THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 861/13

In the matter between:

HENDRIK FREDERICK DELPORT	**FIRST APPELLANT**
CHRISTOPHER ARTHUR ILSTON PICKARD	**SECOND APPELLANT**
PETRUS CASPARUS HORNE	**THIRD APPELLANT**
HENDRIK FOURIE	**FOURTH APPELLANT**
IOANNIS PAPOULIAS	**FIFTH APPELLANT**
MICHAEL HERMANUS KINNEAR	**SIXTH APPELLANT**
VICTOR WILLIAM ARLOW	**SEVENTH APPELLANT**
DEIDRE ARLOW	**EIGHTH APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Delport v The State* (861/13) [2014] ZASCA 197 (28 November 2014)

Coram: Cachalia, Leach, Theron and Majiedt JJA and Schoeman AJA

Heard: **26 November 2014**

Delivered: **28 November 2014**

Summary: Criminal proceedings – whether order of the high court (sitting as a court of appeal) remitting matter to a magistrate for trial to continue appealable – authority of prosecutor to prosecute challenged five years after commencement of trial – whether in the interests of justice for appeal to be entertained – no unusual circumstances – remittal order not appealable – whether Supreme Court of Appeal has jurisdiction to entertain appeal where leave is granted by high court on specific rather than general grounds.

ORDER

On appeal from: North Gauteng Division, Pretoria (Makgoba J and Van der Byl AJ sitting as court of appeal):

The following order is made:
'The appeal is struck from the roll.'

JUDGMENT

Cachalia JA (Leach, Theron and Majiedt JJA and Schoeman AJA concurring)

[1] After hearing the parties in this matter the appeal was struck from the roll on the ground that the order of the high court (sitting as a court of appeal) remitting the matter to a magistrate for the continuation of a criminal trial is not appealable. These are the reasons for the decision.

[2] The appellants were among 13 accused who were arraigned before a regional magistrate on multiple charges, including fraud and racketeering. The main allegation against them is that during the period May 1998 and March 2002 they defrauded the South African Revenue Service (SARS) of approximately R264 million.

[3] The accused first appeared in court on 2 June 2003. The trial commenced about thirteen months later, on 12 July 2004. Mr P A van Wyk SC of the Pretoria Bar informed the court that he would prosecute the case on behalf of the State and that Ms T Kannemeyer, an employee of SARS and also an advocate, would be assisting him. He handed in two documents signed by the Director of Public Prosecutions (DPP), without objection from the defence, indicating that they had been engaged in terms of ss 38(1) and (3) of the National Prosecuting Act 32 of 1998 (the NPA Act) to undertake the prosecution. The propriety of their appointments became an issue in the trial seven years later, and is an issue in this appeal.

[4] At the commencement of the trial all the accused pleaded not guilty to the charges. The trial ran for five years. After the testimony of many witnesses, the State closed its case. The accused applied to be discharged under s 174 of the Criminal Procedure Act 51 of 1977 (the CPA).

[5] On 10 December 2008 the magistrate granted the application for five of the accused, but refused to discharge the eight others. He also, *mero motu*, asked the parties to prepare written argument on the applicability of the principle enunciated in *Bonugli v Deputy National Director of Public Prosecutions*,[1] to the instant case. There the North Gauteng High Court had held that two advocates from the Johannesburg Bar were disqualified from conducting a prosecution on behalf of the National Prosecuting Authority (NPA) as the complainant – a bank – would be paying them. Furthermore, one the advocates, a senior counsel, had advised the bank on

[1] *Bonugli & another v Deputy National Director of Public Prosecutions & others* 2010 (2) SACR 134 (T).

the prospects for a criminal prosecution after the State had withdrawn charges. The case against the accused was reinstated at the bank's behest. At the same time there was civil litigation pending between the bank and a trust closely linked to the accused. These facts, in the learned judge's view, gave rise to a reasonable apprehension that the advocates would not act without fear, favour or prejudice,[2] and that the right of the accused to a fair trial would be infringed if the prosecution continued in these circumstances. Their appointments were thus set aside.

