the SCA,[9] it ruled that the admissibility of the bail record gave rise to factual issues and not questions of law. It therefore struck both questions from the roll. In this Court's preliminary judgment, it held that the SCA had erred in this respect and that the question of the bail record did give rise to a question of law and to a constitutional issue. The application for leave to appeal now needs to be considered in the light of that decision.

(c) The quashing of the charges

[13] Before the commencement of the trial, the respondent objected to nine counts in the indictment on various grounds. After hearing argument, the judge dismissed

[9] *S v Basson* 2004 (1) SA 246 (SCA) (SCA judgment).

two of the objections and upheld seven. Six of the seven objections upheld related to six counts in terms of section 18(2) of the Riotous Assemblies Act, 17 of 1956[10] and to conspiracies to commit serious crimes, mainly murder, beyond the borders of South Africa, in England, Mozambique, Swaziland and Namibia.[11]

[14] The judge held that the section did not criminalise conspiracies entered into in South Africa to commit crimes beyond the borders of South Africa. He held therefore that the charges to which the respondent objected did not disclose offences. After the judge handed down his judgment on 12 October 1999,[12] the state indicated that it did not intend to appeal the judgment quashing the charges immediately. As will appear later in this judgment, this statement became a contentious issue between the parties.[13] The trial proceeded. When judgment was handed down on 11 April 2002, the state then launched an application in terms of section 319(1) of the Criminal Procedure Act[14] to have certain questions of law reserved for consideration by the SCA. One of

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[10] Section 18(2) of the Riotous Assemblies Act provides as follows:

> "(2) Any person who—
>
> (a) conspires with any other person to aid or procure the commission of or to commit; or
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> (b) incites, instigates, commands, or procures any other person to commit,
>
> any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

[11] The seventh objection related to count 59 which related to an attempt to intimidate which allegedly took place in Cape Town. The judge gave permission for the state to amend its indictment on this charge, which it accordingly did.

[12] The judgment is reported as *S v Basson* [2000] 1 All SA 430 (T) (judgment on exception).

[13] See the discussion at para [165] below.

[14] Section 319(1) provides as follows:

> "(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-

those questions was whether the judge had erred in quashing the charges on the basis that they did not disclose an offence. The judge refused to reserve this question of law.

[15] In June 2002, the state petitioned the SCA in terms of section 319(3) read with section 317(5) of the Criminal Procedure Act for the reservation of this question of law.[15] This petition was procedurally defective and in November 2002 the registrar of the SCA wrote to the state's lawyers asking for it to be rectified. A month later the state filed a further affidavit seeking to rectify the situation and asking for condonation of its non-compliance with the rules.

[16] When the matter was heard by the SCA in May 2003, it refused the application for condonation with regard to the reservation of additional questions of law, including the question relating to the quashing of the charges. The state then sought leave to appeal to this Court against that decision.

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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."

[15] Section 319(3) of the Criminal Procedure Act provides:

> "The provisions of sections 317(2), (4) and (5) and 318(2) shall apply mutatis mutandis with reference to all proceedings under this section."

Section 317(5) of the Criminal Procedure Act provides:

> "If an application for condonation or for a special entry is refused, the accused may, within a period of 21 days of such refusal or within such extended period as may on good cause shown, be allowed, by petition addressed to the President of the Supreme Court of Appeal, apply to the Supreme Court of Appeal for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law, as the case may be, and thereupon the provisions of subsections (11), (12), (13), (14) and (15) of section 316 shall mutatis mutandis apply."

[17] In its judgment after the preliminary hearing, this Court held that the question whether the charges that had been quashed did in fact disclose an offence did constitute a constitutional issue, even though the conduct concerned had taken place before the Constitution came into force. The Court expressly refrained from determining, however, the circumstances in which it would interfere with a decision by the SCA refusing condonation for non-compliance with its rules. That is a matter which will have to be determined in this case.

[18] Because of the nature of the complaint concerning bias, which if upheld would vitiate all the proceedings before the High Court, it is appropriate to deal with it first. We then deal with the bail record, and lastly the quashing of the charges.

I THE BIAS OF THE TRIAL JUDGE

[19] In its judgment after the preliminary hearing, this Court held that the question whether the conduct of a judicial officer gives rise to a reasonable apprehension of bias is a question of law.[16] The following questions remain to be considered: whether, by delaying its application to reserve the question of law relating to recusal, the state was barred from seeking the reservation of that question;[17] whether the recusal issue must be considered on the trial record until February 2000 when the recusal application was made or on the full record;[18] if it is limited to the question of bias on

[16] Above n 1 at paras 47-53.

[17] Id at para 80(a).

[18] Id at para 80(b).

the record until February 2000, whether the state may rely on events thereafter to establish the existence of bias in February 2000; and whether, if the state succeeded on the question of bias, it could be said that the accused had been in jeopardy of conviction which would preclude his re-trial under the rule against double jeopardy.[19]

(a) Bias in February 2000 or at the end of the day?

[20] The first question to be considered is whether the issue of bias can only be considered in the light of the record until the judge's decision not to recuse himself in February 2000, or whether it should be considered on the basis of the entire record of the trial. The state submits that the question reserved by the High Court in respect of bias was general and not limited only to events up to and including the recusal decision of February 2000. The findings to which the question refers include those made after February 2000, and even findings made in the application for leave to appeal. It was argued on behalf of the state that even if this Court were to find that the question of bias concerns bias only up to the recusal application in February 2000, the state would still be entitled to rely on events after February 2000, because bias is not something which simply arises and then disappears and that words and conduct after the specific event might show a predisposition of the judicial officer throughout the proceedings. Incidents which occurred and rulings which were made by the trial judge after February 2000 may be considered as evidence of the fact that he was subconsciously biased at the time of the initial recusal hearing. If he were biased, it would be artificial to suggest that the bias existed only up until February 2000 and

[19] Id at para 68.

then went away. Therefore, evidence of events which occurred after February 2000 is relevant to the question of whether the trial judge ought to have recused himself in February 2000.

[21] The respondent is adamant that the initial question reserved by the state was only concerned with bias manifested up until February 2000 and argued that this is clear from the judgment of the High Court on leave to appeal. So adamant was the respondent's counsel, that they submitted no argument on the events after February 2000. The state sought to broaden the scope of the bias question to bias at the end of the day, because it was aware that the original question related only to bias up to 4 February 2000. The respondent points out that before the SCA the state conceded that it did not rely on events subsequent to 4 February 2000 in its appeal based on bias. The respondent further submits that the question of bias at the end of the day was never considered by the SCA.

[22] For the purposes of this application we have assumed in favour of the state that this Court is entitled to consider allegations of bias related to events occurring before and up to February 2000, as well as subsequent events, up to the conclusion of the trial.

(b) The legal test for bias

[23] Access to courts that function fairly and in public is a basic right. Section 34 of the Constitution states:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[24] The impartiality of judicial officers is an essential requirement of a constitutional democracy and is closely linked to the independence of courts. Section 165(2) of the Constitution states:

> "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

[25] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[20] *(SARFU)* this Court held that a judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that the judge may be biased, acts in a manner inconsistent with section 34 of the Constitution and in breach of the requirements of section 165(2) and the prescribed oath of office.[21] It went on to lay down the following test for recusal:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of

[20] 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC). Three cases are reported in the law reports with this name. The first (*SARFU 1)* concerned the question of the proper forum on appeal and is reported in 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC). The second is the one we refer to here (*SARFU 2)* and concerned an application for the recusal of five judges of this Court. The third (*SARFU 3)* concerned the appeal itself and concerned the constitutional reviewability of the decision of the President to appoint a commission of inquiry. It is reported at 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

[21] Id at para 30.

> the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."[22] (footnotes omitted)

[26] As far as criminal trials are concerned, the requirement of impartiality is also closely linked to the right of an accused person to a fair trial, which is guaranteed in section 35(3) of the Constitution. This right has been analysed by this Court in a number of cases.[23] The Court has stated that criminal trials have to be conducted in accordance with notions of basic fairness and justice.[24] The nature of the right to a fair trial as a comprehensive and integrated right has been emphasised.[25] The fairness of a trial is clearly under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice.[26] The requirement that justice must not only be done, but also be seen to be done has been recognised as lying

[22] Id at para 48.

[23] See, for example, *S v Jaipal* 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC); *S v Dzukuda and Others*; *S v Tshilo* 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC); *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC); *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

[24] *Zuma* above n 23 at para 16.

[25] *Dzukuda* above n 23 at para 9.

[26] *Jaipal* above n 23 at paras 30-31.

at the heart of the right to a fair trial.[27] The right to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state.[28]

[27] The impartiality of a judicial officer is crucial to the administration of justice. So too is the perception of his or her impartiality. These principles are recognised in many foreign democracies. Thus, in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)*[29] this Court cited with approval the following reasoning of Le Dain J in the Canadian Supreme Court in the case of *Valente v The Queen*:[30]

> "Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception."[31]

[28] Similar concerns were expressed by this Court in *S v Jaipal* as follows:

> "It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime."[32]

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[27] *Dzukuda* above n 23 at para 11.

[28] See *Jaipal* above n 23 at para 29.

[29] 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 32.

[30] [1985] 2 SCR 673.

[31] Id at 689d-f.

[32] Above n 23 at para 29.

[29] In *SARFU,*[33] the Court identified two different approaches for determining "the appearance of bias". The focus of the one is "real likelihood of bias" and of the other "a reasonable suspicion or apprehension of bias".[34] The Court accepted, relying on earlier authority of the Appellate Division[35] (as the SCA then was) that it was not necessary for a litigant who complained of bias to establish that there was a real likelihood of bias.[36] The Court then went on to consider the distinction between "suspicion" and "apprehension" and, to avoid the potentially inappropriate connotations that the word "suspicion" might engender, preferred the phrase "reasonable apprehension of bias" to "reasonable suspicion of bias".[37]

[30] The Court held that there was a presumption in our law against partiality of the judicial officer.[38] In reaching this conclusion it reasoned as follows:

> "This is based on the recognition that legal training and experience prepare Judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence."[39]

The effect of this presumption is that an applicant who alleges that a judge is biased or reasonably apprehended to be biased must establish that.[40] The Court also

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[33] Above n 20.

[34] Id at para 36.

[35] *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) at 690A-695B.

[36] Above n 20 at para 36.

[37] Id at para 38.

[38] Id at para 41.

[39] Id at para 40.

[40] Id at para 45.

acknowledged that all judges as human beings bring to their work their life experience which means that they are not neutral in an absolute sense. The Court held that it is not improper for judges to have individual perspectives and for these to be brought to bear on their adjudication of cases.[41]

[31] In *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*[42] *(SACCAWU)* this Court emphasised that not only is there a presumption in favour of the impartiality of the court, but it is a presumption which is not easily dislodged. Cogent and convincing evidence is necessary in order to do so.[43] The Court, repeating what had already been held in *SARFU*, referred to the two contexts in which reasonableness fits into the enquiry. It emphasised that not only must the evaluation be made from the perspective of a reasonable person, but the perception of bias must itself also be reasonable.[44] In this regard, Cameron AJ writing for the majority, stated:

> "It is no doubt possible to compact the 'double' aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:
>
> > 'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasise that the threshold for a finding of real or perceived bias is high. It is a finding that must be

[41] Id at paras 42-43.

[42] 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC).

[43] Id at para 12.

[44] Id at para 14.

> carefully considered since it calls into question an element of judicial integrity.'"[45]

[32] In *SARFU* and *SACCAWU* the Court was concerned with the issue of perceived bias in appellate courts where the bench is composed of more than one judge. In evaluating the situation regarding a trial before a single judge, a court must be sensitive to the different nuances of such a "live" situation in a court of first instance, where demeanour or body language, tone of voice, the timing of remarks and the emotional response of participants in exchanges to one another may play a role. The context of the proceedings will be relevant to the determination of the apprehensions of a reasonable person. However, in principle, the test remains the same.

[33] When considering the issue of bias in a trial court, the following must be borne in mind. There is a difference between grounding a complaint of bias on the conduct of the judge in hearing the case and grounding such a complaint on the relationship between the judge and one of the parties or witnesses. It is generally far harder to establish a reasonable apprehension of bias in the former case. As Harms JA noted in a recent decision of the SCA:

> ". . . a Judge is not simply a 'silent umpire'.[46] A Judge 'is not a mere umpire to answer the question "How's that?"' Lord Denning once said.[47] Fairness of court proceedings requires of the trier to be actively involved in the management of the

[45] Id at para 15. The quote is from *R v S (RD)* [1997] 3 SCR 484 at para 113.

[46] *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) at 570E-F.

[47] *Jones v National Coal Board* [1957] 2 All ER 155 (CA) at 159B.

> trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources."[48] (footnotes in the original)

In that case, the litigant had complained of the judge's questioning in a case which it argued had suggested that the judge had disclosed a predisposition to an issue in the case.

[34] This reasoning is similar to that adopted by the Appellate Division in the earlier case of *R v Silber*[49] where Schreiner JA reasoned as follows:

> "[T]he grounds relied upon for suggesting bias were not facts outside the course of proceedings such as are ordinarily put forward as reasons why the judicial officer in question should not try the case. The grounds related purely to what had happened in the course of the trial. Neither counsel has been able to find any reported case in which an application for recusal has been made in the course of a trial on the ground that the judicial officer has shown bias by his conduct of the proceedings. And this is not surprising, since the ordinary way of meeting any apparent bias shown by the court in its conduct of the proceedings would be by challenging his eventual decision in an appeal or review. Bias, as it is used in this connection, is something quite different from a state of inclination towards one side in the litigation caused by the evidence and the argument, and it is difficult to suppose that any lawyer could believe that recusal might be based upon a mere indication, before the pronouncement of judgment, that the court thinks that at that stage one or the other party has the better prospects of success. It unavoidably happens sometimes that, as a trial proceeds, the court gains a provisional impression favourable to one side or the other, and, although normally it is not desirable to give such an impression outward manifestation, no suggestion of bias could ordinarily be based thereon. Indeed a court may in a proper

[48] *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at para 3.

[49] 1952 (2) SA 475 (A).

> case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours the other party, but no reasonable person, least of all a person trained in the law, would think of ascribing this provisional attitude to, or identifying it with, bias."[50]

[35] These considerations need to be borne in mind in the assessment of the state's argument that it is the conduct of the judge during the trial that has given rise to the complaint of bias. As Schreiner JA pointed out in his remarks in the passage from *Silber* just quoted, it is difficult for a litigant to establish bias simply on the basis of the conduct of a judge during a trial. Judges are not silent umpires but may and should participate in the trial proceedings by asking questions, ensuring that litigants conduct themselves properly and making rulings on the admissibility of evidence and other matters as the trial progresses. Inevitably litigants will from time to time be aggrieved about both the content of the rulings made by the judge and the manner in which a judge may ask questions or intervene. Such grievances need to be construed in the realisation that trials are often emotional and heated as a result of the disputes between the parties. A court considering a claim of bias should be wary of permitting a disgruntled litigant to complain of bias successfully simply because the judge has ruled against them, or been impatient with the manner in which they conduct their case.

[36] On the other hand, it is important to emphasise that judges should at all times seek to be measured and courteous to those who appear before them. Even where litigants or lawyers conduct themselves inappropriately and judicial censure is

[50] Id at 481C-H. See also *S v Khala* 1995 (1) SACR 246 (A) at 252e-j.

required, that should be done in a manner befitting the judicial office. Nothing said in this judgment should be understood as condoning discourteous or inappropriate remarks by judicial officers. Inappropriate behaviour by a judge is unacceptable and may, in certain circumstances, warrant a complaint to the appropriate authorities, but it will not ordinarily give rise to a reasonable apprehension of bias. It will only do so where it is of such a quality that it becomes clear that it arises not from irritation or impatience with the way in which a case is being litigated, but from what may reasonably be perceived to be bias.

[37] Finally, it should be noted that the state submitted in this Court that the conduct of the judge in the trial was biased, though not consciously so, and that his conduct gave rise to a reasonable apprehension of bias. The specific conduct referred to by the state to establish this charge must be considered in the light of this submission.

(c) Alleged specific manifestations of bias

[38] The facts and allegations upon which the state relies in support of its bias contentions are dealt with in some detail in what follows up until paragraph 102. They can broadly be divided into two categories namely: (i) remarks and interventions made by Hartzenberg J during the course of the trial; and (ii) incorrect legal rulings and factual findings he made during the course of the trial or in the judgment. The argument in respect of (i) is simply that the remarks and interventions made by the judge give rise to a reasonable apprehension of bias. The argument in respect of (ii) is

that the legal rulings and factual findings made against the state by the judge are not only wrong, but are so unreasonable and one-sided as to give rise to a reasonable apprehension of bias, especially if viewed cumulatively.

[39] The approach we take is to set out briefly the relevant legal principles in respect of each category of complaint and then to evaluate the individual complaints cumulatively in the light of those legal principles. We first deal with the remarks or interventions and thereafter with the rulings and findings during and at the end of the trial.

[40] It is important that the allegations of bias be considered in the context of this trial. The trial ran for a period of about 31 months from 4 October 1999 to 11 April 2002. The court sat for 295 days and heard evidence from over 140 witnesses. Evidence was also taken on commission from two witnesses in Jacksonville, Florida between 10 October and 23 October 2000. The record of the trial runs to over 20 000 pages. The judgment on the merits exceeds 1000 pages. In addition, the trial court heard argument and delivered separate judgments on six attendant issues. It was accordingly a marathon trial attended by the usual frustrations and difficulties of such litigation.

(i) Remarks and interventions made by the judge

[41] The state complains effectively of nine interventions by the trial judge as cumulatively suggesting that the judge was either subconsciously biased or that the

conduct gave rise to a reasonable apprehension of bias. These interventions, which will be described below, can broadly be divided into two categories: those that, the state argues, suggest that the judge was hostile towards the state; and secondly those that the state argues show that the judge had prejudged certain issues.

[42] As far as the first category is concerned, this Court should bear in mind that in long criminal trials a judge may at times make remarks that are inappropriate, or display irritation towards counsel. At times such interventions may arise from attempts at humour. In considering the question of whether such remarks give rise to a reasonable apprehension of bias, a court should not hold a judge to an ideal standard which would be difficult to achieve. Moreover, a court considering a claim of bias must take into account the presumption of impartiality, mentioned by this Court in *SARFU.*[51] To establish bias, therefore, a complainant would have to show that the remarks were of such a number or quality as to go beyond any suggestion of mere irritation by the judge caused by a long trial, and establish a pattern of conduct sufficient to dislodge the presumption of impartiality and replace it with a reasonable apprehension of bias.

[43] As far as the second category is concerned, that the judge had prejudged an issue in the case, the remarks of the courts in *Silber*[52] and *Take and Save Trading*[53] are of assistance. Both make it clear that it is rare that a court will uphold a complaint of

[51] Cited above n 20 at para 41.

[52] Above n 49.

[53] Above n 48

bias arising from a judge's conduct during a trial and affirm that it is not inappropriate for a court to express views about certain aspects of the evidence. They make it clear, as well, that the fact that a judge may express incorrect views is not sufficient to ground a claim of bias.