[6] On 1 April 2009, after hearing the parties' submissions on the applicability of *Bonugli* to the facts of this case, the magistrate found, as in *Bonugli*, that the appointments of both Mr van Wyk and Ms Kannemeyer gave rise to a reasonable perception that they would not conduct the prosecution fairly. This was because Mr van Wyk, said the magistrate, was being paid directly by SARS, the complainant, and not by the NPA, which meant that SARS was in effect his client. And in the case of Ms Kannemeyer, she had been in the employ of SARS for about ten years. The magistrate thus ordered that the matter be referred to the high court for special review the effect of which was to suspend the trial.

[7] On 14 January 2011 the high court (Van der Merwe DJP, Du Plessis J concurring) delivered its judgment. It found, without considering the merits, that there were no proper grounds for the magistrate to have referred the case for review before the conclusion of the trial. It accordingly remitted the matter for the trial to continue.

[8] But the trial was delayed further because the second and sixth appellants had terminated the services of their counsel and engaged new ones. On 7 November 2011, the second appellant filed an application to amend his earlier not guilty plea. He now sought to introduce a special plea, purportedly in terms of s 106(1)*(h)* of the CPA, challenging the prosecutors' title to prosecute the trial. Soon thereafter all his

[2] Ibid 144G-I.

co-accused, excluding the sixth appellant, grasped at the opportunity and joined the second appellant's application.

[9] After hearing argument the magistrate delivered his judgment on 20 March 2002 upholding the appellants' contentions. In doing so he made three rulings: The appellants, excluding appellant six, who was the only accused not to have joined the proceedings, were entitled to amend their pleas to enable them to challenge the authority of the prosecutors under s 106(1)*(h)* of the CPA after the State had closed its case; their special plea putting the title of the prosecutors in issue should be upheld, and consequently, their acquittal in terms of s 106(4) of the CPA had to follow.

[10] The State appealed the decision in terms of s 310 of the CPA, which permits it to appeal any question of law given in a lower court in favour of an accused. This time, appellant six, who was not party to the dispute over the title of the prosecutors, joined the other accused in opposing the appeal. The high court seems to have incorrectly laboured under the impression that he had also been party to this dispute and entertained his appeal along with the other appellants even though he apparently had no legal interest in the outcome of the appeal.

[11] There were six questions the high court identified the magistrate as having considered in arriving at his decision. These were:

(i) Whether an accused may at any stage during a criminal trial raise a plea in terms of s 106(1)*(h)* of the CPA even though s 106 in terms permits the plea to be raised when the accused pleads to the charge – in other words before the trial commences;

(ii) What legal consequences follow in the event of a court upholding such a plea in those circumstances;

(iii) What in law is to be understood by the expression ‘engage, under agreements in writing’ as it used in ss 38(1) and (3) of the NPA Act;

(iv) Whether a person appointed in terms of s 38 requires written authorisation in terms of s 20(5) to institute and conduct prosecutions;

(v) In the event of this question being answered affirmatively, whether, in addition, the authorisation must, in terms of s 20(6) specify the area of jurisdiction, the offences and the court or courts in which the powers are to be exercised; and

(vi) Whether a person appointed in terms of s 38 must also take the oath or make an affirmation in the terms prescribed s 32(2).

[12] The high court (Makgoba J and Van der Byl AJ) delivered its judgment on 13 June 2013. It found that the documents signed by the DPP and handed in by the State at the commencement of the trial indicating that the prosecutors had been engaged in terms of s 38 to conduct this prosecution substantially complied with the requirements of the NPA Act. This finding, it said, disposed of the appeal. It nevertheless considered the questions identified by the magistrate by way of *obiter dicta* and answered all of them in the State’s favour. In the result it again remitted the matter for the trial to continue.