[44] Having set out the relevant legal principles, we turn now to consider briefly each of the nine incidents relied upon by the state.

(aa) The state was conducting "trial by ambush"

[45] When the state suggested that it would prove the bail record after the respondent's version of events was before the court, the judge remarked that "this was exactly what the state did at the bail hearing, it is trial by ambush". In its judgment on the admissibility of the bail record, the court then found that counsel for the state during the bail hearing had cross-examined the respondent with the exclusive purpose of laying the basis for cross-examination during the trial. This remark echoed that conclusion by suggesting that the manner in which counsel sought to present the state's case would amount to "trial by ambush".

(bb) The judge was "bored" by the state's evidence

[46] During the leading of a state witness on financial statements, the judge remarked that he was bored to death.[54] The state argues that the statement that he was bored created the impression that the judge had already made a decision in regard to

[54] He stated: ". . . ek sit en verveel my dood, mnr Ackermann, regtig."

vital aspects of the state's case or that he was hostile to the state's case. The respondent argues that the remark must again be understood in context. The remark arose when counsel for the state suggested that the witness should read a documentary report into evidence which another witness had already read into the record. Counsel for the respondent suggested that he was willing to accept as common cause certain contents of the documents if it would help speed things up. It was then that the judge made the remark about being bored. After that remark, the judge suggested a way to speed up the process of examining the witness. The respondent submits that it is clear from the context that the court was attempting to bypass the need to go into extensive detail on a subject which the defence did not dispute.

[47] In reply, the state denies that the evidence overlapped with that of a previous witness. It claims that the evidence provided the substratum for the state's entire case on the commercial charges and was necessary. In the judgment on recusal, the judge explains that the documents that were being read by the witness were not before him at that time. When he asked the state's counsel which documents he referred to, counsel apparently wanted to read the evidence afresh, an idea that "filled [the judge] with horror".[55] The judge put to counsel that the defence was unlikely to dispute the evidence and it was therefore not necessary for the witness to go further than give his opinion based on the documents and in that context, the judge explained that he was bored to listen to the fine detail of the matter.

[55] *S v Basson* (recusal judgment) above n 3 at 72g-h.

(cc) Counsel for the state was "confused"

[48] The third remark also occurred during the leading of evidence by the state when counsel for the state remarked that he (counsel for the state) had become confused. The judge then remarked "if it were the only time [that you have been confused], I would be happy."[56] The court acknowledged in the recusal judgment that the remark was inappropriate and apologised for it.[57] The respondent points to the fact that the judge apologised for the remark and argues that, in any case, it had no bearing on the merits.

(dd) The prejudice to the state's case, other than the effect on counsel's ego

[49] The fourth remark occurred during oral argument on the recusal application. The court asked counsel about a particular complaint that the state had made. He asked what prejudice had been caused to the state, and added: "other than the fact that I have damaged your ego."[58] The state argues that this sarcastic attitude demonstrated hostility towards the state.

(ee) In chambers the judge laughed with the respondent's counsel about the unsuccessful attempts of the Asset Forfeiture Unit

[50] The fifth remark occurred after a failed attempt by the Asset Forfeiture Unit to acquire a restraint order in respect of the respondent's property in August 1999. Subsequently, the matter was being discussed in chambers with the judge in the

[56] He stated: "Wel, as dit net nou is, is ek bly."

[57] Above n 3 at 73g-h.

[58] He stated: "Behalwe nou dat ek u ego aangetas het."

criminal matter.[59] The state suggests that while they were there, the judge and counsel for the respondent laughed together about the failed application. The state argues that this incident in chambers created the perception that the judge sided with the defence team and was eager to embarrass the state.

[51] In his recusal judgment, the judge admitted that he had laughed, and acknowledged that this might create the impression that he was ill-mannered or insensitive, but not that it would indicate bias.[60]

(ff) The judge's comments concerning the import of General Knobel's evidence

[52] The next intervention occurred during the cross-examination of General Knobel, an important witness for the state. The state submits that during the cross-examination, counsel for the respondent put forward an incorrect summary of the state's case. When counsel for the state objected, the judge responded by saying that it was not incorrect and he "promised" that the witness had indeed given evidence to that effect.

[53] A few days later the state obtained a transcript of the proceedings which demonstrated that the defence's summary had been incorrect. When the state tried to

[59] Proceedings in chambers are generally confidential. The question of whether they can or should be used to support an allegation of bias is a difficult one which we do not attempt to consider fully here. We record the allegation and consider it on the basis of the ordinary rules regulating bias in favour of the state. However, if such conduct may be relied upon, it may well be that the considerations that arise from conduct in chambers require greater circumspection by a court considering whether the conduct gives rise to a reasonable apprehension of bias. Given the conclusion we reach in this case, that is a question that can be left for further and fuller consideration in another matter.

[60] He used the following words: "onbeskof of . . . ongevoelig". Above n 3 at 71b-c.

raise this with the judge, counsel for the respondent said that the dispute could have been resolved outside of court in a collegial spirit. The court took the matter no further.

[54] In this Court, the state submitted that the remark "I promise you" indicated that the judge had prejudged the matter and created a perception of bias against the state. The respondent argues that it was legitimate for the judge to have been concerned with the wasting of time and that his suggestion that the matter be resolved in a collegial way was aimed at saving time and does not ground a reasonable apprehension of bias. In response to the state's submissions that the judge had evidently prejudged an important issue erroneously, the respondent, at the hearing, contended that it was not unreasonable for the judge to have formed an opinion at that point of the trial.

(gg) The comment that a witness had sympathy for the accused

[55] During the cross-examination of one of the state witnesses, the witness made certain concessions which contradicted his evidence-in-chief and which took the state by surprise. The state sought to explore the witness's attitude towards the respondent by asking whether he had sympathy for him. The witness responded that he did. Counsel for the respondent objected to the line of questioning and then the judge enquired why the state was asking these questions. When counsel for the state explained, the judge retorted to the effect that it did not matter if the witness had sympathy for the respondent.

[56] In the recusal judgment the judge explains that he made this remark while attempting to establish whether the state now wanted to treat the witness as hostile. In the judgment, the judge stated:

> "Wiese's evidence indicates that he was part and parcel of the trap and could not hear properly what was said. He was one of at least five policeman involved with the trap. How his attitude towards the accused could be of any importance with regard to what happened during the trap is beyond me, and how the state can think that it can affect it is even less understandable. This perception [of bias] astounds me."[61] (our translation)

[57] The state argues that the attitude of the court "was unjustifiably intemperate" and the manner in which the court dealt with the line of questioning created a perception of bias. The respondent argues that the state was entitled to proceed, in terms of section 190 of the Criminal Procedure Act, to have the witness declared a hostile witness. The state did not do this.

(hh) Remarks and questions by the judge regarding "Project Coast"

[58] The state makes a series of complaints about the trial judge's conduct in assessing evidence relating to Project Coast. It is necessary to explain briefly the factual context in which the state's concerns arise.

[61] Id at 70b-c. The judgment reads:

> "Wiese se getuienis toon aan dat hy deel was van die lokval en nie goed kon hoor wat gesê is nie. Hy was een van minstens vyf polisiemanne wat betrokke was by die lokval. Hoe sy gesindheid teenoor die beskuldigde van enige belang kan wees oor wat tydens die lokval gebeur het, gaan my verstand te bowe en hoe die Staat kan dink dat dit 'n effek kan hê, is nog minder verstaanbaar. Hierdie persepsie verbyster my."

[59] The SADF established a covert operation, known as Project Coast, in order to acquire a chemical-weapons capability for South Africa. The respondent was involved in this project. The charges which are relevant to the present discussion are those of fraud and theft. The state's case was that the respondent (and Dr Mijburgh) had a common purpose to defraud the SADF by appropriating funds meant to be used for Project Coast.

[60] An important dispute related to a group of companies known as the WPW group. The state's case was that the respondent participated in setting this group up with the purpose of channelling funds into it for his own benefit. The idea was to create the impression that this group was channelling funds to be used for Project Coast, when in fact the respondent was channelling funds into these companies for himself. The respondent's defence was that these companies were indeed formed to facilitate the clandestine operations of Project Coast. Therefore, if there were no link between the WPW group and Project Coast, the state's case against the respondent would be very strong. If, however, there were a link, the state's case would be considerably weaker.

[61] The state complains that on 4 February, still early in the trial, the judge made a statement to the effect that it would not take much to convince him that the WPW group was linked to Project Coast. The state argues this statement indicates that the judge had prejudged this question which lay at the heart of the criminal trial. Moreover, the state claims the statement was not an indication of a prima facie view

of the judge, but a formed and final view and that there was no evidence that justified the court making this remark at such an early stage in the proceedings.

[62] The state argues that the trial judge therefore created the impression that he had prejudged a central issue in the case. In its submissions in reply, the state refers to another comment by the judge which indicated that he relied on newspaper reports in order to form the opinion that the state's submissions were inherently implausible. In the course of argument regarding the recusal application, the judge put it to counsel for the state that it was inherently implausible that the accused could have managed to defraud Project Coast of R86 million out of a total budget of R152 million. When the proceedings continued, counsel for the state pointed out that the state's case was that Project Coast had been defrauded of R36 million and that in light of the lower amount, it was understandable why the state had failed to pick up the fraud. The judge said that he had read in the newspaper that it was R80 million. The state submits that the fact that the judge used newspaper reports to develop the view that the state's case was improbable, created a reasonable apprehension of bias.

[63] The respondent argues that the state is incorrect to say that the judge had formed a final view about the link between the WPW group and Project Coast. When he made the remark, he had already heard evidence from another witness to the effect that it was SADF policy that in order to prevent a chemical attack on South African troops and to create a chemical-weapons capacity, anything that had to be done, ought to be done. This would include getting information from enemy agents, buying items

on the black market or stealing information. Evidence was led that there was no firm plan on how money was to be transferred: the general policy being, the product (chemical-weapons capability) was needed, the money was available and there was to be no self-enrichment. The respondent argues further that it is clear from certain exchanges during the recusal application that the judge still had an open mind as to the facts.

[64] In the recusal judgment, the judge suggests that at the time he made the remark complained of, he was merely exploring the possibilities of the evidence. He states that when he was asking whether the witness had considered the possibilities that the funds were actually being channelled through these companies to the benefit of the project "Mr Ackerman nearly had an apoplectic fit".[62] Despite the unfortunate tone of such a comment, it is relevant that he also points out that a judge is entitled or obliged to ask questions to clarify the issues.[63] He also said his questions regarding the WPW group and its concurrence with the project cannot indicate prejudice. He stated that it may have indicated that he did not fully understand at that stage what all the facts would lead to – an indication that he did not want to concede, but nevertheless one which he believed would not have been seen by a reasonable litigant as prejudice.[64]

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[62] Above n 3 at 68e (our translation). The judgment reads: "Ek het die indruk gekry dat mnr Bruwer meen dat daar net een moontlikheid is. Ek wil toets of wat hom aanbetref, daar nie ruimte is vir [ander moontlikhede] nie. Toe ek dit doen het mnr Ackermann byna 'n apopleksie gekry".

[63] Id at 63d.

[64] Id at 75b-c.

(ii) Judge's conduct during the cross-examination of Dr Basson

[65] The state asserted that its cross-examination of Dr Basson was hampered by the judge's interjections. It notes that the judge asked whether it was necessary for the state to ask the respondent questions on the answers given during the bail proceedings; the court's suggestion that the respondent should be entitled to read documents before he was cross-examined on them; and the court's comment that the state was leading Dr Basson into an ambush.

(jj) Assessment of challenges relating to remarks and interventions by the judge

[66] The first five of these complaints[65] and the seventh[66] and ninth[67] are all comments or conduct of the judge which the state argues tend to show hostility to the state's counsel or to their case. Several of them may have been inappropriate, as the judge himself acknowledged in the recusal judgment. Regrettable as judicial impatience may be, reliance on several examples of such impatience or irritation is not sufficient to ground a reasonable apprehension of bias. Neither individually nor cumulatively do these incidents suggest that the judge was biased towards the state. Most of them suggest a degree of irritation with the manner in which the state's case was being conducted and little more.

[65] The comments that the state was conducting a trial by ambush; that the judge was bored with the evidence; that counsel for the state was confused; that the judge had hurt counsel's ego; and the fact that the judge laughed in chambers concerning the failed asset forfeiture application.

[66] The judge's comment concerning a witness's sympathy for the accused.

[67] The complaint concerning the judge's interjections during the cross-examination of the respondent.

[67] The other two interventions[68] disclose the judge's views on the evidence he had heard. As Schreiner JA noted in *Silber*,[69] it is inevitable that during a long trial a judge will form provisional impressions favourable to one side or another. It is also inevitable that judges will put questions based on those impressions to witnesses and to counsel. Such questions give litigants an opportunity to rebut incorrect impressions that have been expressed by the judge. To argue that the putting of an incorrect impression by a judge gives rise to a reasonable apprehension of bias ignores the fact that judges should ask appropriate questions during a trial in order to assist in the process of fact-finding that lies at the heart of criminal trials. To the extent therefore that the interventions complained of by the state relate to the incorrect assessment of the evidence by the judge, it cannot be said that they could have given rise to a reasonable apprehension of bias.

[68] We turn now to consider the second category of complaints raised by the state.

(ii) Mistaken legal rulings and findings of fact

[69] In addition to pointing to certain comments and interventions by the judge, the state argued that certain of the rulings made by the trial judge were indicative of bias on his part. The rulings can be divided into those in which the judge made a mistake of law, those where he refused to exercise a discretion in favour of the state,

[68] The sixth relates to the judge's preliminary assessment of General Knobel's evidence and the eighth relates to his remarks concerning the relationship between Project Coast and the WPW group of companies.

[69] Above n 49 at 481G.

and those in which, according to the state, his assessment of the facts was completely wrong. In considering these complaints, it is important to bear in mind that it is inevitable that, from time to time, a judge may make an error of law in determining the admissibility of evidence in a long trial. To assert that an error of law constitutes evidence of bias, or gives rise to a reasonable apprehension of bias, would be to underestimate the difficulties of presiding as a judge in long trials and to impose a counsel of perfection on judicial officers. Such an approach would be at odds with our constitutional order.

[70] An argument that a judge has made a mistake on the facts, even if correct, is not ordinarily sufficient on its own to give rise to a reasonable apprehension of bias. To establish a reasonable apprehension of bias on such an argument is not easy. We must bear in mind that our law does not permit the state a right of appeal on mistaken factual findings, although it is inevitable that from time to time a trial court will make a mistake on the facts in a criminal case. For a mistake on the facts to give rise to a reasonable apprehension of bias, it would need to be established that the mistake of fact is so unreasonable on the record that it must have arisen from bias or given rise to a reasonable apprehension of bias.

[71] Each of the eight incidents or complaints will now be considered in turn.

(aa) Attorney-client privilege

[72] Counsel for the respondent cross-examined a state witness about a conversation that he had had with his lawyer. The essence of the line of questioning was to seek confirmation from the witness that he had discussed his guilt or innocence with his lawyer. During the course of the cross-examination counsel for the state objected to the line of questioning on the grounds of attorney-client privilege. The court dismissed the objection stating that that privilege attached to the attorney and not the client.

[73] The state quite rightly[70] argues that the judge was incorrect and that the privilege attaches to a client and not the attorney. It also argues that the cross-examination in question intruded into the terrain covered by the privilege and that the manner in which the court overruled the objection by the state created a perception of bias against the state. In the judgment on recusal, the judge states that he may have made a mistake on the law, but that the dismissal of the objection was correct, since the witness had waived the privilege. He described the perception of the state in regard to the court's treatment of the privilege as "trivial" ("beuselagtig") and baseless.[71] The state argues that its complaint was not trivial and that the fact that the court summarily dismissed the objection without calling for argument from the parties, gives rise to a perception of bias.

[70] It is clear in our law that the attorney-client privilege attaches to the client. See *Bowes v Friedlander NO and Others* 1982 (2) SA 504 (C) at 511B-D; *S v Van Vreden* 1969 (2) SA 524 (N) at 529C; *S v Moseli en 'n Ander (2)* 1969 (1) SA 650 (O) at 652E–653B; *S v Green* 1962 (3) SA 899 (D) at 900B-901A; Joubert (ed) *LAWSA* 2 ed vol 9 (LexisNexis Butterworths, Durban 2005) "Evidence" at para 754; and Zeffert et al *The South African Law of Evidence* (LexisNexis Butterworths, Durban 2003) at 585.

[71] Above n 3 at 69h.

(bb) Refusal to allow or call three further witnesses

[74] The state had wanted to call three further witnesses (Mr Murgham, Mr Regli and Mr Dreier) during the presentation of its case, but for various reasons had not been able to do so. The witnesses later came forward after the state had closed its case. Mr Regli had originally refused to give evidence but changed his mind after the close of the state's case. In the case of Mr Murgham, the state had been under an incorrect impression that he was a defence witness and only realised that this was not so later, hence the late application to call him.

[75] The state therefore asked the court to exercise its powers under section 186 of the Criminal Procedure Act to call the witnesses. The court refused to do so. Section 186 provides that:

> "The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case."[72]

[76] The state views the failure of the court to call these witnesses as an indication of bias and further submits that the court's conclusion that these witnesses' evidence was not essential and that they would never admit to any involvement with Dr Basson was wholly unfounded.

[72] For a discussion of the court's powers under this provision, see *S v Gerbers* 1997 (2) SACR 601 (SCA).

[77] The respondent rebutted these submissions before this Court and indicated that the judge was entitled to make such a finding on the likely credibility of the above witnesses, based on testimony that had already been given by General Knobel.

[78] According to the state, the judge had no factual basis for the above conclusion and his decisions were so dramatically erroneous that they can only lead to a reasonable apprehension of bias. By refusing to call witnesses, the court could be said to have protected the accused from proper cross-examination and from having the strength of his testimony tested against that of other witnesses.

[79] However, it is for the court to determine whether the evidence of the witnesses is "essential to the just decision" of the case. In considering this, the court was entitled to consider the right of the accused that the trial be concluded within a reasonable time.[73] It was further relevant that the state sought that the evidence from these witnesses be received on commission which might have precluded Dr Basson from being present during their testimony and would have been very costly.

(cc) The implausibility of Dr Basson's evidence

[80] The need for the state to prove that the existence of the financial principals was merely fabrication by the respondent in the fraud charges was, according to the state, central to the case. The respondent made a number of substantial investments

[73] Section 35(3)(d) of the Constitution reads:

> "Every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay".

which he claimed to have made on behalf of the principals with no financial benefit for himself at all. He had made no mention of the principals at the bail hearing, nor in the affidavit to which he had deposed in respect of the Merton House investment, nor in the information that he submitted to the Auditor-General regarding Project Coast. However, at the trial he claimed to have acted not on his own behalf in those investments, but on behalf of the financial principals from whom he received instructions. Contrary to this, documentary evidence at the trial pointed to the fact that he himself had made those financial decisions with no reference to any principals, whether Russians, Germans or Libyans, as he claimed at the trial.

[81] The state submits that it had proved beyond reasonable doubt that Dr Basson's evidence of financial principals was fabricated as these principals did not exist, yet the trial judge accepted Dr Basson's version that he had indeed made the investments upon the instructions of financial principals. The state points to several examples on the record which, it argues, indicate the implausibility of Dr Basson's version, and support its argument that Dr Basson's evidence should not have been accepted. It is not necessary to deal with each of those examples in this judgment. An example will suffice. The state points to the fact that the judge should not have accepted Dr Basson's allegation that he had been instructed by Libyan financiers to make investments for them in Tubmaster, an American company, in order for the Libyans to gain green card status. The state argues that this proposition is highly improbable and that there is little or no evidence to support it. Thus, the state continues, the judge's acceptance of this evidence is an indication of bias.

[82] The state based a large part of its case on the fraud charges on the contact that the respondent had had with Libya and the time period when this happened. The respondent alleged that he had had contact with principals in Libya from 1986, but the state's case was that the respondent had only had contact with Libya after 1993, after the allegedly fraudulent transactions had been concluded. The trial court found that it was at least possible that the respondent had had contact with the Libyans before 1993. In its analysis of the evidence relied on by the court, the state submits that this evidence did not support this ruling at all.

[83] To counter these allegations, Dr Basson's counsel explained that the circumstances under which Dr Basson was being questioned about the financial principals at the bail hearing were different from those at the trial. The manner of questioning was also different, thus the answers Dr Basson gave at the trial which were allegedly inconsistent were actually not.

[84] To a large extent, this complaint by the state is a complaint that the judge reached the wrong conclusion on the evidence led. The evidence of Dr Basson in which he stated that he had acted for certain principals was accepted by the trial court.

(dd) The judge's refusal to call Mr Buffham

[85] The state applied for the court to allow it to call Mr Buffham as a witness as, allegedly, his evidence would have seriously contradicted that of the respondent who

had testified that Mr Buffham was an employee of the financial principals who had channelled funds to the respondent. The court would have been entitled to call Mr Buffham in terms of the International Co-operation in Criminal Matters Act, 75 of 1996 if it considered that his evidence was "necessary in the interests of justice".[74]

[86] However, the court refused to call Mr Buffham, but made conclusions regarding his credibility without having heard him. To quote the learned judge: "Yes, Buffham was a 'wheeler and dealer' if you ever saw one".[75] The state argued that this comment and the failure to call Mr Buffham gave rise to a reasonable apprehension of bias. We cannot agree. The judge had a discretion as to whether to take steps to call Mr Buffham. In the exercise of that discretion, he had to consider whether Mr Buffham's evidence was "necessary in the interests of justice". It is clear that from other evidence the judge had heard concerning Mr Buffham, he doubted his credibility which informed his decision that Mr Buffham's evidence was not necessary in the interests of justice.

(ee) Erroneous factual finding: evidence of Mrs Webster

[87] The trial court reached a conclusion that Mrs Jane Webster had known of the respondent's ties with the SADF, but the state submits that this conclusion was not

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[74] Section 2(1) of this Act provides:

> "If it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign State, is necessary in the interests of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which assistance from that foreign State is sought to obtain such evidence as is stated in the letter of request for use at such proceedings."

[75] Our translation. The judge said: "Ja Buffham was 'n 'wheeler and dealer' as jy al ooit een in jou lewe gesien het".

supported by Mrs Webster's testimony or that of the respondent. In this regard, the state submits that the court's failure to keep an open mind until the conclusion of the case created an apprehension of bias.

[88] The respondent contends that the judge's comment on the above issue was made during final argument, thus the court had already heard the evidence that would lead it to reach the conclusion it did. Furthermore, it was possible that Mrs Webster knew something of Dr Basson's SADF connections, as Mr Dave Webster had been present at a party where Dr Basson was made a brigadier and the nature of Mr Webster's relationship with his wife indicated that he would communicate such information to her.

(ff) Judge's assessment of evidence: Dr Basson and General Knobel

[89] Counsel for the state further argues that the manner in which the trial judge assessed the evidence of the respondent and General Knobel in his judgment was incorrect. They argue that the judge considered the evidence-in-chief of state witnesses as well as their cross-examination and that in many instances, the judge held that the effect of the cross-examination was to neutralise the evidence led in chief. However, in his assessment of the evidence of the respondent, the judge did not refer to the cross-examination at all, despite the fact that he had been cross-examined for 33 days.

[90] With regard to General Knobel, the defence cross-examined him with the aim of eliciting concessions from him, which it did. However, on re-examination the state established that the source of information upon which the concessions had been based was the respondent himself. This nullified the probative value of the concessions because they were not based on first-hand knowledge of General Knobel and only on the subjective view of the respondent. The state argues that the judge completely ignored the re-examination of General Knobel by the state in its assessment of his evidence.

[91] Secondly, General Knobel had been asked whether he thought that the respondent had been depicted in a series of photographs. General Knobel denied this, but mistakenly the judge held that General Knobel had indeed confirmed that the respondent had been depicted in the photographs.

[92] Thirdly, General Knobel had testified during cross-examination that he had not been aware that certain Special Branch members had received Rolex watches. The judge, in his assessment of General Knobel's evidence, mistakenly found that General Knobel had accepted that certain Special Branch members had received Rolex watches.

[93] Fourthly, the testimony of General Knobel was that he had no knowledge of protective clothing donated to an Angolan political organisation, UNITA, in the 1980s or transactions with Iraqis concerning the sale of protective clothing. The state's

complaint is that when the judge summarised General Knobel's evidence he again found erroneously that General Knobel had verified that protective clothing and military help had been given to UNITA and that the clothing had been sold to Iranians.

[94] Fifthly, General Knobel testified that he was unaware of the methodology used by the state in the formulation of the charge sheet. The judge found, however, again mistakenly that General Knobel had conceded that the state had a particular approach to gathering evidence to formulate the charge.

[95] The state had also asked to recall General Knobel, but the court refused. The respondent submits that this was due to the fact that proceedings had already advanced far and the state had not given the respondent enough time to respond to the application. It appeared to the respondent that the state was not serious about recalling General Knobel, and this must have also been the court's impression.

(gg) Erroneous factual finding: conspiracy to murder Mr Dullah Omar

[96] The respondent was charged with conspiracy to murder Mr Dullah Omar by substituting his heart medication with poison. In its submissions, the state highlighted certain evidence which demonstrated that a plan had been hatched to use a substance called Dioxin to poison Mr Omar. The trial judge however found that Dioxin is not a poison and that the plan was not feasible, which the respondent as a cardiologist would have known. In addition, the court made a finding that Mr Van Zyl (who was

to deliver the poison in Cape Town) flew to Cape Town on 13 May 1989 instead of 13 September 1989 as testified. The state alleges that this demonstrates that the court misunderstood much of the evidence presented to it.

(hh) Repeated mistakes by judge: legal implications

[97] Before this Court counsel for the state stressed that whereas it is understandable that some rulings and decisions of a court could be incorrect, the trial judge in this matter erred consistently and dramatically, always in the same direction, to the extent that it could only be explained with reference to bias. On behalf of the respondent it was submitted that when looking at the cumulative effect of rulings and findings, one also has to take into account a number of important rulings which the trial judge made in favour of the state.

[98] The following examples were pointed out:

(a) The judge allowed a commission to take evidence from Mr Webster in the USA when the accused was not allowed to travel there. Despite the threat to fair trial requirements and the possibility that Dr Basson could be prejudiced by the fact that he was not in the USA to hear Mr Webster's evidence and help counsel respond to it, the judge nevertheless allowed the trip to go forward, and the evidence to be admitted.

(b) The respondent also points to the fact that the judge allowed two state counsel to cross-examine the accused, which is unusual.

(c) Similarly, in the recusal judgment, the judge points to rulings he made in favour of the prosecution, for example, his refusal to uphold defence objections that the prosecution's re-examination of General Knobel amounted to unfair cross-examination.

(d) Before this Court counsel for the respondent mentioned the judge's dismissal of the defence's application in terms of section 174 of the Criminal Procedure Act, at the end of the state's case, as example of a ruling in favour of the state.

[99] The state argued that rulings made in its favour which are clearly correct cannot be weighed in the balance. The question is whether incorrect rulings dramatically favoured one side. This is an assessment that it is almost impossible to make on a trial record which extends over 20 000 pages. In our view, the question is whether the incidents raised by the state appreciated in their context establish that the judge was biased or that his conduct gave rise to a reasonable apprehension of bias.

(ii) Assessment of challenges regarding mistaken legal rulings and factual findings

[100] In respect of this second category of complaints, it is clear that at least one of the trial judge's interlocutory rulings was based on wrong legal principles and we accept that in many of the examples referred to by the state another court might have reached a different conclusion on the facts. Some aspects of the evidence of the respondent (for example as to the financial principals) appear somewhat improbable to

us. However, this Court is not sitting in judgment on the factual findings made by the trial court. It is the issue of bias which has to be adjudicated.

[101] The fact that a trial judge may make an interlocutory ruling mistakenly does not provide weighty material to support a conclusion of bias. Nor does the judge's refusal to exercise his discretion to call further witnesses. Over 140 witnesses were led in this case and it cannot be said that the judge's decision not to call the further witnesses at the state's request indicates any bias at all. As to the conclusions of fact of which the state complains, it may be that a different court would have had a different appreciation of the facts, but that too cannot found a complaint of bias, unless it appears that the judge's conclusions are so out of kilter with the evidence led that they are explicable only on the grounds of bias. We cannot conclude that that was the case here.

(d) Conclusion on the bias challenge

[102] We have considered cumulatively all the complaints of the state in the light of the legal principles concerning the law of bias set out above. In particular, we are mindful of the difficult task faced by a litigant who seeks to establish bias on the basis of the conduct of a judge during a trial. We are unable to conclude on the papers before us that any specific ruling or finding of the judge, or all the rulings or findings identified by the state viewed cumulatively, either show actual bias, albeit subconscious, or give rise to a reasonable perception of bias on the part of the trial judge. As we have said, it may be that some of the rulings made by the judge were

mistaken, and that some of his remarks were ill-considered. The remarks and rulings of which the state complains however must be seen in the context of a marathon trial with all its complexities and human frustrations. In our view, viewed in this context, we cannot agree with the state that the conduct of the trial judge as recorded in the record could or should have given rise to a reasonable apprehension of bias on the part of an observer, nor does it suggest actual bias, albeit subconscious, on the part of the judge.

[103] We have considered all the allegations made by the state upon which it relies to establish its allegation of bias by the trial judge. We have found that the state has not made out a case. In the circumstances, it is not necessary to decide the question relating to whether the state was barred from raising the bias question on the ground that it did not appeal the recusal decision of the trial court immediately. Nor is it necessary to decide the question of whether the state is limited to the record up until 4 February 2000.

II THE ADMISSIBILITY OF THE BAIL RECORD

[104] We have already found that the issues concerning the admissibility of the bail record do raise constitutional matters.[76] There are two issues raised by the state in relation to the bail record. The first relates to the fact that the High Court considered the admissibility of the bail record before the trial had in fact commenced and before

[76] This Court's preliminary judgment, *S v Basson* (Constitutional Court judgment), cited above n 1 at para 26.

the state had made any application to admit the record. The second relates to the High Court's conclusion that the admission of the bail record would render the trial unfair.

[105] In response to the first issue, the timing of the consideration of the admission of the bail record, the SCA held that the fact that this happened prior to the beginning of the trial rather than thereafter could not have had an effect on the outcome of the case.[77] We agree with the SCA in this regard, in particular, because no matter how the judgment was formulated by the High Court, it is clear that a decision to exclude evidence is an interlocutory decision which can be revisited at any stage during the trial. As we find below, it was open to the state to reapply for the admission of the bail record, or parts of it, at relevant times during the trial. In our view, therefore, the timing of the hearing of the application to exclude the bail record is not a matter upon which the state can succeed on appeal. We turn now to consider the second question – the decision by the trial judge to exclude the record of the bail proceedings.

[106] In our preliminary judgment in this matter, we held that in deciding whether to admit a bail record a judge exercises a discretion which must be exercised in the light of what is fair in the circumstances.[78] The first question we must then consider is the proper approach of an appeal court to the exercise of such a discretion by the High Court. Once that question is determined, this Court will have to consider whether on the approach identified the state's appeal on this leg has prospects of success. Before turning to the question of the approach on appeal to the exercise of a discretion by the

[77] *S v Basson* (SCA judgment) above n 9 at para 22.

[78] *S v Basson* (Constitutional Court judgment) above n 1 at para 26.

High Court, it might be helpful to set out briefly the law on the admissibility of bail records as it applied in this case.

(a) The law as to the admissibility of bail records in criminal proceedings

[107] Section 60(11B)(c) of the Criminal Procedure Act provides as follows:

> "The record of the bail proceedings . . . shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings."

This provision was not in force at the time of the bail proceedings against the accused but had come into force at the time of the trial.[79] In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*,[80] this Court held that this provision should not be interpreted to deprive a trial court of its discretion to exclude admissible evidence that would otherwise render the trial unfair. Kriegler J reasoned as follows:

> "Provided trial courts remain alert to their duty to exclude evidence that would impair the fairness of the proceedings before them, there can be no risk that evidence unfairly elicited at bail hearings could be used to undermine accused persons' rights to be tried fairly. It follows that there is no inevitable conflict between s 60(11B)(c) of the CPA and any provision of the Constitution. Subsection (11B)(c) must, of course, be used subject to the accused's right to a fair trial and the corresponding obligation on the judicial officer presiding at the trial to exclude evidence, the admission of which would render the trial unfair."[81]

[79] This provision was inserted into the Criminal Procedure Act by the Criminal Procedure Second Amendment Act, 85 of 1997 which came into force with effect from 1 August 1998.

[80] 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC).

[81] At para 99.

[108] The High Court relied upon this reasoning when it concluded that the admission of the bail record as evidence in the criminal trial would result in an unfair trial. In reaching this conclusion, the judge relied on a range of considerations particularly the fact that the prosecutor had acted unfairly in the bail proceedings by preventing the accused from having access to documents in the state's possession; and the fact that much of the questioning of the accused in the bail hearing was undertaken only for the purpose of laying a foundation for cross-examination in the subsequent trial.[82]

(b) The approach of an appeal court to the exclusion of a bail record

[109] This Court has held that it is the trial court that is best placed to determine what will constitute a fair trial or not.[83] Quite clearly, in this case, the trial judge decided that the admission of the bail record would render the proceedings unfair and accordingly exercised his discretion to exclude the record. The question that arises is what approach an appeal court should take to the exercise of such a discretion.

[110] On ordinary principles, the question of the approach of an appellate court to the exercise of discretion by another court depends upon the nature of the discretion

[82] See *S v Basson*, unreported judgment on the admissibility of the record of the bail proceedings, CC32/99, 15 November 1999.

[83] See *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC) at para 13; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 153.

concerned.[84] Where the discretion is a "strong" discretion or "true" discretion in the sense that there are a range of options available to the court exercising the discretion,[85] an appellate court will only interfere with the exercise of that discretion where it is shown that—

> ". . . the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."[86]

This Court has held that an appellate court would only interfere with the exercise of a discretion by a lower court, with regard to the refusal of a postponement[87] and the refusal of an application for condonation,[88] if such discretion had not been exercised judicially or if it were to have been influenced by wrong principles or a misdirection on the facts.[89]

[111] In addition, however, it should be noted that there are other considerations relevant to determining the approach of an appellate court to the exercise of a

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[84] See *Mabaso v Law Society, Northern Provinces, and Another* 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 20, note 21; *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1045B-D; *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361H-I; *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800C-H.

[85] See the reasoning in *Media Workers Association*, above n 84 at 800D-E.

[86] Ackermann J in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11. See also *Mabaso*, above n 84 at para 20.

[87] Id.

[88] *Mabaso*, above n 84 at para 20.

[89] On the other hand, in *Knox D'Arcy Ltd and Others v Jamieson and Others,* the SCA held that the decision to grant an interim interdict was a decision that an appellate court would interfere with on appeal if it considered the lower court's decision to be wrong (above n 84 at 362D). See also *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) at 401G-402C.

discretion which is not a discretion in the strict sense. In *Media Workers Association*, for example, Grosskopf JA noted that:

> "In passing I should state, lest I be misunderstood, that even where a decision is not discretionary in the narrow sense considered above, there may be features in the nature of the decision or the composition of the tribunal *a quo* which might call for restraint by a Court of appeal in the exercise of its powers. Such restraint would then, however, be exercised for policy reasons, and would not, as with discretionary decisions, flow necessarily from the nature of the decision appealed against."[90]

Even if a discretion is not a discretion in the strict sense, there may be circumstances in which a court will nevertheless adopt an approach on appeal which will overturn the lower court's decision only if it has not been judicially made, or based on incorrect principles of law or a misappreciation of the facts. It is necessary to consider now the nature of the discretion at issue in relation to the exclusion of the bail record by the trial court.

[112] Under our constitutional order, a trial court may exclude otherwise admissible evidence on the basis that it may render the trial unfair in order to protect the right to a fair trial.[91] There can be no doubt that it is the duty of the trial court to ensure that the trial is fair in substance and the trial court is obliged to give content to this notion.[92] In considering the approach to the exercise of discretion to exclude otherwise admissible evidence in order to ensure a fair trial upon appeal, it should be borne in mind that trial judges must be given freedom to exercise this discretion fairly on their

[90] *Media Workers Association* above n 84 at 800G-H.

[91] See authorities cited above at n 83. See also *S v Kidson* 1999 (1) SACR 338 (W) at 349d-e.

[92] *S v Zuma and Others* above n 23 at para 16.

understanding of the case before them. Courts must be slow to adopt rules which would straight-jacket a trial judge in the exercise of that discretion.

[113] When a trial court assesses the question whether the admission of evidence would render the trial unfair, it has to consider a range of factors: the nature of the evidence in question, and how much of it is of advantage to the parties; the need to be fair not only to the accused but also to the prosecution, in the interests of the broader community; the need to ensure that a trial can run efficiently and reasonably quickly; and the reasons underlying the fact that the admission of the evidence may render the trial unfair. These are complex factors which may well pull in different directions. If the evidence is wrongly admitted and the trial is rendered unfair, the accused will clearly have a right to raise that on appeal and the question for an appeal court will be whether the trial was unfair. The more difficult question arises, as in this case, where the evidence is excluded on the basis that its admission may render the trial unfair. An assessment of whether the evidence would have rendered the trial unfair is inevitably hypothetical and difficult to assess in the relatively rarefied atmosphere of an appellate court. It is indeed a matter which the trial court is best placed to judge.

[114] In these circumstances, it seems clear that this is an appropriate case in which an appellate court should be slow to interfere with the decision of the trial court. The trial court identified the following considerations as relevant to the decision of whether to admit the bail record: whether the accused was properly warned in terms of section 60(11B)(c), which the court noted was not applicable in this case as that

provision had not come into force at the time of the bail hearing; whether the prosecutor had acted fairly in cross-examining the accused during the bail hearing;[93] the duty on the prosecutor to ensure that an accused is not unnecessarily deprived of documents in the state's possession where withholding the documents would prejudice the accused unduly; and whether in the extraordinary factual circumstances of the case (in which the accused had previously been examined at length by the OSEO, the length of time since the events had occurred and the failure to permit the accused an opportunity during the bail hearing to consult documents in the prosecution docket) the state's conduct was fair towards the accused.