[13] Not satisfied with this outcome, on 18 September 2013, the appellants applied to the high court for leave to appeal to this court against the remittal order. The application was considered by Makgoba and Kgomo JJ, who granted all the appellants, including appellant six, leave to appeal to this court specifically on the six questions mentioned above. The judgment granting leave to appeal makes no reference to its finding that the appointment of the prosecutors substantially complied with the NPA Act. I return to this question later when I consider whether, in light of this omission, this court has jurisdiction to entertain the appeal.

[14] After the parties, including appellant six, filed their written submissions in this court they were afforded an opportunity to submit further argument on whether the remittal order is appealable. They did so. Separate heads of argument were also filed on behalf of appellant six for the appeal to be upheld on basis of the decision in *Bonugli*, even though the high court had earlier refused to consider this issue when the matter was referred for special review.

[15] The appellants submit that the remittal order is appealable. This is because, they say, the dispute concerns the proper appointment of the two prosecutors in terms of the relevant provisions of the NPA Act, which was enacted pursuant to s 179(4) of the Constitution, to ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. The dispute therefore concerns the violation of their constitutional rights and ought to be appealable.

[16] In support of this contention the appellants rely, in the first instance, on a judgment of this court in *Phillips v SA Reserve Bank*,[3] where it held appealable an order of the high court that a party was liable for the wasted costs occasioned by a postponement. This was because the cause of the postponement, the high court held, was a party's failure to give proper notice in terms of rule 16A(1) of the Uniform Rules that he intended to raise a constitutional issue. The court said that even though the order was not definitive of the rights of the parties, nor dispositive of a substantial portion of the relief claimed, it was nevertheless appealable. This is because, the court reasoned, an incorrect order, which the order of the high court was, '. . . may well give rise to considerable inconvenience and prejudice and impede the attainment of justice in constitutional matters where arguments arise as to whether rule 16A(1) had been complied with . . .'.[4]

[3] *Phillips v SA Reserve Bank & others* 2013 (6) SA 450 (SCA).
[4] Ibid para 28.

[17] *Philips v Botha*,[5] a judgment of the high court, also supports their submission that the remittal order is appealable, say the appellants. That case concerned the standing of a private prosecutor to conduct a prosecution, which the Attorney-General had declined to prosecute. The crux of the dispute was whether the appellant had shown, as s 7(1)*(a)* of the CPA requires, a 'substantial and peculiar interest in the issue of the trial arising out of some injury' which he had suffered in consequence of an alleged fraud. An *obiter dictum* of the court, which the appellants rely upon said the following:

'. . . It seems to me that the failure to take objection by way of pleading to a charge does not prevent an accused from raising it thereafter. Absence of title in the prosecutor is fundamental to the proceedings, a jurisdictional void . . . since the statute only recognises and empowers persons who possess the specified attributes. Accordingly, if the magistrate was correct in his conclusion, his judgment was as effective as if it had been given pursuant to a plea to the private prosecutor's title. The proceedings are not a nullity when such a plea is upheld since s 106(4) provides that the accused is entitled to demand that he be acquitted, as the magistrate did.'[6]

[18] Arising from this statement the appellants contend that if there is such a 'jurisdictional void' in the title of the prosecutors, they should not be expected to suffer the inconvenience, delay and prejudice until the end of the trial and a possible appeal to correct the error.

[19] Before I consider these submissions it is necessary to review the law on the appealability of orders as they relate to uncompleted criminal proceedings. Under s 21(1) of the Supreme Court Act 59 of 1959, and since 23 August 2013 when it was replaced by s 16 of the Superior Courts Act, the courts have treated 'decisions' made by high courts in criminal proceedings as having the same meaning as that ascribed to a 'judgment or order' in civil proceedings.[7]

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[5] *Philips v Botha* 1995 (2) SACR 228 (W).
[6] Ibid 231H-232C.
[7] *S v Western Areas Ltd & others* 2005 (5) SA 214 (SCA) para 19.