[115] The court concluded that it was unfair of the prosecutor to withhold documents from the accused during the bail hearing and that it would not have been prejudicial to the state for those documents to have been provided to the accused at the bail hearing. It also concluded that the extensive cross-examination by the prosecutor in circumstances where the accused had conceded that the state had a prima facie case against him was solely for the purposes of creating a platform for cross-examination during the trial and that that was unfair to the accused.

[116] In deciding to exclude the record, the court did take into account that the bail record can be a useful tool for the state and that it should not lightly be deprived of such a tool. The court concluded however that the cumulative effect of the state's conduct during the bail hearing was such that it would be unfair to the accused to

[93] The court relied on this Court's judgment in *S v Dlamini* above n 80 at para 98.

admit the bail record and that it should therefore be excluded. The state also argued in the High Court that those portions of the record which were tainted should be excised and the remainder of the record admitted. In response to this, the trial court held that such an exercise would be time-consuming and impractical.

[117] In this Court, the state argued that the decision of the High Court to exclude the bail record in its entirety was wrong. This Court has held that the test on appeal is not whether the trial court was correct in the exercise of its discretion to exclude evidence on the grounds that it may render the trial unfair. The question is whether, as this Court formulated it in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[94] the lower court has not exercised its discretion judicially, or been influenced by wrong principles of law or a misdirection on the facts, or reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and legal principles.

[118] In considering the reasons given by the High Court for its decision to exclude the bail record, we cannot say that that discretion was not judicially exercised. It may be that another court would have come to a different conclusion, or decided that the issue of the bail record should be decided at a later stage in the trial. However, the state has not pointed to a misdirection on the facts, or the mistaken application of legal principles which would render it appropriate for this Court to interfere with the High Court's decision on the matter.

[94] See above n 86.

[119] The state argued in this Court that the record of the bail proceedings would have been admissible despite the provisions of section 5(8) of the OSEO Act.[95] However, the state had conceded before the trial court that certain of the evidence would not have been admissible. It now seeks to change its stance and argue that all the evidence was admissible. In our view, it cannot be said that the conclusion of the judge to exclude the bail record was based on wrong principles of law sufficient to enable this Court to intervene on appeal. The court reached its decision after a wide-ranging consideration of factors relevant to fairness including its view of the fairness of the bail proceedings. Its decision was based on its assessment of fairness not on the provisions of the OSEO Act. In our view, and for the reasons given in the preceding paragraphs, the state has not made out a case for us to interfere with that decision on appeal.

[120] It should be noted that although the state did argue in this Court that the admission of the bail record may have materially affected the outcome, it did not argue that the exclusion of the bail record resulted in an unfair trial. Although it is clear that the Constitution requires a trial to be fair towards both the accused and the state,[96] an allegation that an interlocutory ruling was wrongly made which may have had a material impact on the outcome of a case is not sufficient to demonstrate that the trial was unfair.

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[95] Cited above n 5.

[96] See *S v Basson* (Constitutional Court judgment) above n 1 at paras 23-24. See also the Canadian Supreme Court decision *R v S (RD)* above n 45 at para 96 per Cory J.

[121] It is clear that the decision by the trial court was an interlocutory one which could have been revisited at any point during the trial. To the extent that counsel for the state argued that it was not possible or practicable for the issue to be revisited during the trial proceedings that argument must be rejected. Indeed, the state did make one such application to revisit the decision. During its closing argument it noted that the defence criticisms of a state witness, General Knobel, had not been put to him during cross-examination and that they were contrary to the evidence of the accused in the bail hearing. It applied for that portion of the bail record to be admitted to refute the criticism but the court refused that application. At any stage, therefore, the state was entitled to approach the court to ask for a reconsideration of the ruling in the light, for example, of a specific statement by the accused which contradicted his evidence-in-chief in the bail hearing. Other than the one instance referred to, no such applications were made during the cross-examination of the accused or any other witness.

[122] If such applications had been made, the trial court would have been obliged to consider them and the question of whether the relevant aspect of the bail record should have been admitted in evidence would have been considered in the light of the circumstances of that application, as they were in the case of the state's application in respect of General Knobel. In the absence of such specific applications by the state, we are not in a position to assess whether there were aspects of the evidence in the bail proceedings which were admissible and material in the trial. Nor was the trial

judge in a position to make such an assessment. His decision cannot therefore be criticised on that ground. Given the interlocutory nature of the ruling on the bail record, and given that it cannot be said to have not been judicially made, or based on wrong principles of law or a mistaken view of the facts, we cannot conclude that the exclusion of the bail record by the trial court rendered the trial unfair.

[123] In all the circumstances, we conclude therefore that the appeal in so far as it relates to the correctness of the High Court's decision to exclude the bail record from the evidence in the trial of the accused must be dismissed.

III THE QUASHING OF THE CHARGES

[124] The state petitioned the SCA for the reservation of further questions of law. These questions included question 11 which sought to appeal against the order of the High Court upholding the exception to the indictment on the basis that it did not disclose an offence. That question reads as follows:

> "Whether the trial court erred in law by finding that on a proper interpretation of s 18(2)(a) of the Riotous Assemblies Act 17 of 1956, the court did not have the power to adjudicate on a conspiracy within South Africa to commit an offence beyond its borders and consequently quashed charges 31, 46, 54, 55, 58 and 61". (applicant's translation)

[125] As the petition had certain defects, the state had to apply for condonation. The SCA refused the petition and the application for condonation. It found that the defects in the petition and the application for condonation were in themselves

sufficient reason to refuse condonation without considering the merits of the petition. However, it did not decide the case on that basis alone but proceeded to consider the merits of the petition.

[126] Relying upon the decision in *R v Adams and Others*,[97] it held that it was not competent for the state to reserve a question of law pursuant to the quashing of the charges, as the order of the High Court did not amount to an acquittal or conviction of the accused.[98] This conclusion meant that the SCA effectively had no jurisdiction to entertain the appeal on this ground. It was accordingly a material conclusion which had a substantial effect on the approach of the SCA to the petition. Having reached this conclusion after full consideration of the rule in *Adams,* it added, somewhat as an afterthought that even if the rule in *Adams* were not a bar, it would, in any event, exercise its discretion against reserving the questions of law sought to be reserved. For this conclusion it cited, as reasons, the fact that: the application for reservation had not been made within a reasonable time after the charges were quashed; that the state indicated after judgment that it was not going to appeal; that the state did not address any argument on the trial court's interpretation of section 18(2)(a); and the fact that the trial court dismissed some of the evidence upon which the state based the quashed charges.

[97] 1959 (3) SA 753 (A).

[98] *S v Basson* (SCA judgment) above n 9 at para 64. The court relied on the dictum in *Adams*, per Steyn CJ, at 764G-H.

[127] This being an application for leave to appeal, it must comply with the standard for determining such applications. In the first place the application must raise a constitutional matter. We have already held that the question whether it was competent for the state to appeal against the order of the High Court upholding an exception to the indictment in terms of section 319(1) of the Criminal Procedure Act, is a constitutional matter.[99] The other requirement is that it must be in the interests of justice to grant such leave. The prospects of success form an important component of this requirement, though not decisive. The consideration of the prospects of success requires us to consider the issues raised by the application in relation to both the refusal of the application for condonation and the petition for leave to appeal.

(a) Preliminary legal questions

[128] As a result of the approach of the SCA, it becomes necessary for this Court to consider five different preliminary legal questions connected with the quashing of the charges. The following issues thus need consideration:

(i) whether the appeal lies against the decision of the SCA or of the High Court;

(ii) the validity of the *Adams* rule;

(iii) the proper approach to appeals against a decision by the SCA refusing condonation;

(iv) whether the SCA's refusal to reserve question 11 should be overturned; and

[99] *S v Basson* (Constitutional Court judgment) above n 1 at para 34.

(v) the nature of the charges and South Africa's international law obligations.

We shall deal with each of these in turn. The first four raise a series of complex procedural and jurisdictional questions. The fifth concerns the relevance, if any, of the fact that the quashed charges related to what in argument were referred to as war crimes.

(i) Does an appeal lie against the decision of the SCA or the High Court?

[129] As pointed out earlier, the SCA refused the application for condonation for three inter-related reasons: firstly, because of non-compliance with its rules; secondly, because it held that in the light of the *Adams* rule it lacked jurisdiction to consider the quashing of the charges by the High Court; and thirdly, in the exercise of its discretion whether to reserve a question of law. The prospects of success required the court to consider whether it had jurisdiction to entertain an appeal against the decision of the High Court upholding an exception to an indictment. This question turned upon the proper interpretation of section 319 of the Criminal Procedure Act. We have already held that the proper interpretation of section 319 of the Criminal Procedure Act raises a constitutional matter.[100] In refusing condonation, therefore, the SCA also decided the underlying constitutional issue relating to its jurisdiction. And it is this constitutional issue that we are required to consider in this application. This fact immediately distinguishes this case from *Mabaso v Law Society, Northern Provinces,*

[100] Id at para 38.

and Another[101] in which the SCA did not consider or decide the underlying constitutional question.

[130] In *Mabaso*'s case, this Court was concerned with a decision of the SCA refusing condonation because of non-compliance with its rules and lack of prospects of success on the merits. However, in deciding whether there were prospects of success, the SCA did not decide the underlying constitutional issue, namely, the constitutional validity of section 20 of the Attorneys Act, 53 of 1979. And it was that issue which the applicant in *Mabaso*'s case sought to have considered by this Court. It was against this background that this Court held that in such a case the appeal ought properly to lie against the decision of the High Court which had decided the underlying constitutional issue. In this regard the Court held:

> "Where an appeal to the SCA has failed because the SCA has refused condonation for a failure to comply with its Rules, without a consideration of the constitutional matter, it is our view that whatever the position may have been under the old Rules, something which the Court has not yet determined, the new procedure under Rule 19 should be construed to require an applicant to apply for leave to appeal to this Court against the decision of the High Court, rather than the decision of the SCA refusing condonation. This approach would protect the inherent power of the SCA, as confirmed by the Constitution, 'to protect and regulate [its] own process'. It would avoid this Court having regularly to second-guess the SCA when it refuses condonation which might undermine the SCA's autonomous regulation of its own process."[102] (footnotes omitted)

[101] Above n 84.

[102] Above n 84 at para 23.

[131] *Swartbooi and Others v Brink and Another (1)*[103] is also distinguishable. In that case this Court was concerned with a refusal of a petition for leave to appeal by the SCA where the SCA gave no reasons for its decision. In such a case, this Court held that the appeal lies not against the decision of the SCA, but against the decision of the High Court. It held that sub-rule 18(1) of the old rules of this Court which expressly provided that it applies to appeals against decisions of courts other than the SCA "irrespective of whether . . . the SCA has refused leave . . . to appeal", was applicable.[104] It further held that sub-rule 18(1) was designed to allow parties to come to this Court where the SCA had refused the petition for leave to appeal without giving reasons. Both *Mabaso* and *Swartbooi* therefore stand for the proposition that where the SCA refuses leave to appeal without considering the underlying constitutional issue, the appeal in relation to that constitutional issue lies against the decision of the High Court which decided that issue.

[132] The respondent also sought to rely on the decision of this Court in *Mphahlele v First National Bank of SA Ltd*,[105] in which, it was argued, this Court held that the refusal of a petition for leave to appeal to the SCA is not appealable.[106] Section 21(3)(d) of the Supreme Court Act, 59 of 1959 provides that the decision of the SCA to grant or refuse an application for leave to appeal is final.[107] Clearly this subsection

[103] 2003 (5) BCLR 497 (CC).

[104] Id at para 4.

[105] 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC).

[106] Id at para 14.

[107] Section 21(3)(d) provides:

> "The decision of the majority of the judges considering the application, or the decision of the appellate division, as the case may be, to grant or refuse the application shall be final."

must now be construed consistently with the Constitution. It means that in non-constitutional matters, the decision of the SCA is final. It cannot mean that in constitutional matters, a decision of the SCA refusing a petition for leave to appeal is final.

[133] In *Swartbooi*, the Court stated, with reference to *Mphahlele's* case—

> "that the refusal of a petition for leave to appeal to the SCA is not appealable. When the SCA refuses to grant leave to appeal in a case, the appeal to this Court is not an appeal against the SCA's refusal of leave to appeal to it but an appeal against the High Court decision itself."[108]

But the respondent has taken this sentence out of context. Construed in the context of the reasoning in the rest of *Swartbooi* and *Mphahlele*, this statement should not be construed to mean that the decision of the SCA is final and not appealable even where the SCA has dealt with a constitutional matter in the course of its judgment refusing leave. Such an interpretation would frustrate the constitutional purpose of ensuring that this Court is the final court of appeal in constitutional matters. The respondent's submission on this basis therefore must be rejected.

[134] It follows therefore that in the present case the appeal lies against the decision of the SCA because it refused condonation after deciding, among other issues, the underlying constitutional issue, namely, whether it had jurisdiction to entertain an

[108] Above n 103 at para 4.

appeal under section 319 of the Criminal Procedure Act against the decision of the High Court upholding an exception. We proceed now to consider the rule in *Adams*.

(ii) The Adams rule

(aa) Origin and application of the rule

[135] The *Adams* case involved questions of law that were reserved for consideration by the Appellate Division at the instance of the accused.[109] The questions related to an exception taken against an indictment and an application to quash the indictment. The court below had declined to allow the exception but reserved questions of law and postponed the trial. In the Appellate Division, one of the points taken by the state was that the Appellate Division had no jurisdiction at that stage of the proceedings to decide questions of law reserved. The question that the Appellate Division had to consider was the time at which the request for the reservation of the question of law may be made under section 366 of the Criminal Procedure Act, 66 of 1955, the predecessor of section 319 of the Criminal Procedure Act.

[136] The court accepted that the relevant subsection was silent on the matter. Relying upon other provisions of section 366 and, in particular, the long-established legislative and judicial policy of not allowing midstream appeals, the Appellate Division held that a question of law may only be reserved at the conclusion of a trial after the conviction or acquittal of the accused. And in response to the suggestion by

[109] *R v Adams*, above n 97.

the court below that the state has a right to seek the reservation of a question of law on a successful exception or objection to an indictment, the court held:

> "In my view the only right conferred upon the prosecutor is to apply for a reservation in his own favour in the case of an acquittal or in favour of an accused in the case of a conviction. If an exception or objection to his indictment is upheld, he can amend it or present a new indictment, and in a suitable case resort may be had to the procedure under sec. 385 of the Act. Because of these remedies available to the prosecutor it is even more unlikely than in the case of an accused that the Legislature could have intended to vest him with a right, not possessed by him before, and unrestricted by the fact that the trial has not been concluded."[110]

[137] The *Adams* rule therefore holds that a question of law can only be reserved following the acquittal or conviction of the accused. The effect of the rule is that a question of law cannot be reserved following an order upholding an exception to an indictment because such an order is neither an acquittal nor a conviction of an accused.

[138] This rule has been followed in a number of subsequent decisions of the Appellate Division;[111] significantly though, not without reservations. In *S v Mene*, it was accepted that section 319 is capable of another construction and that the one given in the *Adams* case has resulted in a lacuna.[112] The Appellate Division however held that this is a matter for the legislature to rectify.[113] A similar observation was made by

[110] Above n 97 at 764G-H.

[111] *S v Khoza en Andere* 1991 (1) SA 793 (A) at 796A-D; *S v Seekoei* 1982 (3) SA 97 (A) at 101D-E; and *S v Mene* 1978 (1) SA 832 (A) at 838B-C.

[112] Id.

[113] Id.

the SCA in the present case but the court declined to find that the *Adams* case was wrongly decided in view of the other decisions that had followed it.[114]

[139] Applying the *Adams* rule, the SCA held that it was not competent for the state to reserve a question of law concerning the upholding of the exception to the charges under section 18(2) of the Riotous Assemblies Act under section 319 of the Criminal Procedure Act. This is so, it reasoned, because a question of law could only be reserved at the request of the state upon conviction or acquittal of the accused, and an order upholding an exception to a charge was neither a conviction nor an acquittal. This is the essence of the *Adams* rule. It is this rule that presented the state with an insurmountable hurdle. And it is this hurdle that we are now invited to remove.

(bb) The proper construction of section 319

[140] Section 319 of the Criminal Procedure Act provides:

> "(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 sections 317(2), (4) and (5) and 318(2) shall apply mutatis mutandis with reference to all proceedings under this section."

[114] *S v Basson* (SCA judgment) above n 9 at para 68.

[141] One of the consequences of the advent of our constitutional democracy is the requirement that all laws must be construed in the light of the Constitution. This requirement flows from the supremacy of the Constitution.[115] It is thus axiomatic that, where possible, legislation must be construed in a manner that will bring it within constitutional bounds.[116] Thus, when legislation is capable of more than one possible construction, the one that brings the legislation within the Constitution ought to be preferred.[117] And, as this Court observed in *Daniels*—

> ". . . when dealing with old order legislation, this interpretive injunction may require courts to depart from a construction previously placed on the legislation."[118]

[142] It follows therefore that section 319(1) must be construed in the light of the Constitution, in particular, the constitutional duty of the state to initiate criminal proceedings. Section 179(2) of the Constitution confers on the state the authority to institute criminal proceedings and provides:

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[115] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[116] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 102; *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 35; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-26; *S v Dzukuda and Others; S v Tshilo* above n 23 at para 37(a); *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85; and *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 59. See also *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA); 2001 (8) BCLR 779 (SCA) at para 20.

[117] *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at para 43; *Hyundai* above n 116 at para 26.

[118] Id at para 47.

> "The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

[143] And section 179(4) provides that:

> "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

[144] It flows from section 179(2), the state's power to institute criminal proceedings, that the prosecution of crime is a matter of importance to the state.[119] It enables the state to fulfil its constitutional obligations to prosecute those offences that threaten or infringe the rights of citizens. And by providing for an independent prosecuting authority with power to institute criminal proceedings on behalf of the state, the Constitution makes it plain that effective prosecution of crime is an important constitutional objective.

[145] It is plain from the legislative history of section 319 that its purpose was, amongst others, to allow the state to appeal on a point of law by requesting the reservation of a question of law. The original section 372 of the Criminal Procedure and Evidence Act, 31 of 1917 made it clear that a question of law could be reserved and stated only in the case of a conviction. In *R v Herbst* the Appellate Division held that a question of law could only be reserved under section 372 if the accused had

[119] See this Court's preliminary judgment in this matter, above n 1 at paras 32-33.

been convicted.[120] The practical effect of this decision was that the prosecutor could not request the reservation of any question of law at all on behalf of the state.[121]

[146] In 1948 the legislature intervened by enacting the Criminal Procedure Amendment Act, 37 of 1948. This statute substituted a new section for section 372. The substituted section omitted the reference to the conviction of the accused which was to be found in subsection 2 of the original section 372. The effect of this was that the statement of a question of law reserved was no longer conditional only upon the conviction of the accused. In addition, the substituted section 372 made the provisions of subsections 2 to 6 of section 370 and section 371(2) applicable to the reservation of questions of law. The Criminal Procedure Amendment Act also substituted a new section for section 374. It was plain from the new section 374 that the state could also reserve a question of law. Subsection 3 of the new section 374 dealt with the powers of courts in the case where "a question of law has been reserved on the application of a prosecutor in the case of an acquittal" and a decision was given in favour of the state.[122]

[147] The amendments introduced by the 1948 Criminal Procedure Amendment Act were no doubt intended to address the legal position that prevailed prior to the amendment. That position was that the prosecutor could at no stage request the

[120] 1942 AD 434 at 436.

[121] See also *Adams* above n 97 at 759B-C.

[122] Sections 370, 371, 372 and 374 of the Criminal Procedure Amendment Act of 1948 were retained in the Criminal Procedure Act, 56 of 1955 as sections 364, 365, 366 and 369 respectively. In the Criminal Procedure Act, 51 of 1977 they appear as sections 317, 318, 319 and 322 respectively.

reservation of any question of law at all on behalf of the state. The amendment altered this position by allowing the prosecutor to request the reservation of a question of law on behalf of the state. This legislative history of section 319 makes it clear that it was intended to afford the state the right to appeal a question of law to the SCA. This right is incidental to the right of the state to institute criminal proceedings provided for in section 179(2) of the Constitution. But was it intended that this right is available only in limited circumstances?

[148] There are indications both in the language of section 319(1) and in the context in which the section occurs, that this was not the case. Section 319(1) provides that if "any question of law arises on the trial in a superior court", the court may of its own motion or at the request of the prosecutor or accused reserve that question for consideration by the SCA. There is nothing in this language to suggest that the state may only request the reservation of questions directed at the conviction or acquittal of the accused. Section 319(2) indeed strongly suggests that the legislature intended to permit an appeal against any order upholding or dismissing an objection by way of a reservation of a question of law. The subsection provides that "[t]he grounds upon which any objection to an indictment is taken shall, for the purposes of [section 319] be deemed to be questions of law."

[149] In holding that a question of law can only be reserved at the conclusion of a trial, the court in *Adams* relied, among other factors, upon the long-established legislative and judicial policy which precluded piecemeal appeals to the Appellate

Division.[123] The problem of midstream appeals does not arise where the only charge against an accused is quashed by the High Court. The quashing of such a charge brings the proceedings to an end. Yet the *Adams* rule maintains that there is no right of appeal in such situations because an order upholding an exception is neither an acquittal nor a conviction. Even in those cases where there are multiple charges, the quashed charge or charges may have no relation to the remaining charges. In such a case, there is no reason why the trial should not proceed in relation to the remaining charges while the question of law arising from the quashing of the charges is taken on appeal. Where the exception is dismissed, fairness may require that the accused not be subjected to a full-blown trial where in fact the exception is well founded.

[150] The effect of the *Adams* rule is to take away the right of the state to appeal against an order of the High Court upholding an objection that a charge does not disclose an offence in law. The court suggested that if an objection to an indictment is upheld, the state can amend the indictment or present a new one. But this does not overcome the situation where, as here, the order upholding the objection has the effect of barring the state from prosecuting the accused on the charges which were quashed.[124]

[151] The effect of the *Adams* rule is not only to prevent the state from instituting criminal proceedings where a court quashes an indictment on the ground that it does not disclose an offence, but it also takes away the right of the state to appeal against a

[123] Above n 97 at 762H-763H.

[124] See *S v Basson* (Constitutional Court judgment) above n 1 at para 32.

decision upholding an exception to its indictment for another reason.[125] Such an interpretation of section 319 is inconsistent with the right of the state to institute criminal proceedings and thus with the Constitution. In addition, such an interpretation is inconsistent with both the purpose and language of section 319, namely, to allow the state to appeal a question of law arising from an order upholding an exception to an indictment. We agree with the observations made by the court in *Mene* and in the court below that section 319 is capable of another construction.

[152] In our view section 319 should not be construed so as to prevent an appeal against an order dismissing or upholding an exception. The section should be construed so as to allow the state or the accused to appeal against an order upholding or dismissing an exception. Such a construction of section 319 brings it within constitutional bounds by recognising the right of the state to institute criminal proceedings and, if need be, to appeal an adverse finding on a question of law. It is this construction of section 319 which must be adopted. It follows therefore that section 319 did not prevent the SCA from considering an appeal against the order of the High Court quashing the charges relating to the conspiracy. The SCA therefore erred in concluding that the *Adams* rule constituted a bar to the reservation of the question of law relating to the quashing of the charges.

[125] Id.

[153] Before going further, it is important now to consider the proper approach of an appellate court to an application for leave to appeal in respect of a refusal of condonation by another court. It is to that question that we now turn.

(iii) The proper approach to appeals against the decision of the SCA refusing condonation

(aa) An appellate court's review of discretion

[154] The question whether condonation should be granted or refused involves the exercise of discretion.[126] When an appellate court is called upon to review the exercise of discretion, the scope of review is determined by the nature of the discretion involved. A distinction is generally drawn between a discretion in the true or strict sense of the word and a discretion in the sense that the court must have regard to a number of factors before coming to a decision.[127] In *Shepstone & Wylie and Others v Geyser NO*[128] the SCA explained this distinction and said:

> "To say, for example, that the Court has a discretion to grant or refuse an interim interdict means no more than that 'the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a conclusion'. . . . In such cases the Court of appeal is at liberty to decide the matter according to its own views of the merits. . . . Accordingly, whenever such a Court is asked to interfere, the nature of the discretion must first be ascertained. This will not be a simple exercise where a discretion is conferred in a statute by the use of the word 'may' which, standing on its own, is not particularly informative."[129]

[126] See the discussion above at para 110.

[127] See *Knox D'Arcy Ltd and Others v Jamieson and Others* above n 84 at 361H-I, and other cases cited in that note.

[128] Above n 84.

[129] Above n 84 at 1045B-D. See also *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 21; *Hix Networking Technologies v Systems Publishers* above n 89 at 401G-402C.

[155] In *Mabaso*,[130] this Court held that the exercise of a discretion to grant or refuse condonation is a discretion in this strict sense – a court has to weigh a number of factors relevant to the applications. Factors that are relevant in considering applications for condonation have been set out in a number of decisions of the SCA. One that comes to mind is *Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie*,[131] where the court said:

> "In considering petitions for condonation under Rule 13, the factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice . . . . The cogency of any such factor will vary according to the circumstances, including the particular Rule infringed. Thus, a badly prepared record — Rule 5(7) to (10) — involves both the convenience of the Court and the standard of its proceedings in the administration of justice. A belated appeal against a criminal conviction — Rule 5(5) — may keenly affect the public interest in the matter of the law's delays. On the other hand the late filing of the record in a civil case more closely concerns the respondent, who is allowed to extend the time under Rule 5(4)(c). The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment — the time for noting an appeal having elapsed, he is *prima facie* entitled to adjust his affairs on the footing that his judgment is safe".[132]

[156] The crucial factors that have to be considered include the degree of non-compliance and the explanation therefor, the importance of the case and the prospects of success. A court considering an appeal against the exercise of such a discretion,

[130] Above n 84 at para 20.

[131] 1969 (3) SA 360 (A).

[132] Id at 362F-363A.

therefore, must consider whether the discretion was judicially exercised, and consider whether it was based on wrong principles of law, or a mistaken view of the facts and not consider how it would have exercised the discretion were it to be considering the matter anew.[133]

(bb) The degree of non-compliance and explanation therefor

[157] The SCA found that the petition for leave to appeal that was filed did not comply with rule 6[134] of its rules in that it did not have a notice of motion and a

[133] See discussion above at paras [111]-[112] and [118], and footnotes attached.

[134] Rule 6 of the SCA rules reads:

> "Application for leave to appeal
> (1) In every matter where leave to appeal is by law required of the Court, an application therefor shall be lodged in duplicate with the registrar within the time limits prescribed by that law.
> (2) Every such application shall be accompanied by—
> (a) a copy of the order of the court a quo appealed against;
> (b) where leave to appeal has been refused by that court, a copy of that order;
> (c) a copy of the judgment delivered by the court a quo; and
> (d) where leave to appeal has been refused by that court, a copy of the judgment refusing such leave:
> Provided that the registrar may, on written request, extend the period for the filing of a copy of the judgment or judgments.
> (3) Every affidavit in answer to an application for leave to appeal shall be lodged in duplicate within one month after service of the application on the respondent.
> (4) An applicant who applied for leave to appeal shall, within 10 days after an affidavit referred to in subrule (3) has been received, be entitled to lodge an affidavit in reply dealing strictly only with new matters raised in the answer.
> (5) Every application, answer and reply—
> (a) shall—
> (i) be clear and succinct and to the point;
> (ii) furnish fairly all such information as may be necessary to enable the Court to decide the application;
> (iii) deal with the merits of the case only in so far as is necessary for the purpose of explaining and supporting the particular grounds upon which leave to appeal is sought or opposed;
> (iv) be properly and separately paginated; and
> (b) shall not—
> (i) be accompanied by the record, or
> (ii) traverse extraneous matters.
> (6) The judges considering the application may call for—
> (a) submissions or further affidavits;
> (b) the record or portions of it; and
> (c) additional copies of the application.
> (7) The party concerned shall lodge the required documents within the period prescribed by the registrar.

founding affidavit. In addition, it did not succinctly and fairly set out the state's case. A further application that was lodged to rectify these defects was also defective in that it had no prayer for substitution, it failed to call upon the respondent to file an answer and it incorporated in large part the original application. In addition, there was no separate application for condonation as required by rule 12; instead the request for condonation was addressed in the course of the substitute application. And finally there were missing pages. The SCA found that these defects were so serious that they would have justified the refusal of the application for condonation.

[158] In the SCA it was common cause that the defects in the application for leave to appeal were so serious that they would have justified the refusal of condonation. In this Court, however, the state sought to minimise the seriousness of the defects, describing them only as formal defects. These defects must be viewed against the fact that the very first document that was lodged as a petition for leave to appeal was defective. The second document lodged to remove the defects was also defective. The state failed to succinctly and fairly state its case. Instead, it filed volumes of documents which the court was required to go through in order to establish the case that was sought to be made. In these circumstances the finding by the SCA that the defects were serious cannot be gainsaid.

[159] The explanation for the defects was two-fold. First, it was said that it was not clear to the state whether a petition or an application was required. Second, it was

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(8) If the party concerned fails to comply with a direction by the registrar or fails to cure the defects in the application within the period directed, the registrar shall refer the matter to the judges assigned to the application who may dispose of it in its incomplete form."

said that the legal representatives of the state who handled the matter did not have experience in the practice of the SCA. Both these explanations must be rejected. The rules of the SCA set out what is required of the petition for leave to appeal, which in effect is an application for leave to appeal. It is apparent from the decisions of the SCA that litigants have not been complying with the rules of the SCA governing petitions for leave to appeal. This prompted the SCA to issue "general direction[s] as to the proper drafting of a petition for leave to appeal."[135] This was prompted by what the SCA described as "a current tendency for petitions to be prepared in this 'lazy' way".[136] Practitioners who litigate in the SCA are required to acquaint themselves with the rules of that court as well as its practice.

[160] Although it may be that at times a defective petition is of itself sufficient to warrant the refusal of condonation,[137] condonation was not refused in this case on this basis alone. Perhaps the most important factor upon which the SCA based its decision was the rule in *Adams,*[138] discussed above. To the extent that its understanding of the *Adams* rule was a material factor in reaching the decision to refuse condonation, it is our view that the decision was based on a wrong principle of law of sufficient significance to render the decision appealable. However, the SCA also based its decision on other factors which we turn to consider briefly now.

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[135] *National Union of Metalworkers of South Africa v Jumbo Products CC* 1996 (4) SA 735 (A) at 739H.

[136] Id.

[137] See, for example, *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 687A-B; *Darries v Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA) at 41C-D.

[138] *S v Basson* (SCA judgment) above n 9 at paras 64-69.

(iv) Should the refusal by the SCA to reserve question 11 in the exercise of its discretion be overturned?

[161] Having concluded that the *Adams* rule did constitute a bar to the reservation of the question of law relating to the quashing, the SCA went on to reason that even if the rule in *Adams* did not, it would nevertheless exercise its discretion against the reservation of the question. In reaching this conclusion, the SCA was influenced by four factors, namely, that there was an unreasonable delay in making the application for the reservation of the question of law, the state had indicated after judgment that it would not appeal, the state did not address any argument on the High Court's interpretation of section 18(2)(a), and the trial court dismissed some of the evidence upon which the state based the quashed charges.

[162] In terms of section 319(1) a trial court has a discretion whether to reserve a question of law or not. A refusal to reserve a question of law may be taken on appeal to the SCA. This may be done in terms of section 319(3)[139] read with section 317(5)[140] and read further with section 316(11)-(15).[141] On appeal, the SCA has to

[139] Cited above n 15.

[140] Id.

[141] Section 316(11)-(15) of the Criminal Procedure Act provides:

> "(11)(a) A petition referred to in subsection (8), including an application referred to in subsection (8)(b)(ii), must be considered in chambers by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal.
>
> (b) If the judges differ in opinion, the petition shall also be considered in chambers by the President of the Supreme Court of Appeal or by any other judge of the Supreme Court of Appeal to whom it has been referred by the President.
>
> (c) For the purposes of paragraph (b) any decision of the majority of the judges considering the petition, shall be deemed to be the decision of all three judges.
>
> (12) The judges considering a petition may—
>
> (a) call for any further information, including a copy of the record of the proceedings that was not submitted in terms of the proviso to subsection (10) (c), from the judge who refused the application in question, or from the judge who presided at the trial to which any such application relates, as the case may be; or

determine whether the trial court erred in the exercise of its discretion under section 319(1). If the SCA finds that the trial court erred in the exercise of its discretion, it must itself exercise the discretion that the trial court should have exercised.

[163] On behalf of the state it was contended that the discretion involved in considering an application for reservation of a question of law under section 319(1) is not a discretion in the true or strict sense of the word. This is not a matter we need to decide in this case. Even if it is a discretion in the strict sense, that discretion must be exercised judicially and on the basis of correct principles of law and on a proper consideration of all the relevant facts.

(b) in exceptional circumstances, order that the application or applications in question or any of them be argued before them at a time and place determined by them.
(13) The judges considering a petition may, whether they have acted under subsection (12) (a) or (b) or not—
(a) in the case of an application referred to in subsection (8) (b) (ii), grant or refuse the application; and
(b) in the case of an application for condonation grant or refuse the application, and if the application is granted—
(i) direct that an application for leave to appeal must be made, within the period fixed by them, to the High Court referred to in subsection (8) (a); or
(ii) if they deem it expedient, direct that an application for leave to appeal must be submitted under subsection (8) within the period fixed by them as if it had been refused by the High Court referred to in subsection (8) (a); and
(c) in the case of an application for leave to appeal, subject to paragraph (d), grant or refuse the application; and
(d) in the case of an application for further evidence, grant or refuse the application, and, if the application is granted the judges may, before deciding the application for leave to appeal, remit the matter to the High Court concerned in order that further evidence may be received in accordance with subsection (5) (c); or
(e) in exceptional circumstances refer the petition to the Supreme Court of Appeal for consideration, whether upon argument or otherwise, and the Supreme Court of Appeal may thereupon deal with the petition in any manner referred to in this subsection.
(14) All applications contained in a petition must be disposed of—
(a) as far as is possible, simultaneously; and
(b) as a matter of urgency, where the accused was sentenced to any form of imprisonment that was not wholly suspended.
(15) Notice of the date fixed for the hearing of any application under this section, and of any time and place determined under subsection (12) for any hearing, must be given to the Director of Public Prosecutions concerned and the accused."

[164] The first factor upon which the SCA based its conclusion that it would not exercise its discretion in favour of the reservation of the question of law, related to the delay by the state in pursuing the reservation of the question. In our view, however, the SCA overlooked the fact that had the state attempted to appeal through the reservation of a question of law the quashing of the charges immediately, the *Adams* rule might well have prevented an appeal midstream. The state would have had to wait until the proceedings had been concluded. Once it is accepted, as it must be, that the *Adams* rule might well have prevented the state from appealing the decision of the High Court or appealing midstream, the state's delay in prosecuting the appeal cannot be the subject of sharp criticism.

[165] The second reason given for the decision of the SCA, the fact that the state indicated at the time the charges were quashed that it would not appeal, is apparently based upon the statement by the prosecution made after the trial court's order quashing charges 31, 46, 54, 55, 58 and 61. Counsel for the prosecution apparently stated that the state "does not intend to appeal at this stage against your judgment."[142] This statement was made when the trial resumed after the state had been given time to consider whether to appeal or not. All that this statement seems to convey is that the state did not intend to appeal at that stage. There is nothing to suggest that this statement was intended to convey that the state would not appeal in the future. At best, the statement is ambiguous. It cannot be said that the statement was intended to convey that the state would not appeal at a later stage.

[142] Our translation. The original statement was that the state "is nie voornemens om op hierdie stadium te appelleer teen u uitspraak nie."

[166] The respondent argued that during the SCA hearing the state abandoned the petition for leave to appeal. It is clear from the judgment of the SCA that the petition for leave to reserve further questions of law was never abandoned. These questions were raised as self-standing questions of law which should be reserved. That is how the SCA construed them. It noted that the state did not expressly withdraw them and proceeded to address them. In addition, the statement by counsel for the state that their main concern was bias could not be construed as an indication of an abandonment of an application for leave to appeal. Indeed the SCA did not construe it as such. In all the circumstances it cannot be said that the state abandoned the petition for leave to appeal.

[167] The third reason underlying the attitude of the SCA to the exercise of its discretion related to the failure of the state to place argument before the SCA on the proper interpretation of section 18(2)(a) of the Riotous Assemblies Act. This consideration seems to us to hold most merit in support of the SCA's decision to refuse condonation. However, even though the state's prospects of success on its legal argument would have been a relevant consideration in the SCA, it should be borne in mind that the sharp issue between the parties appears to have been whether the questions of law sought to be reserved could be reserved in the light of the *Adams* rule.

[168] The last consideration upon which the SCA based its decision not to reserve the question of law related to the respondent's assertion that although the trial court quashed counts 31, 46, 54, 55, 58 and 61 as disclosing no offence, it nonetheless heard evidence on each of the quashed charges, for purposes of an umbrella conspiracy charge under count 63, dealt with them and made findings on their merits favourable to the accused. The argument goes that these findings of the trial court in effect render the quashed charges susceptible to a plea by the respondent of res judicata.

[169] In our view, as is set out more fully below,[143] the question of potential double jeopardy cannot satisfactorily be determined in these proceedings and cannot therefore be weighed in the decision as to whether it is in the interests of justice to grant the appeal. Were the accused to be re-charged, the question of double jeopardy would have to be determined by the trial court at that time in the light of the new charges and the record of the criminal proceedings. We accordingly refrain from deciding the merits of this argument as it is patently premature. Similarly, it was premature for the SCA to reach this conclusion. It did not have the full record before it, nor did it have any outline of the evidence that the state would wish to lead on the quashed charges. Accordingly, in our view it should not have informed the SCA's decision on the exercise of its discretion.