[20] This court has applied a 'salutary general rule' in civil and criminal proceedings for many years that appeals are not entertained piecemeal.[8] Orders of the high courts have generally been held to be appealable only if they have three attributes. They must be final in effect, definitive of the rights of the parties and effectively dispose of a substantial part of the relief claimed in the main proceedings. This court has, however, increasingly been willing recently to apply these criteria flexibly and pragmatically directing itself to what is appropriate in a particular case rather than being hamstrung by the classification of the order. In this regard considerations of convenience, delay and prejudice all of which have a bearing on the interests of justice come into play.[9]

[21] In the context of criminal proceedings the courts have for many years set themselves firmly against the idea that a trial should be stopped for disputed points of law to be resolved by appellate courts only for the trial to resume thereafter. In *R v Adams & others*[10] Steyn CJ cited a statement of a provincial division going back to 1917, to support this view. It has much resonance in this case:

'The idea of a trial is that it should be as much as possible continuous, and that it should not be stopped. If this kind of procedure were to be allowed it would mean that a trial may become protracted, and may extend over a number of months. The magistrate would sit on one day and hear part of the evidence of a witness; then the hearing would have to be postponed till the opinion of the Supreme Court could be taken, perhaps a month or two later. Thereafter the trial would again be continued, after some months and immediately it is resumed objection might again be raised in connection with some evidence, with an application again to the Supreme Court, and again back to the magistrate. I think that would produce an intolerable condition of things.'[11]

[22] Those sentiments were confirmed in the constitutional era. In *S v Mhlungu*,[12] one of the questions the Constitutional Court had to consider was the referral of a

[8] *Wahlhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113 (A) at 120E.
[9] *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) paras 26-28.
[10] *R v Adams & others* 1959 (3) SA 753 (A) at 763C-D.
[11] *McComb v Assistant Resident Magistrate, Johannesburg and the Attorney-General* 1917 TPD 717 at 719.
[12] *S v Mhlungu & others* 1995 (3) SA 867 (CC) at 895D-E.

constitutional issue from a provincial division to the Constitutional Court under s 102(1) of the interim Constitution (Act 200 of 1993). The referral was required if the issue was decisive for the case and in the interests of justice to do so. This is what Kentridge AJ said:

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

[23] Section 35(3)*(d)* of the Constitution states emphatically that criminal trials must 'begin and conclude without unreasonable delay'. Implicit in this command is that appeals should not be entertained in stages before a trial has run its course. It is therefore, as Corbett JA said in *S v Stevens*,[13] in the interests of justice that finality should be reached in criminal cases and that they should not be allowed to drag on indefinitely.

[24] Legislative policy, pre-dating the Constitution, is also firmly against the idea that disputes concerning the irregularity or illegality of criminal proceedings before a high court may be appealed before the end of trial. Sections 317 and 318 of the CPA, in terms, permit an accused to appeal to this court only after conviction in a high court, not before. And s 319 makes provision for an appeal on a question of law on the trial in a high court only after conviction or acquittal.[14] It would, in my view, be incongruous to allow an accused, before conviction, to appeal to this court against a remittal order following an adverse finding against him in the high court (sitting as a court of appeal) on whether the proceedings in a lower court were conducted irregularly – which is the contention in this case – whereas an appeal, before conviction, would not be competent if this finding were made in trial proceedings in the high court.

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[13] *S v Stevens* 1983 (3) SA 649 (A) at 661D-E.
[14] *S v Western Areas Ltd & others* 2005 (5) SA 214 (SCA) para 18.

[25] However, even though judicial and legislative policy do not allow appeals that impede the continuation and completion of criminal trials, the courts have recognised that while the superior courts will be slow to exercise its review or appellate jurisdiction upon uncompleted criminal proceedings in the magistrates' courts, it does have the power to do so and will do so '. . . in rare cases where grave injustice might otherwise result or where justice might not by other means be attained . . . '.[15]

[26] It has further been accepted that a departure from the general rule shall be permitted also in proceedings in the high court 'where unusual circumstances called for such a procedure'.[16] In *S v Western Areas Ltd & others*[17] Howie P, writing for a unanimous court, also acknowledged that the general rule against piecemeal appeals may conflict with the interests of justice in a particular case.[18] He put it thus:

'It is surely not in the interests of justice to submit an accused person to the strain, expense and restrictions of a lengthy criminal trial if that can be avoided, in appropriate circumstances, by allowing an appeal to be pursued out of the ordinary sequence and so obviating the trial or substantially shortening it.'[19]

[27] To conclude this discussion on the appealability of legal questions – which include constitutional questions – arising from uncompleted criminal proceedings, the general rule, underpinned by s 35(3)*(d)* of the Constitution is against permitting piecemeal appeals. It is therefore in the interests of justice that criminal trials should commence and be completed without unreasonable delay and that appeals should not be entertained before the trial is completed. However, the interests of justice may also require – in unusual circumstances – a departure from the general rule. The general rule therefore requires a remittal order not to be appealable, unless unusual circumstances warrant this.

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[15] *Wahlhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113 (A) at 120A-C.
[16] *R v Adams & others* 1959 (3) SA 753 (A) at 763B-C; *S v Malinde & others* 1990 (1) SA 57 (A) at F-G.
[17] *S v Western Areas Ltd & others* 2005 (5) SA 214 (SCA).
[18] See *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* SA 2012 (4) SA 618 (CC) paras 47-53 where the Constitutional Court confirmed this approach.
[19] Ibid *Western Areas* (supra) fn 17 para 27.

[28] What amounts to unusual circumstances obviously depends on the facts. In this regard considerations of convenience, delay, prejudice must all be weighed to decide whether the advantages of entertaining the appeal outweigh the disadvantages. This analysis does not require the court to give a decision on the merits. But it must consider the efficacy of the points raised to assess whether there is a reasonable likelihood that the advantages will materialise.[20]

[29] I mentioned earlier that Mr van Wyk handed in two documents signed by the DPP indicating that he and Ms Kannemeyer had been engaged in terms of ss 38 of the NPA Act to conduct the prosecution in this matter. The appellants' case is that their appointments were invalid because they had not entered into 'agreements in writing' as contemplated in ss 38(1) and (3)[21] and obtained written authorisation in terms of ss 20(5) and (6).[22] In addition they ought to have taken an oath or affirmation of impartiality as envisaged in s 32, which they also had not done. Their appointments, they argue, are therefore invalid and the appellants were entitled to amend their pleas in terms of s 106 (1)*(h)*[23] and to be acquitted under s 106(4) of the CPA.

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[20] *S v Malinde & others* 1990 (1) SA 57 (A) at 68C-F.

[21] '**Engagement of persons to perform services in specific cases**
(1) The *National Director* may in consultation with the *Minister*, and a *Deputy National Director* or a *Director* may, in consultation with the *Minister* and the *National Director*, on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases.
(2) . . .
(3) Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the State-
(a) the *National Director*; or
(b) a *Deputy National Director* or a Director, in consultation with the National Director,
may, on behalf of the State, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting the *Minister* as contemplated in that subsection.'

[22] '**Power to institute and conduct criminal proceedings**
(5) Any *prosecutor* shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the *National Director*, or by a person designated by the *National Director*.
(6) A written authorisation referred to in subsection (5) shall set out-
(a) the area of jurisdiction;
(b) the offences; and
(c) the court or courts,
in respect of which such powers may be exercised.'

[23] '**Pleas**
(1) When an accused pleads to a charge he may plead-
. . .