(v) Nature of the charges and South Africa's international law obligations

[143] See paras [248]-[259].

[170] The final and crucial factor in our view which renders the decision of the SCA to refuse condonation susceptible to being overturned on appeal relates to an important factor which was not considered by the SCA. Nor was it sharply drawn to the attention of that court. The petition for leave to appeal raised an important question, namely, whether an accused can be charged with conspiracy where the offence forming the subject matter of the conspiracy is to be committed beyond our borders. This raised an important question of law which deserved the attention of the SCA. The answer to this question has important implications for our country as part of the community of nations which must unite in their fight against crime. No country ought to allow its soil to be used as a basis for planning cross-border criminal activities. Equally important, is the nature of the allegations that were made which, as we shall now indicate, were very serious indeed.

[171] In deciding whether or not to grant condonation the SCA failed to put into the scales the extreme gravity of the charges, or to give consideration to the need to take account of South Africa's international obligations in respect of upholding principles of international humanitarian law.

[172] War by its very nature is brutal. It involves the intentional and frequently cruel killing of human beings, using all the force that a state can muster. Yet the law declares firmly that all is not fair in love and war. Since ancient times throughout the globe humanity has imposed limits on what can be done in the course of armed conflict. Legal constraints on the manner in which war could be conducted were

found in a diverse range of cultural traditions from antiquity onwards and established the basis for the adoption of universally accepted norms of conduct in times of war.[144] Thus, recognition of the principle of individual responsibility for atrocities in war as violations of the law of nations occurred during an early and relatively immature stage of the development of international law generally.[145] Prior to the establishment of the Nuremburg and Tokyo Tribunals after World War 2, the focus for trying such anciently condemned atrocities lay with national courts.[146] The recent establishment of the International Criminal Court represents the culmination of a centuries-old process of developing international humanitarian law. It in no way deprives national courts of responsibility for trying cases involving breaches of such law which are properly brought before them in terms of national law.[147]

[173] As Cassese points out, legal rules, however weak and defective, introduce a modicum of humanity into utterly inhuman conduct.[148] The absence of normative standards would be especially regrettable, leaving states free of any restraint.

> "[H]ere, more than in any other area, legal standards possess a significant metajuridical value: they serve as a moral and political yardstick by which public

[144] McCormack "From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime" in McCormack and Simpson (eds) *The Law of War Crimes: National and International Approaches* (Kluwer Law International, The Hague 1997) at 62.

[145] Id.

[146] Id.

[147] For the purposes of this case it is not necessary to enter into controversies surrounding the existence of universal jurisdiction for crimes against humanity and war crimes, and a concomitant duty to prosecute. We have not found it necessary to consider whether customary international law could be used either as the basis in itself for a prosecution under the common law, or, alternatively, as an aid to the interpretation of section 18(2)(a) of the Riotous Assemblies Act.

[148] Cassese *International Law* (Oxford University Press, Oxford 2001) at 348.

> opinion and non-governmental groups and associations can appraise if, and to what extent, States misbehave."[149]

[174] In the *Legality of the Threat or Use of Nuclear Weapons*,[150] the International Court of Justice (ICJ) highlighted the significance of humanitarian law for all countries in the world:

> "It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . . that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[151]

[175] The broadness of the sweep of international humanitarian law over past decades was further highlighted by the international criminal tribunal that heard the *Tadić*[152] case. It pointed out that since the 1930s the distinction between international and internal conflict has become more and more blurred and international legal rules had increasingly emerged to regulate internal armed conflict. Civil wars had become more frequent, more cruel and protracted and "the impetuous development and propagation in the international community of human rights doctrines" had resulted in

[149] Id.

[150] 1996 *ICJ Reports* 226.

[151] Id at para 79.

[152] *Prosecutor v Duško Tadić* Appeals Chambers, International Criminal Tribunal for the former Yugoslavia 1995 case no IT-94-1-AR72, 2 October 1995. Interlocutory appeal on jurisdiction. Reported in (1996) 35 *International Legal Materials* 32.

a state-sovereignty-oriented approach being gradually supplanted by a human-being-oriented approach.[153]

> "Principles and rules of humanitarian law reflect 'elementary considerations of humanity' widely recognised as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition."[154]

[176] One of the enduring themes of evolving international humanitarian law has been the need to make a distinction between combatants and persons who do not take part (or no longer take part) in hostilities.[155]

[177] South Africa was a party to the Geneva Conventions.[156] Yet as the ICJ pointed out in *Nicaragua v United States of America*,[157] even if South Africa had not been a party, it would have been obliged in the 1980s to respect the Conventions in all circumstances "since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression."[158] The ICJ also observed that:

> "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules

[153] Id at para 97.

[154] Id at para 129.

[155] Cassese, above n 148 at 330.

[156] South Africa ratified the Geneva Conventions in 1952.

[157] 1986 *ICJ Reports* 14.

[158] Id at para 220.

> which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (*Corfu Channel, Merits, ICJ Reports 1949*, p 22; paragraph 215 above)".[159]

[178] The Court observed further that because the minimum rules applicable to international and to non-international conflicts are identical, there was no need to address the question whether those actions had to be looked at in the context of any specific rules which might operate in respect of the one or the other category of conflict. The relevant principles were to be looked for in the identical provisions of Article 3 of each of the four Conventions of 1949,[160] the text of which will be dealt with later.

[179] In our view these considerations establish the setting in which the present matter must be viewed. The growing overlap between international humanitarian law and international human rights law[161] makes it unnecessary for the purposes of this case to investigate the precise characterisation of the armed conflict in Namibia or the legal status of the area in which the combat took place. What matters is that regard had to be had by all those involved in the conflict to intransgressible principles based on elementary considerations of humanity. There can be no doubt that the use of instruments of state to murder captives long after resistance had ceased would in the 1980s, as before and after, have grossly transgressed even the most minimal standards of international humanitarian law.

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[159] Id at para 218.

[160] Id at para 219.

[161] Cassese, above n 148 at 330.

[180] The same has to be said of the use of poison to bring about the death of opponents and the provision of cholera bacteria for placement in water supplies. Such means of warfare are abhorrent to humanity and forbidden by international law. The use of poison to eliminate opponents in armed conflict has long been prohibited.[162] In 1925 the Geneva Protocol prohibited the use of chemical and bacteriological weapons. In 1972 the ban on bacteriological means of warfare was restated and strengthened by a specific convention designed to prohibit the manufacture and stockpiling of these agents of destruction.[163]

[181] As has been pointed out above, Article 3, which is common to the four 1949 Geneva Conventions, is particularly relevant in establishing a basic yardstick for evaluating conduct in the course of armed conflict. It deals expressly with the treatment of non-combatants and indirectly with the responsibilities of medical officers. The relevant provisions read as follows:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

[162] Id at 333-4.

[163] Id at 334. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction was concluded in 1972 and entered into force on 26 March 1975.

> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> . . . .
>
> 2. The wounded and sick shall be collected and cared for."

[182] The quashed charges allege that Dr Basson used his medical knowledge not to treat the wounded and the sick, but to subject healthy prisoners in the hands of the SADF to asphyxiation through poison followed by the disposal of their corpses from aircraft over the sea.[164] Another charge alleges that Dr Basson manufactured and provided cholera bacteria for insertion in the water supply of persons regarded as opponents of the Pretoria government.[165]

[183] The present case does not involve an examination of the lawfulness of the chemical and bacteriological programme headed by Dr Basson, and acknowledged and explained by him at his trial on the basis that its development was to be purely for defensive purposes. The quashed charges relate to the alleged use of poison and bacteria for offensive purposes to kill persons regarded as opponents of the then government. Although the most dramatic of the charges, and certainly the most heinous if true, are those that relate to the killing of hundreds of South-West Africa

[164] This alleged conduct formed the basis for count 31. The gravity of the allegations is compounded by the fact that Dr Basson is alleged to have used deception against some of the victims, pretending that they were receiving medical treatment.

[165] This alleged conduct formed the basis for count 61.

People's Organisation (SWAPO) captives and the threat to infect the water supply with cholera, the four other charges are far from trivial. They allege murder by poison and the existence of an active link between Dr Basson and a programme of assassination conducted by the Civil Co-operation Bureau (CCB).

[184] As was pointed out at Nuremburg, crimes against international law are committed by people, not by abstract entities, so that only by punishing individuals who commit such crimes can the provisions of international law be enforced.[166] Given the nature of the charges, the SCA should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the state. Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges.

(vi) Conclusion on the condonation application

[185] In our view, the nature of the charges in the overall context of international law and South Africa's international obligations was a consideration that should have been taken into account by the SCA in considering whether to exercise its discretion in favour of reserving a question of law on the quashing of the charges. The failure to

[166] *Trial of the major war criminals before the International Military Tribunal (Nuremburg)* Vol 22 (1948) (the official text in the English language at page 465-6). Quoted with approval by La Forest J (dissenting) in *R v Finta* [1994] 1 SCR 701 at 729.

consider the nature of the charges was a material factor in the court reaching the conclusion it did. In our view, this failure alone may have been sufficient to require us to set aside the decision of the SCA in relation to the reservation of the question of law. In addition, however, to the extent that the court's view of the *Adams* rule was material to its decision, it was mistaken on this as well, as we have outlined. For both these reasons, therefore, it is appropriate for this Court to overturn the SCA's decision to refuse the state condonation in respect of its application concerning the quashed charges. We conclude that the state's application to reserve the question of law in relation to the quashed charges should have succeeded.

[186] We turn briefly to consider whether it is in the interests of justice to grant leave to appeal. We are satisfied that the gravity of the alleged offences under consideration, construed in the light of South Africa's international law obligations, makes it plain that it is in the interests of justice that the application be granted.

[187] In this Court's judgment after the preliminary hearing,[167] the majority of the Court concluded that the proper interpretation of section 18(2) of the Riotous Assemblies Act gave rise to a constitutional matter. Ordinarily it might have been appropriate for this Court to refer this case back to the SCA for it to consider the interpretation of that section before this Court considers it. However, these proceedings have already been unusually and unfortunately prolonged. As a result, we consider that it is in the interests of justice for this Court to consider the question

[167] Above n 1 at para 35.

now. We therefore turn to the question whether the trial court was correct in upholding the exception to the charges.

(b) Is the decision of the High Court upholding the exception wrong?

(i) The charges that were quashed

[188] The respondent was charged with various offences under section 18(2) of the Riotous Assemblies Act. This section provides:

> "Any person who—
>
> (a) conspires with any other person to aid or procure the commission of or to commit; or
>
> (b) incites, instigates, commands, or procures any other person to commit,
>
> any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

Counts 31, 46, 54, 55, 58 and 61 are relevant to this aspect of the application for leave to appeal. Count 31 concerns a conspiracy to murder SWAPO detainees in camps in Namibia. The respondent was charged with conspiring to murder SWAPO members as well as members of the SADF considered security risks. Count 46 concerned a conspiracy to murder Peter Tanyengene Kalangula in Namibia. Count 54 concerned the conspiracy to kill Pallo Jordan and Ronnie Kasrils in London. Count 55 concerned the conspiracy to murder Gibson Mondlane and others in Mozambique. Count 58 concerned a conspiracy to murder an ANC operative, Enoch Dhlamini, in Swaziland. Count 61 concerned the conspiracy to murder certain SWAPO members, who were being kept in a refugee camp in Namibia, using cholera germs.

[189] Before pleading to the charges the respondent objected to the indictment contending that murders committed beyond the borders of South Africa are not offences under South African law, and that the charges accordingly did not disclose an offence. This argument was upheld by the High Court judge. The issue we must now consider is whether this decision was correct.

[190] The objection to the indictment made in terms of section 85(1)(c)[168] of the Criminal Procedure Act, was "that the charge does not disclose an offence". The judge correctly approached the matter on the basis that it had to be assumed for the purposes of the objection that the allegations in the indictment would be proved. When we refer to the "facts" relevant to the decision it must be understood, therefore, that these are alleged, and not proven facts.

[191] During argument before this Court, the state handed up a useful summary of the facts alleged in further particulars before the High Court. The summary, the

[168] Section 85(1) of the Criminal Procedure Act reads as follows:

> "Objection to charge.—(1) An accused may, before pleading to the charge under section 106, object to the charge on the ground—
>
> (a) that the charge does not comply with the provisions of this Act relating to the essentials of a charge;
>
> (b) that the charge does not set out an essential element of the relevant offence;
>
> (c) that the charge does not disclose an offence;
>
> (d) that the charge does not contain sufficient particulars of any matter alleged in the charge: Provided that such an objection may not be raised to a charge when he is required in terms of section 119 or 122A to plead thereto in the magistrate's court; or
>
> (e) that the accused is not correctly named or described in the charge:
>
> Provided that the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the ground upon which he bases his objection: Provided further 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."

correctness of which was not questioned by counsel for the respondent, provides a convenient description of the allegations made in support of the charges. The full particulars did not form part of the record before us. Counsel for the respondent was asked and undertook to provide the Court with the full set of further particulars which were before the High Court, and to highlight within them any allegations that might be relevant to the issues before the Court, other than those which had been referred to in the High Court judgment or had been placed before us during argument. Despite several reminders this was not done, although counsel for the respondent did send us a list of references to relevant places in the record. We therefore assume that there is nothing of relevance that has not been placed before us in argument and deal with the exception on that basis.

[192] The state's summary of material averments made in the particulars included the following:

> "1. During the period between 1979 and 1989 members of the SADF in Pretoria and elsewhere were involved in planning and executing murders on a large scale. The units involved in the killing were Barnacle/D40 and later the CCB. It was the aim of the CCB optimally to disrupt 'the enemy', and this included killing the enemy in a covert manner.
>
> 2. The persons who were targets for these murders were:
>
> 2.1. SWAPO detainees and other SWAPO members;
> 2.2. members of own forces who were a 'security risk';
> 2.3. 'enemies of the state';
> 2.4. ANC members in Mozambique, . . . and
> 2.5. specific individuals who were targeted for elimination, including

- an unidentified person in Ovamboland;
- Ronnie Kasrils;
- Pallo Jordan;
- Gibson Mondlane; and
- Enoch Dlamini.

The way in which Barnacle and the CCB operated

3. The operations and functions of Barnacle and the CCB were well-documented.

4. The CCB operated through written proposals and authorisations for murders which it wished to undertake.

. . . .

The position of the accused

5. The accused was a doctor in the Special Forces ('Spes Magte') and was the commander of the other doctors in the unit.

6. He was the project officer of Project Coast and was responsible for the establishment and development of the project. Research results had to be delivered to him and he could adapt, amend or bring to an end any project. The accused was the 'leading figure' of the project. He gave orders for persons to be murdered, and did so on command of 'hoër gesag' in the defence force.

The mass murders in Namibia

7. The members of the SADF who were in charge of the detainees in Namibia would identify those detainees who had to be 'eliminated'. The commander of Barnacle would identify the 'own forces' who were security risks. They would be handed over to other SADF members who would do the killing. Certain members would obtain toxic substances, and others would administer the poison. Sometimes the murders would occur by less sophisticated means, including killing victims with a hammer and by strangulation. Their bodies would be disposed of over the ocean by other members of the defence force.

8. The accused was brought in to assist in these 'eliminations', as there were problems in the early days of this operation with the execution of targets. The accused prepared and provided the operatives with toxic substances which were used

to poison, incapacitate and ultimately kill through overdose those persons who were targets of these attacks. In certain instances he personally administered the poison to victims.

9. One instance included the murder of five SWAPO detainees at Fort Rev. The accused on that occasion gave the five men poisonous pills to drink. They refused and hid the pills while the accused and another member of the CCB watched through one-way glass. The accused then went back into the room and convinced the detainees to take the pills. The detainees were accordingly incapacitated and the accused injected them with poisonous substances while they were sleeping. Their bodies were subsequently disposed of over the ocean.

10. The accused also participated in poisoning beer and cold drinks that would be used in order to incapacitate their victims. On one occasion he participated in disposing of bodies over the ocean. In particular, he was instructed by the commander of Barnacle to ensure that the victims would not wake up in the aeroplane while the unit was disposing of their 'bodies' over the ocean.

11. In some instances, he also ordered that detainees be sedated and that certain experiments be performed upon the incapacitated victims. Thereafter, they would be killed by giving them toxic substances and their bodies disposed of over the ocean.

12. Certain of the murders of SWAPO members were planned with the specific aim of disrupting the Namibian referendum. This included the planned mass murder of SWAPO members living in a refugee camp.

13. Members of the CCB planned to poison targets by using cholera germs in order optimally to disrupt the 'enemies of the state.' In this case, returning SWAPO supporters residing in a refugee camp in Namibia were identified as 'enemies of the state'. It was ultimately the aim that this 'disruption' would influence the election in Namibia. The CCB had approved the plan that the water supply to the refugee camp would be contaminated with cholera germs. These germs were cultivated by SADF members at the RNL and their use in Namibia facilitated by the accused. The accused provided the infrastructure for the manufacturing of the germs. He identified the scientists who would provide the cholera germs, and arranged for its delivery.

The individual assassinations

14. The unit also targeted individuals whom it executed, or attempted to execute, through covert means.

14.1. Poison was applied to a car door with the intention of killing the owner of the vehicle. The accused participated in the planning and execution of this assassination by obtaining the poisonous substances and making it available to the assassins, training them in the use of the poisons, and providing them with the other means to apply the substances, including black rubber gloves, surgical gloves and antidotes for the poison.

14.2. Specialist weapons used to administer poison were researched, designed and manufactured and tested for the purpose of murdering 'enemies of the state' targeted by the unit. These weapons were taken to Europe by SADF operatives for use there. Specific targets included Ronnie Kasrils and Pallo Jordan, ANC members who were in London at the time of the planned assassination.

14.3. The accused financed and supervised the design of the weapons, provided the infrastructure for their manufacturing and received them once they were manufactured. He instructed other SADF operatives to take these weapons to Europe to be used in planned assassinations there.

14.4. Gibson Mondlane was identified to be killed by a major in the SADF Military Intelligence who was working on ANC projects. His area of responsibility was ANC targets in Mozambique and Swaziland. . . . The poison which would be used in his killing was prepared and handed to the operative. . .

14.5. A transit house of the ANC in Mozambique was identified as a target of the CCB.

. . . .

14.7. The CCB identified Enoch Dhlamini to be killed by poison. The CCB approved the plan that the substance would be administered by poisoning Swazi beer to be given to the victim. The beer was obtained and the accused was asked to provide the poisonous substance. He established the infrastructure for the provision of poison, ordered the contamination of the beer with toxic substances, received the poisoned beer and handed it over to 'Spes Magte'. The agent in Swaziland gave the beer to Dhlamini. The accused asked for a report on the effect of the poison to be given to him. The poisoning resulted in the victim's death." (footnotes omitted)

[193] To a large extent the conspiracies involved offences to be committed in Namibia, then referred to by the South African authorities and legislation as South West Africa. In this section, save where we quote from legislation or allegations made in the indictment, we have referred to the territory as Namibia as we have done throughout the judgment.

[194] It is important before going further to record briefly the political history of Namibia. From 1833-1915, it formed part of the German colonial empire. During the First World War, South African forces conquered the territory and in terms of the Versailles Peace Conference in 1919, South Africa was granted a "Class C" mandate over Namibia which allowed it to administer the territory "as an integral portion of the Union" with "full power of administration and legislation", under the supervision of the League of Nations. After the Second World War the United Nations, which had replaced the League of Nations, sought to administer the territory through the auspices of the newly created Trusteeship Council. South Africa rejected the proposed arrangement, and administered the territory as before.

[195] In 1950, in an advisory opinion, the International Court of Justice ruled the mandate still to be in force and held that the UN had succeeded to the League's supervisory powers.[169] A subsequent challenge to the manner in which South Africa

[169] Advisory Opinion on the *International Status of South West Africa*, 1950 *ICJ Reports* 128. For a discussion of the opinion see Kahn "The International Court's Advisory Opinion on the Status of South-West Africa" (1951) 4 *International Law Quarterly* 78.

was managing the mandate was rejected by the court on the grounds that the complainant states, Ethiopia and Liberia, had no standing to pursue the challenge.[170] The mandate was however terminated by the UN General Assembly by resolution in 1966, and confirmed by the Security Council by resolution in 1970.[171] The International Court of Justice subsequently declared the continued presence of South Africa in Namibia to be illegal, and made clear South Africa's obligation to withdraw its administration from the territory.[172]

[196] The South African government nevertheless maintained its presence in the territory. It exercised political power through a number of mechanisms at various times, including an Administrator-General, a National Assembly with wide legislative powers, martial law, and the assumption of all executive functions including functions relating to the military. Elections for a Constituent Assembly were eventually held in 1989, and a Constitution committed to individual rights adopted by the Assembly in 1990.[173] Namibia won its independence on 21 March 1990.

[197] The alleged conduct which forms the subject matter of several of the charges took place in Namibia before it achieved independence and while still under the political control of South Africa, albeit that that control was generally considered to be

[170] *South West Africa, Second Phase, Judgment,* 1966 *ICJ Reports* 6, at 51.

[171] General Assembly Resolution 2145 (XXI) of 27 October 1966 and Security Council Resolution 276 (1970) of 30 January 1970. See also Resolutions 264 (1969) and 269 (1969).

[172] Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* 1971 *ICJ Reports* 58. For a discussion of these events see Dugard *The South West Africa/Namibia Dispute* (University of California Press, Berkeley 1973).

[173] Constitution of the Republic of Namibia, adopted on 9 February 1990 and commencing on 12 March 1990.

unlawfully exercised in terms of international law. Several of the charges relate to alleged conduct in other countries.

[198] Section 144(3) of the Criminal Procedure Act provides that where an attorney-general (now the Director of Public Prosecutions) arraigns an accused person in a superior court for a summary trial, as happened in the present case,

> "the indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the attorney-general, are necessary to inform the accused of the allegations against him".

The section goes on to provide that this provision shall not be so construed that the state shall be bound by the contents of the summary.

[199] In his judgment the trial judge referred in some detail to the summary of facts in deciding whether or not the charges disclosed an offence. For instance, in dealing with charge 58 concerning a conspiracy to murder Enoch Dhlamini, the place at which the murder was to be committed is not specified in the indictment. Details are, however, given in the summary of facts. The judge had regard to this in holding that the charge contemplated a murder in Swaziland.

[200] It is clear from the summary provided above that the indictment and further particulars provide sufficient detail of the charges against the accused to determine whether or not the objection to the indictment was well founded. However, in the light of the fact that the High Court judge referred extensively to the summary, we

point briefly to the way in which the summary informed the respondent of other details of the state's case.

[201] It alleges that the CCB went to great lengths to hide its links with the state and to ensure that its activities could not be linked with the state. It alleges further that CCB operatives used different names so that their real identities could be hidden. It also alleges that the CCB was divided into regions which included areas within South Africa and also beyond its borders. According to the summary, the CCB financed its members to set up private businesses as a front.

[202] The state, in its summary of material facts, provides a description of the operation of the CCB, as it appears from the summary of facts:

> "— They identified targets, assigned a 'priority class' to the targets, and studied the targets.
> — The member of the CCB assigned to the operation would make a written proposal to the regional manager and co-ordinator in respect of an identified target. The written proposal contained the planned action against the target – for example the elimination through poison.
> — Both the planned operation and the proposed action would have to be approved. If the project was approved by 'hoër gesag', that also implied that the finances were approved and that the operative could proceed with the execution."

[203] The summary of essential facts also provides more details on the murder of Gibson Mondlane in Mozambique. It alleges that the deceased was monitored so that it could be established when he would be in Mozambique. A written proposal about the deceased was prepared on the basis of which his murder was approved. It is

alleged that a particular type of poison which would allow the operative to "get further away" from the victim would be used. The indictment does not allege that Mondlane died from being poisoned. The further particulars and the state's summary before this Court, however, allege that he did.

[204] Nothing in the summary of facts contradicts the essential allegations to which we have referred.

(ii) The interpretation of section 18(2)

[205] Conspiring to commit an offence, other than treason, is not a crime under South African common law.[174] The state, therefore, had to show that the allegations made, read with the summary of facts, constituted offences within the meaning of section 18(2) of the Riotous Assemblies Act.

[206] The judge held that section 18(2) contemplates conspiracies to commit offences which are justiciable in South Africa, and that murders committed beyond the borders are not within the jurisdiction of South African courts. He accordingly upheld the objection to the indictment.

(aa) Conspiracy in South African Law

[207] Under South African common law, where an offence has been committed or attempted, those who participate in the planning or otherwise assist the perpetrator are

[174] *S v Moumbaris and Others* 1974 (1) SA 681 (T) at 686A-B.

guilty as associates or socii crimini, and are liable to the same penalties as the principal offender. But where an offence has not been committed, or attempted, conspiracy to commit an offence, other than treason, is not a crime.[175] One of the purposes of section 18(2) of the Riotous Assemblies Act was to fill this gap in the common law and to make conspiracy an offence.

[208] The judge correctly held that the crime contemplated by section 18(2) is committed when the criminal conspiracy is entered into by the conspirators. It does not depend on the commission of the contemplated offence.[176] He held, however, that section 18(2) contemplates conspiracies to commit offences which are justiciable in South Africa.

[209] A criminal conspiracy is an offence whether it is implemented or not. It follows that the failure of a conspiracy is not relevant to the conspirators' guilt. The judgment must therefore be understood as meaning that section 18(2) applies to conspiracies to commit crimes, which if committed, would be justiciable in South Africa.

[210] In this Court counsel for the state, who had not appeared for the state at the trial or in the SCA, submitted that even if this legal conclusion reached by the High Court was correct, it did not follow that the charges were correctly quashed. They relied for this submission on various arguments which had not been raised before the

[175] Id.

[176] *S v Sibuyi* 1993 (1) SACR 235 (A) at 249e.

High Court or SCA. Three arguments were raised in this Court: first, an argument based on the Military Discipline Code (the Code) which forms part of the Defence Act[177] and which criminalises certain conduct of Defence Force members even when committed beyond the borders of South Africa; secondly, the provisions of section 19A of the Riotous Assemblies Act which, until its repeal in 1996,[178] provided that "[t]his Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel"; and thirdly, the proposition that where a crime is committed beyond the borders of South Africa, South African courts would nevertheless have jurisdiction to try such crimes where there is a "sufficient connection" between the crime and South Africa.

(bb) The Military Code

[211] At the time of its enactment section 47 of the Code provided:

> "Any person who beyond the borders of the Union commits or omits to do any act in circumstances under which he would, if he had committed or omitted to do that act in the Union, have been guilty of a civil offence, shall be guilty of an offence under this Code and liable on conviction to such penalty applicable in respect of that civil offence as could be imposed under section ninety-one of this Code."

[212] Section 47 of the Code was amended in 1963 to refer to "the Republic" instead of the "Union",[179] and later in other respects not material to this application. For all practical purposes, however, its provisions remained substantially the same as

[177] Act 44 of 1957.

[178] Section 19A was repealed by the General Law Amendment Act, 49 of 1996.

[179] Section 31 of the Defence Amendment Act, 77 of 1963 replaced all references to "Union" in the Act with "Republic". It also replaced all references to the "Governor-General" with "State President".

they were when enacted in 1957 throughout the period covered by the charges which were held by the judge not to disclose an offence. This period was from 1979 to 1989. And this remained true at the time the accused was indicted, when he pleaded, and throughout his trial. The Act has since been substantially replaced by the Defence Act, 42 of 2002.[180]

[213] The Code defines a "civil offence", in contradistinction to a military offence, as meaning "any offence in respect of which any penalty may be imposed by a court of law, not being an offence under sections four to fifty, inclusive, of this Code." Sections 4 to 50 of the Code deal with what might best be described as "military offences" which are of particular relevance in an army – eg. endangering the safety of forces, conduct in action, military desertion, assaulting a senior officer, etc.

[214] The Code distinguishes between "civil offences" committed within the Republic and "civil offences" committed beyond the borders of the Republic. Any person subject to the Code who commits a "civil offence" beyond the borders of the Republic commits an offence under the Code. Military courts can try persons who are subject to the Code for civil offences committed in South Africa or abroad, but murder and other serious charges committed within the "Republic" are excluded from their jurisdiction.[181] To complete the picture, the 1957 Defence Act, which was in force at

[180] The First Schedule, which contains the Military Code, has not been repealed and is one of the few parts of the 1957 Act which remains in force.

[181] Section 56 of the Code.

all times material to the indictment, vested jurisdiction in any division of "the Supreme Court of South Africa" to try any offence under the Code.[182]

[215] In effect, these provisions mean that a member of the SADF who commits murder within "the Republic" commits an offence under the "civil law", and a member who commits murder beyond the borders of "the Republic", commits an offence under "military law".

[216] It follows that a member of the Defence Force who commits murder in the Republic is guilty of an offence under the common law, and is liable to be prosecuted for that offence in the ordinary criminal courts. A member who commits murder beyond the borders of the Republic is guilty of an offence under the Military Discipline Code and may be prosecuted in a military court subject to certain time stipulations, and is also liable to be prosecuted for that in an ordinary court.

(cc) Murder beyond the borders of South Africa

[217] The Code is applicable to all members of the Permanent Force of the Defence Force.[183] The summary of material facts alleges that the conspiracies entered into

[182] Section 105(1) of the Defence Act.

[183] See section 104(5) of the Defence Act, which reads as follows:

> "The Military Discipline Code shall to the extent and subject to the conditions prescribed therein, apply—
>
> (a) to all members of the Permanent Force;
>
> (b) to members of the Citizen Force, commandos and the Reserve, while they are rendering any service, undergoing any training or doing any duty in pursuance of this Act or, when liable or called up therefor, fail to render such service or to undergo such training or to do such duty;

were between members of the SADF, and that they were to be implemented beyond the borders of South Africa by members of the SADF.

[218] It was contended that since the Code applies to all members of the permanent force, members of that force who commit murder are and were liable to be prosecuted for that in South Africa, whether the murder is committed beyond the borders of the country or not. Thus, so the submission went, even if the judge was correct in holding that the target offence has to be one justiciable in South Africa, that requirement was satisfied in the present case.

[219] This applies to counts 55 and 58 which deal with conspiracies to commit murder in Mozambique and Swaziland, which are alleged to have been carried out. It also applies to count 54 which deals with a conspiracy to commit murder in London which failed. In terms of the Code, and on the basis of the allegations made in the indictment and further particulars, the target offences would all have been justiciable in a South African court.

(dd) Namibia

[220] Different considerations may, however, possibly apply to the conspiracies to commit murders in Namibia. The Defence Act defined the Union as including

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(c) to all persons (other than members of a visiting force) lawfully detained by virtue of or serving sentences of detention or imprisonment imposed under the Military Discipline Code;

(d) to members of the auxiliary services, established in terms of section 80, being on service as defined in the First Schedule."

Although this section has been amended since the Defence Act was initially passed, subsection 5(a) has remained the same since then.

"South-West Africa."[184] In 1963, the Defence Amendment Act 77 of 1963 replaced all references within the Defence Act and the Code to "Union" with "Republic". For the purposes of the Defence Act, Namibia was therefore deemed part of the Republic. These definitions are applicable to the interpretation of the Defence Act "unless the context otherwise indicates".

[221] The Code is a schedule to the Defence Act. Section 1 of the Code provides that "any expression to which a meaning has been assigned in the [Defence] Act, bears the meaning so assigned thereto, and unless the context otherwise indicates" definitions in the Code itself shall apply. It is in this section that definitions are given of "civil offence" and "civil court". In the result, unless the context indicates otherwise, the word "Republic" in section 47 of the Code must be construed consistently with the definition of Republic in the Defence Act. If the definition of Republic is applicable to the interpretation of section 47 of the Code, the offences to be committed in Namibia were not target offences beyond the borders of the "Republic". For the purposes of the Code they were offences deemed to have been committed in the Republic.

[222] The question then would arise whether South African courts continued to enjoy jurisdiction after Namibia became independent in 1990 over crimes committed in Namibia prior to 1990. In our view, this question need not be answered. There is another legal basis upon which it is clear that South African courts would enjoy

[184] Section 1(xxii) of the Act, as it appeared in 1957, provided that "'Union' includes the territory of South-West Africa".

jurisdiction in respect of the crimes alleged in this indictment even after Namibia gained independence in 1990. We turn to consider the basis for that jurisdiction now.

(ee) The scope of criminal jurisdiction in South Africa

[223] We accept that as a general proposition our courts have declined to exercise jurisdiction over persons who commit crimes in other countries.[185] This, as Dugard points out,[186] is an aspect of sovereignty which has given rise to a presumption against the extraterritorial operation of criminal law.

[224] There are, however, exceptions to the general rule. As Watermeyer CJ observed in *R v Holm*; *R v Pienaar*[187] the basis of this rule is international comity:

> "An independent state does not claim a wider jurisdiction because it does not wish to encroach upon the corresponding rights of other independent states."[188]

Watermeyer CJ goes on to refer to Wheaton, *International Law*, as saying that the judicial power of the state extends:

> "(1) To the punishment of all offences against municipal laws of the State, by whomsoever committed, within the territory.
> (2) To the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas and on board its public vessels in foreign ports.
> (3) To the punishment of all such offences by its subjects wheresoever committed.

[185] See, for example, *S v Kruger en Andere* 1989 (1) SA 785 (A); *S v Maseki* 1981 (4) SA 374 (T); *S v Makhutla en 'n Ander* 1968 (2) SA 768 (O).

[186] Dugard *International Law – A South African Perspective* 2 ed (Juta, Cape Town 2000) at 133.

[187] 1948 (1) SA 925 (A).

[188] Id at 930.

> (4) To the punishment of piracy and other offences against the law of nations by whomsoever and wheresoever committed."[189]

Watermeyer CJ points out that this proposition is not accepted by all sovereign states and that England makes the smallest claim to punish its own subjects or others for extraterritorial offences. Other countries go so far as to exercise jurisdiction over nationals who commit crimes in any country.

[225] It seems generally to be recognised, even by those countries which limit their jurisdiction to crimes committed within their territories, that there are exceptions to the territorial rule. Treason is such an exception, for it is considered that the state that is threatened has a greater interest than any other state in punishing the offender. Exceptions are also made in respect of transnational crimes where more than one state may have an interest in holding the offender liable for the crime.[190]

[226] Conspiracy poses a particular problem because it is a distinct crime, apart from the criminal conduct that is being planned. The present case concerns an ongoing conspiracy entered into in South Africa to commit crimes in Namibia and elsewhere. In *Libman v The Queen*[191] the Supreme Court of Canada gave careful consideration to the principles applicable in the circumstances where a conspiracy involves acts in more than one country. La Forest J, writing for the Court, referred to

[189] Id.

[190] Dugard above n 186 at 136-7.

[191] [1985] 2 SCR 178.

the development of Canadian and English law, including the English decisions relied on by the judge in the present case, and concluded as follows:

> "As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a 'real and substantial link' between an offence and this country, a test well-known in public and private international law".[192]

We agree with this approach.

[227] In relation to the charges concerning Namibia, the relevant facts in the present case are as follows:

a) At the time of the alleged conspiracy Namibia was being administered by the South African government as an integral part of South Africa.[193]

b) The Riotous Assemblies Act was applicable in Namibia.

c) The conspiracy alleged to constitute a breach of section 18(2) of the Riotous Assemblies Act was entered into in South Africa.

d) When the conspiracy was entered into, and at all material times thereafter, the SADF was deployed in Namibia in terms of the Defence Act.

e) The Defence Act deems Namibia to be part of South Africa.

f) The conspiracy was to murder persons perceived to be enemies of South Africa, including members of SWAPO being held as detainees by the SADF, and SWAPO refugees residing in a refugee camp.

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[192] Id at 212-3. See also *United States of America v Lépine* [1994] 1 SCR 286 at 299i-300c.

[193] See the South-West Africa Constitution Act, 39 of 1968, which replaced the South-West Africa Constitution Act, 42 of 1925. See also the South West Africa Constitution Amendment Act, 95 of 1977.

g) The conspiracy was a continuing conspiracy organised and directed by members of the SADF from within South Africa, where plans were approved, poisons and other weapons prepared, and instructions were issued to the operatives.

h) The Defence Act contemplates that an act committed by members of the SADF in circumstances which, if it had been committed in South Africa, would have been a crime, will be a crime for which they can be prosecuted in a South African court.

[228] Those facts leave no doubt that there was a real and substantial link between this country and the conspiracy to commit murders in Namibia.

[229] Moreover, Namibia was not then a sovereign state. It was being administered by South Africa and the doctrine of comity, which is the foundation of the presumption against extraterritorial jurisdiction, could have had no application.[194] We agree with the comment by Lord Diplock in *Treacy v Director of Public Prosecutions*:[195]

> "[T]he rules of international comity . . . do not call for more than that each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state where that conduct has had no harmful consequences within the territory of the state which imposes the punishment."[196]

[194] See also in this regard paras [223]-[224] above, and *Director of Public Prosecutions v Doot and Others* [1973] AC 807 (HL) at 834-5.

[195] [1971] AC 537 (HL).

[196] Id at 564E.

On the contrary, comity to the international community from whom the mandate was derived required South Africa to punish members of its military who committed such grave offences, contrary to the Geneva Convention and international law. Indeed, the Defence Act requires this to be done, and it could hardly be said that by deeming Namibia to be part of South Africa, the Defence Act put conduct which would otherwise be an offence within the jurisdiction of the South African courts beyond their jurisdiction.

[230] If the conspiracy was a crime according to South African law when it was entered into, it does not cease to be a crime by reason only of the subsequent establishment of Namibia as an independent sovereign state in 1990.

[231] The cases relied upon by the judge in coming to a contrary conclusion bear little relevance to the facts of the present case. The decision in *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others*[197] dealt with the question whether the applicants were entitled to claim amnesty for murders committed in Namibia under the Promotion of National Unity and Reconciliation Act, 34 of 1995 (the TRC Act). This Act established the Truth and Reconciliation Commission (the TRC). The murders had been committed by the applicants in the course of attacks carried out by a militant organisation based in Namibia known as Kontra 435. That group carried out attacks on United Nations installations in Namibia with the object of derailing the first Namibian elections which were being supervised by the United

[197] 2000 (1) SA 113 (SCA).