[30] I turn to consider whether the circumstances of the present case warrant a departure from the rule. I shall assume in favour of the appellants – without deciding the point – that the appointment of the prosecutors was irregular for want of strict compliance with the relevant provisions of the NPA Act. I shall also assume that the appellants were entitled to invoke s 106 (1)*(h)* midway through the trial although this is by no means clear.

[31] As I have mentioned the appellants rely on *Phillips v Botha*[24] to support its contention that the absence of the prosecutor's title to prosecute is so fundamental to the conduct of criminal proceedings that it results in a jurisdictional void, which the appellants should not be required to endure until the end of the trial. It is, however, important to bear in mind that, that case was concerned with the right or standing of a prosecutor to conduct a private prosecution in accordance with s 7 of the CPA. To decide that question the court had to consider whether the prosecutor had a 'substantial and peculiar interest in the issue of the trial arising out of some injury'[25] which the complainant had suffered in consequence of an alleged fraud.

[32] Properly understood the dispute in this case, however, is not over the prosecutors' standing to prosecute but about whether they were properly appointed and authorised to prosecute. And even if I accept for present purposes that s 106(1)*(h)* may be invoked not only where the standing of a prosecutor is in issue[26] but also where it is asserted that the appointment is irregular, it does not follow that an accused is entitled to demand an acquittal in terms of s 106(4), as was suggested in *Philips v Botha*, and relied upon by the magistrate in this case.

[33] Section 106(4) provides that an accused who has pleaded to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on whose behalf a plea of not guilty is entered by the court, shall unless provided for

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(h) that the prosecutor has no title to prosecute.'
[24] *Phillips v Botha* (supra) fn 5.
[25] Section 7(1)*(a)* of the CPA.
[26] *Ndluli v Wilken NO & andere* 1991 (1) SA 297 (A) at 306C-D.

differently in this Act or any other law, be entitled to demand that he be acquitted or convicted. The section operates in favour of an accused who has pleaded to a charge.

[34] In *S v Sibuyi*[27] this court said that s 106(4) read with s 84, which provides for the particularity of charges, entitles an accused to demand an acquittal or conviction on that with which he has been charged, and not an entirely different offence to which he might have admitted to during the course of the trial, even if similar to that with which he was charged. In my view the section also fulfils another purpose: to prevent trial proceedings from hanging over the head of an accused indefinitely after he has pleaded. But I do not think it can be invoked in the circumstances of this case. For if this were the case, it would cause immense prejudice to the prosecution and allow an unscrupulous accused to use it for purposes other than those for which it was intended.

[35] Before us counsel for the appellants contended that even if the objection to the prosecutors' 'title' on the ground of standing was bad, the fact that their appointments were irregular nullified the proceedings. If this contention were to be upheld it would mean that this trial would have to commence de novo. This submission is preposterous. The question in regard to irregularities is always whether they have resulted in a failure of justice.[28] Bearing in mind that irregularities do not in and of themselves lead to a failure of justice, there is little likelihood of this court, or any other, holding that they did in these circumstances.

[36] The appellants do not claim that they have suffered any trial-related prejudice by the irregular appointment of the prosecutors. Whatever other prejudice they may now suffer in conducting their defences in the event of an adverse decision against them on the appealability of the remittal order would have been of their own

[27] *S v Sibuyi* 1993 (1) SACR 235 (A) at 248H-J.
[28] *Cf Williams & another v Janse van Rensburg & others (2)* 1989 (4) SA 680 (C) at 683D-684B.

making.[29] They received the documents indicating that the prosecutors had been 'engaged' in terms of ss 38(1) and (3) of the NPA to undertake this assignment, before the trial started. They did not object to the appointments then or require the prosecutors to prove their authority. They took the point that the prosecutors were not properly appointed seven years into their trial and after they had unsuccessfully applied to be discharged at the end of the State's case. The real prejudice occasioned by all these delays has been to the State.