Nations. Kontra 435 was based in Namibia, and the operations were planned and executed there. The only connection with South Africa was that the two applicants were apparently recruited here. The court held that the offences did not fall within the ambit of the TRC Act.[198] They were not committed on behalf of a "political organisation or liberation movement" or "security forces" as defined in the TRC Act.

[232] The applicants in that case had raised the possibility of an amnesty being granted to them by the TRC as a defence to a claim made by Namibia for their extradition. In the course of the judgment it was pointed out that the offences had been committed in Namibia, and that a South African court would therefore not have had jurisdiction to try the applicants for such offences.[199] It was held that it could not have been intended by Parliament to confer on the Amnesty Committee of the TRC the power to grant an amnesty in respect of offences committed outside South Africa which are not triable in this country. Olivier JA who delivered the judgment of the court said:

> "The power conferred on the Committee to grant amnesty in respect of offences committed outside South Africa can, in my view, only be exercised in respect of so-called extra-territorial offences triable in this country. The crimes committed by the appellants at Outjo do not belong to the latter category."[200]

In relying on the conclusion that the offences committed by the applicants in that case were not triable in South Africa, the judge in the trial court in this matter overlooked

[198] Id at paras 20-33.

[199] Id at para 34.

[200] Id at para 35.

the significant factual differences between that case and this. In that case, the applicants were not members of the SADF, nor was the case concerned directly with conspiracy or the interpretation of the Riotous Assemblies Act. That judgment could not therefore support the trial judge's conclusion in this case that the offences were not triable in South Africa.

[233] The trial judge in this case also referred to the decisions of the House of Lords in *Board of Trade v Owen and Another*[201] and of the Court of Appeal in *R v Cox*.[202] *Board of Trade v Owen* dealt with the common law of England and not with the interpretation of a statute. The court accepted that a conspiracy to commit a crime abroad cannot be made the subject of an indictment in England, unless the crime, if committed, would have been one which could have been made the subject of a prosecution in England. The charge was of a conspiracy to secure an export permit from Germany by unlawful means. It was said by Lord Tucker who delivered the principal judgment that:

> "The comity of nations can hardly require the acceptance of the Crown's contentions in the present case, having regard to the non-recognition of conspiracy as a crime in Germany."[203]

The nature of the charges is again referred to in a concluding passage of the judgment where it is said:

[201] [1957] AC 602 (HL).

[202] [1968] 1 All ER 410 (CA).

[203] Above n 201 at 634.

> "[A] conspiracy of the nature of that charged in count 3 as proved in evidence – which, in my view, was a conspiracy to attain a lawful object by unlawful means, rather than to commit a crime – is not triable in this country, since the unlawful means and the ultimate object were both outside the jurisdiction. In so deciding I would, however, reserve for future consideration the question whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad."[204]

[234] *R v Cox* dealt with a conspiracy concluded in England between the appellant and another person to use unused cheques from a bank in England fraudulently to acquire jewellery in France. The court held that the common law of England was such that conspiracy concluded in England to commit a crime abroad, other than murder, is not indictable in England. The court suggested that the common law of England as it had been developed was unsatisfying and called for attention by Parliament.[205]

[235] We consider a conspiracy within the SADF involving high ranking officers to murder detainees in the custody of the army and to commit offences such as those which form the subject matter of the charges in the present case, in a territory being administered by South Africa, to have grave implications for South Africa's international standing. In our view, it falls within the category of offences contemplated in *Board of Trade v Owen* as being capable of being made the subject of an indictment in South Africa.

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[204] Id.

[205] Above n 202 at 413H-414B.

[236] We consider that it may well be so that the conspiracy to commit crimes in countries other than Namibia may well fall within the category of offences contemplated in *Board of Trade v Owen* as well. They were all offences which involved a conspiracy to commit murder of enemies of the South African government by members of the SADF. However, this is not a matter which we have to decide in this case.

[237] We do not find the examples referred to in the judgment, and relied on in argument before us by counsel for the respondent, of a conspiracy in South Africa to smoke cannabis in the Netherlands where it is lawful to do so, or to consume alcohol in a Muslim country where it is an offence to do so, to be helpful. There is insufficient connection between the conspiracy in South Africa, and the acts to be committed in the foreign country, to warrant a prosecution in a South African court. In the first example the act to be committed would be a crime if committed in South Africa, but is not a crime in the country concerned, and it would be against the comity owed to that country for a South African court to punish a person for acts which can lawfully be committed there. In the second example, the conduct does not amount to a crime in South Africa, and no one under our constitutional order could be convicted of conspiracy to commit an offence in a place other than South Africa which does not constitute a crime in South Africa. In both cases the interests of South Africa and its connection with the conduct referred to are too remote to implicate any legitimate interest South Africa may have in such conduct. The same cannot be said of a

conspiracy within the South African military to murder "enemies" of the state in a territory administered by it and where its forces are stationed.

[238] We were not referred to a decided case in South Africa which has held that section 18(2) of the Riotous Assemblies Act requires the crimes to be committed in terms of the conspiracy to be justiciable in South Africa. Nor were we referred to any South African case dealing with transnational crimes, other than theft, which in South Africa is a continuing offence, that are relevant to the issues raised in the judgment on the exception. We can see no reason why the common law of England, which has been found to be unsatisfactory and to require intervention by Parliament, should be adopted by our courts as the basis for liability under section 18(2). The mere fact that it is more favourable to an accused person is in our view insufficient to call for an interpretation of section 18(2) which is inconsistent with the realities of a modern state, where international criminal conspiracies organised and directed from one country often involve criminal acts to be committed in other countries, and the proceeds of the crime to be laundered elsewhere.

(c) The relevance of the amnesty afforded to the respondent by Namibia

[239] The respondent also raised as a preliminary issue before the trial court a contention that he was entitled to the benefit of an amnesty granted by the Administrator-General to all members of the SADF in respect of acts performed by them in performance of their duties and functions in Namibia.[206] The judge held that

[206] *S v Basson* (judgment on exception) above n 12 at 441.

in respect of the charges relating to Namibia, which in his view did not fall within the scope of section 18(2) of the Riotous Assemblies Act, there was the additional fact that the respondent was entitled to an amnesty in respect of the offences contemplated by the conspiracy.

[240] The terms of the amnesty relied upon by the respondent are set out in a proclamation issued by the Administrator-General for the territory of South West Africa on 7 June 1989. The proclamation was headed "Granting of Amnesty to Certain Persons". The operative provisions, set out in section 2(1) of the Proclamation, were as follows:

> "No criminal proceedings shall after the date of commencement of this Proclamation be instituted or continued in any court of law against any person referred to in sub-section (2) or (3), in respect of any criminal offence committed by such person in the territory or elsewhere at any time before the said date."[207]

[241] The amnesty did not apply to members of the SADF, but subsection (3) of the Proclamation provided:

> "The Administrator-General may in his discretion by notice in the *Official Gazette* direct that the provisions of subsection (1) shall, subject to such conditions as he may determine, apply to any person or category of persons other than a person referred to in subsection (2)."[208]

[207] No AG 13, Amnesty Proclamation, 1989, *Official Gazette Extraordinary of South West Africa,* 7 June 1989.
[208] Id.

[242] On 9 February 1990 the Administrator-General issued a further proclamation, which provides:

> "Under subsection (3) of section 2 of the Amnesty Proclamation, 1989 (Proclamation AG. 13 of 1989), I hereby direct that the provisions of subsection (1) of that section shall apply to the persons who, while they were members of the South African Police, the South West African Police, the South African Defence Force, including the South West African Territory Force, in the performance of their duties and functions in the territory have performed or failed to perform any act which amounts to a criminal offence as contemplated in that subsection."[209]

Namibia became independent in the following month on 21 March 1990.

[243] The amnesty is limited in two respects:

a) It does not extinguish the crimes. It bars prosecutions for such crimes being instituted or continued in Namibia after the date of the commencement of the Proclamation.

b) It is limited to prosecutions in respect of offences committed in "the territory" of Namibia.

[244] The Proclamation has no application to prosecutions initiated in South Africa, for the Administrator-General's lawmaking power was limited to the "territory". Moreover, the amnesty was directed to future prosecutions. It did not extinguish the crimes, and persons convicted and serving sentences prior to the date of the proclamation would not have benefited from it.

[209] No AG 16, Direction under the Amnesty Proclamation, 1989, *Official Gazette Extraordinary of South West Africa,* 9 February 1990.

[245] The conspiracy with which the respondent was charged was entered into in South Africa. If, as we have held, it falls within section 18(2) of the Riotous Assemblies Act it constituted an offence whether or not the contemplated crimes were carried out.[210] The fact that after the date of the Proclamation no prosecutions could have been initiated in Namibia for such crimes is therefore not relevant. The respondent is being charged in South Africa for an offence committed in South Africa.

[246] It is not necessary, therefore, to consider whether the blanket amnesty granted by the outgoing Administrator-General on the eve of independence is contrary to international law. It has no application to the present case.

[247] We conclude therefore that the High Court erred in quashing counts 31, 46, 54, 55, 58 and 61 on the grounds that they did not disclose an offence. Those counts as formulated did disclose an offence within the terms of section 18(2) of the Riotous Assemblies Act.

(d) Double jeopardy

[248] The final issue to be considered in this section of the judgment is whether the appeal in relation to the quashed charges should not be upheld on the grounds that it would offend the double jeopardy protection afforded by section 35(3)(m) of the Constitution.

[210] *Sibuyi* above n 176.

[249] It will be helpful to remember that ahead of the preliminary hearing of the application for leave to appeal which was held in November 2003, the Chief Justice gave directions on 20 August 2003 requesting parties to lodge argument on the following preliminary issues: Was respondent in jeopardy of being convicted at his trial? If so, and if the appeal were to succeed, would further prosecution be competent if regard was had to the provisions of section 35(3)(m) of the Constitution? The answers to these questions clearly implicate whether it would be in the interest of justice to grant leave to appeal. In its judgment this Court dealt at some length with the meaning and reach of double jeopardy, but took the view that this factor, although relevant, was not, at that stage, sufficient on its own, for it to conclude that it was not in the interests of justice for leave to appeal to be granted.[211]

[250] Section 35(3)(m) provides that the right to a fair trial of every accused person includes the right "not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted". The section protects every accused person against double jeopardy.

[251] Sections 106(1)(c) and (d)[212] of the Criminal Procedure Act allow an accused person to plead that she or he has already been convicted or acquitted of the offence

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[211] Above n 1 at para 69

[212] Sections 106(1)(c) and (d) read as follows:

> "(1) When an accused pleads to a charge he may plead—
> . . . .
> (c) that he has already been convicted of the offence with which he is charged; or
> (d) that he has already been acquitted of the offence with which he is charged".

with which they are charged. These provisions recognise the common law defences of autrefois convict and autrefois acquit. An accused person is thus protected against the risk of double jeopardy under both the statute and the common law.

[252] The double jeopardy rule prevents anyone being tried twice for the same crime. The rule has been widely adopted in legal systems around the world. International law recognises the concept of double jeopardy. The International Convention on Civil and Political Rights (ICCPR)[213] includes a provision that protects against someone being tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. The European Convention on Human Rights similarly recognises this right.[214]

[253] The rules governing double jeopardy vary from jurisdiction to jurisdiction. The protection available is dependent on the applicable laws in each country. In this country, the protection against double jeopardy is one of the fundamental rights protected by the Constitution (section 35(3)(m)).

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[213] Article 14(7) of the ICCPR provides that "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

[214] See Article 4(1) of Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".

[254] An accused person is only protected against prosecution in a second prosecution, if he or she was in jeopardy of conviction in the first. Stratford JA enunciated this principle in *R v Manasewitz*[215] in the following terms:

> "I accept, for the purpose of these reasons, the following requisites to establish a plea of autrefois acquit, namely that the accused has been previously tried (1) on the same charge, (2) by a Court of competent jurisdiction and (3) acquitted on the merits. Obviously an accused so tried must have been in jeopardy. The proposition is sometimes stated slightly differently thus: That the accused has been previously indicted on the same charge, was in jeopardy, and was acquitted on the merits. If so stated it is necessary to add that if the indictment was invalid or the Court had no jurisdiction the accused was not in jeopardy. Again, if after conviction a superior Court quashes an indictment as bad ab initio the accused cannot on retrial rely upon the previous-ultimate-acquittal. This view can be justified either on the ground that the crime alleged in the subsequent, good, indictment is not that alleged on the previous, bad indictment, or on the ground that the accused was never (legally) in jeopardy or that the acquittal was not on the merits."

[255] The requirement that the previous acquittal must have been on the merits, or to put it differently, that the accused must have been in jeopardy of conviction, means that, if the previous prosecution was vitiated by irregularity, then it cannot found a plea of autrefois acquit in a subsequent prosecution. That is because the accused was not acquitted on the merits and was never in jeopardy of conviction because the proceedings were vitiated by irregularity.[216]

[256] Should this Court uphold the appeal against the trial court's decision to quash counts 31, 46, 54, 55, 58 and 61, the respondent will not be able to raise the plea of

[215] 1933 AD 165 at 173-4.

[216] *S v Moodie* 1962 (1) SA 587 (A) 595F-596F.

autrefois acquit as there was no acquittal on the merits in respect of the quashed charges. The accused did not plead to these charges and was therefore never in jeopardy of conviction upon them.

[257] However, the respondent raised the further argument that although the trial court quashed counts 31, 46, 54, 55, 58 and 61 as disclosing no offence, it nonetheless heard evidence on each of the quashed charges, for purposes of an umbrella conspiracy charge under count 63,[217] dealt with the evidence and made findings in respect of it favourable to the accused. The argument goes that these findings of the trial court in effect render the quashed charges susceptible to a plea by the respondent of res judicata.

[258] To determine the merit of this argument one would have to canvass the mass of evidence in order to decide whether the evidence covers the quashed charges. In addition, it would be necessary to consider that evidence in the light of the particulars of the quashed charges. In our view, that cannot be done at this stage of the proceedings. Were the state to proceed with the prosecution, the question of double jeopardy should be raised at the trial court.

[217] Charge 63 read as follows:

> "Conspiracy to Murder
> Contravention of section 18(2)(a) of the Riotous Assemblies Act, No 17 of 1956 as amended
> In that during the period 1979 to 1992 and at or in the vicinity of Pretoria, within the jurisdiction of the Transvaal Provincial Division, the accused did unlawfully and intentionally, with the specialised units and/or organisations and/or entities referred to in Column 1 of the attached Annexure 1, conspire to commit and/or aid in the commission of and/or cause to be committed the crimes of murder and/or attempted murder, assault and intimidation in respect of enemies of the State as referred to in Column 2 and other persons unknown to the State." (our translation)

[259] Accordingly, in our view, the question of double jeopardy cannot at this stage be raised to prevent the court from upholding the state's appeal on the quashed charges.

(e) Conclusion: quashing of the charges

[260] In all the circumstances, we conclude that the SCA should have granted the application for condonation and the petition for leave to appeal, upheld the question of law in favour of the state, set aside the order of the High Court upholding the exception and replaced it with an order dismissing the exception. The effect of this conclusion is that the indictment previously quashed, stands. It is up to the state to decide whether to put the accused on trial on the same indictment or on an amended indictment. Should the state decide to do so, the question of the right of Dr Basson to be tried within a reasonable time and the question of double jeopardy will have to be determined by the trial court, in the first instance.

SUMMARY AND ORDER

(a) Summary

[261] As was said at the outset, the respondent, Dr Basson, was charged in the Pretoria High Court in 1999 on 67 counts including murder, conspiracy, fraud and drug offences. At the end of the trial in that court, he was acquitted. The state approached this Court effectively to seek leave to appeal on three grounds in respect of the proceedings in the High Court. In the first place, it argued that the conduct of the judge in the High Court had given rise to a reasonable apprehension of bias which

argument, if upheld, would have vitiated the proceedings before the High Court entirely. We have found that the state has not made out a case that the conduct of the trial judge gave rise to a reasonable apprehension of bias and the state fails in this respect.

[262] Secondly, the state sought leave to appeal the decision of the High Court to exclude the bail record from the criminal proceedings. The state argued that the trial court had erred in law when it heard argument concerning the admissibility of the bail record before the accused had been called upon to plead, and in respect of its ruling that the bail record should be excluded. We dismiss both these challenges.

[263] Thirdly, the state sought to approach this Court to have the decision of the High Court to quash six of the most serious charges against the respondent set aside. The High Court quashed those charges on the ground that they concerned alleged criminal conspiracies to commit serious crimes beyond the borders of South Africa, which it held did not fall within the prohibition created by section 18(2) of the Riotous Assemblies Act which criminalises conspiracies. The accused accordingly did not plead to those charges and the trial proceedings did not directly involve them. The SCA refused the state condonation in respect of its application to reserve a question of law in relation to the trial court's upholding of the objections in respect of these charges (counts 31, 46, 54, 55, 58 and 61 in the original indictment). This Court upholds the state's appeal to this Court against the decision of the SCA on this issue. In respect of the reservation of that question, relating as it does to the proper

interpretation of section 18(2) of the Riotous Assemblies Act, the appeal is also upheld. The trial court's order quashing charges 31, 46, 54, 55, 58 and 61 is accordingly set aside and the charges are reinstated. The state must determine what steps it wishes to take in respect of those charges.

[264] The question of whether Dr Basson will be able to raise a defence of double jeopardy is expressly not decided and will have to be considered by a trial court in future if the state decides to pursue the prosecution. Similarly, any objections based on section 35(3)(d) of the Constitution – the right of an accused to have a trial begin and conclude without unreasonable delay – will have to be determined by a future trial court if the prosecution proceeds.

(b) Order

[265] Accordingly, the following order is made:

1. The application for leave to appeal is granted.
2. The appeal succeeds to the following extent.

    (a) The following question of law is reserved in terms of section 319 of the Criminal Procedure Act, 51 of 1977 for consideration: "whether the trial court erred in law by finding that on a proper interpretation of section 18(2)(a) of the Riotous Assemblies Act 17 of 1956, the court did not have the power to adjudicate on a conspiracy within South Africa to

commit an offence beyond its borders and consequently quashed charges 31, 46, 54, 55, 58 and 61".

(b) The question reserved in paragraph 2(a) is answered in the affirmative. The order of Hartzenberg J setting aside charges 31, 46, 54, 55, 58 and 61 is itself set aside.

3. Save to the extent set out in paragraph 2 of this order,

(a) the appeal is dismissed; and

(b) the order made by the Supreme Court of Appeal stands.

Chaskalson CJ, Langa DCJ, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, van der Westhuizen J and Yacoob J.

For the applicant:	W Trengove SC, A Cockrell and N Fourie, instructed by the State Attorney, Johannesburg.
For the respondent:	JG Cilliers and MMW Van Zyl, instructed by Adolf Malan and Vermeulen Inc.