[37] To recap: The trial commenced in July 2004. In April 2009 the magistrate referred the case to the high court for review. In January 2011 the high court remitted the case to the trial court. In March 2012 the magistrate acquitted all, except one of the accused. The matter went back to the high court after the State appealed – as it was obliged to – the magistrate's legal findings on the prosecutors' titles to prosecute. On this occasion appellant six, who was not party to the legal challenge against the prosecutors, opportunistically joined in opposing the State's appeal. In June 2013 the high court, sitting as a court of appeal, again remitted the matter to the trial court for finalisation. This time all the accused, including appellant six, appealed and were granted leave to this court, yet again delaying the trial.

[38] Appellant six, has now withdrawn his appeal to this court in light of its recent ruling in *Porrit v NDPP*[30] which implicitly overrules the high court's ruling in *Bonugli* and removes any legal basis for challenging the prosecutors' title on the ground of perceived bias because of their association with SARS. So the resumption of his trial must await the fate of the appeal of his co-accused, who have persisted with their appeal.

[39] For the courts to allow a piecemeal appeal in the circumstances that have arisen in this case would, to quote from what the courts said almost one hundred

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[29] *Cf Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7D-I.
[30] *Porrit & another v The NDPP & others* (978/13) [2014] ZACSA 168 (21 October 2014).

years ago, 'produce an intolerable condition of things'.[31] The appellants have not been able to persuade me that there is anything unusual that obliges this court to entertain this appeal. On the contrary what is unusual is for a criminal trial of this nature to take longer than a decade to be completed. Considerations of convenience, delay and prejudice to both the State and the appellants point heavily to it being contrary to the interests of justice and its proper administration to countenance this appeal.

[40] But there is another reason why the appeal is not properly before this court. This is because the high court granted leave on very limited grounds, which did not include its principal finding – and which is the *ratio decidendi* of the judgment – that the appointment of the prosecutors substantially complied with s 38 of the NPA. This means that this court has no jurisdiction to consider the appeal.

[41] In this regard it is well established that when a high court grants leave to appeal to this court it may limit the grounds of appeal to be addressed or it may grant leave generally so that all the relevant issues might be canvassed.[32] Where the high court has limited the grounds of appeal, as it did here, this court has no jurisdiction to expand the grounds of appeal. If an appellant is dissatisfied with a high court decision to limit the grounds of appeal his remedy is to petition this court to expand the grounds of appeal, not to appeal directly to this court.

[42] Counsel for the appellants contended that when read with the notice of appeal and the judgment of the high court, the third ground upon which leave was granted – ie what in law is to be understood by the expression 'engage, under agreements in writing' as it is used in ss 38(1) and (3) of the NPA Act – is broad enough to include the finding that the National Prosecuting Authority had substantially complied with the section in the appointment of the prosecutors. I cannot agree with this

[31] See fn 11 above.
[32] *S v Sikosana* 1980 (4) SA 559 (A) at 563A-C.

submission. This ground relates only to the meaning of the section, and is not directed at the court's finding.

[43] It may be that the learned judges who considered the application for leave to appeal in error omitted to include the issue of whether there had been substantial compliance with the s 38 of NPA Act. If it was an error the appellants ought to have approached the high court to correct it. And if that court had declined to do so, they could have applied to this court to expand the grounds of appeal. There is in any event no reasonable likelihood of the appellants succeeding in disturbing the high court's finding that there was substantial compliance with s 38 of the NPA Act.[33]

[44] For all these reasons the appeal was struck from the roll.

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A CACHALIA

JUDGE OF APPEAL

[33] Cf *S v Safatsa* 1988 (1) SA 868 (A) at 877B-G.

APPEARANCES

For 1st – 5th, 7th and 8th Appellants:	B Pretorius Instructed by: Thys Cronje Inc, Menlo Park Van der Merwe & Sorour, Bloemfontein
For Respondent:	L G Nkosi-Thomas SC (with her L A Friester-Sampson and P J Louw) Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein