

REPORTABLE



**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case No: A283/13

In the matter between:

JOHANNES ERASMUS VAN STADEN

First Appellant

MARC SCHOEMAN

Second Appellant

GARY WYBO NEWMARK

Third Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED: TUESDAY, 11 MARCH 2014

FOURIE, J:

[1] The three appellants and their co-accused are charged in the Western Cape High Court under case number CC15/2010 with racketeering, money laundering, fraud and forgery. The indictment relating to the charges brought

against them, was served on the appellants and their co-accused when they appeared in the magistrate's court on 15 December 2009. The indictment is in Afrikaans.

[2] The matter was subsequently referred for trial in the Western Cape Division, Cape Town. In accordance with the practice in this Division, appellants then attended pre-trial conferences at which procedural and administrative matters are attended to, prior to the commencement of a criminal trial. At a pre-trial conference held on 10 May 2010, first appellant applied for the indictment to be translated into English. Hlophe JP, who presided at the pre-trial conference, refused the application. At a subsequent pre-trial conference held on 11 October 2010, third appellant also applied for the indictment to be translated into English. Similarly, the application was refused by Hlophe JP.

[3] During February 2012, the appellants applied for leave to appeal to a Full Court of this Division against the decisions of Hlophe JP refusing the applications for the indictment to be translated into English. The learned Judge President granted the applications for leave to appeal. It appears that, when the

applications for leave to appeal were argued, the issue as to the appealability of a decision of this nature was not canvassed.

[4] Prior to the hearing of the appeal, this court directed that the jurisdictional issue as to the appealability of the decisions refusing the translation of the indictment, be determined first. It should be emphasized that the mere fact that leave to appeal was granted, does not mean that the decisions of Hlophe JP, are therefore appealable. The jurisdictional issue as to appealability, has to be decided by this court as the court of appeal.

[5] In determining this jurisdictional issue, it is necessary to firstly determine which matters in criminal proceedings are appealable. As pointed out by Du Toit *et al* in Commentary on the Criminal Procedure Act, at 31-11, in order for a judicial decision to be appealable it has to be a judgment or order. The learned authors state that, generally speaking, the essential qualities of a judgment or order are the following:

- (i) It has to be final in effect with a final meaning unalterable by the court whose judgment or order it was.
- (ii) It has to be definitive of the rights of the parties.

(iii) It has to be dispositive of at least a substantial portion of the relief claimed in the main proceedings.

See: *Zweni v Minister of Law and Order* 1993(1) SA 523 (A) at 532I-533B; *S v Western Areas Ltd and Others* 2005 (1) SACR 441 (SCA) at 451 (para 20).

[6] In the recent decision of *S v Duma* 2012 (2) SACR 585 (KZP) Ndlovu J (with Lopes J concurring), dealt as follows with the finality requirement of a judgment or order, at 589 (para 8):

“The general rule is that, once a court has pronounced a final judgment or order in a given matter, the court has itself no authority to correct, alter or supplement that judgment or order. In that respect the court had become functus officio, in that its jurisdiction in the matter has been fully and finally exercised and, therefore, its authority over the subject – matter has ceased. However, not every decision which a court makes constitutes a ‘judgment or order’ which is appealable. In certain circumstances the court’s decision would only constitute a ‘ruling,’ which was merely a direction against which there was no appeal unless the decision disposed of a part of the relief claimed.”

I am in respectful agreement with this reasoning.

See also *Firestone SA (Pty) Ltd v Genticuro AG* 1977 (4) SA 298(A) at 306F-G; *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A).

[7] As pointed out in *Duma* (at para 10), it was reiterated in *Van Heerden v De Kock NO & 'n Ander* 1979 (3) SA 315 (E) at 319 D, that, in criminal proceedings, a presiding officer is not *functus officio* until after conviction, and only becomes so at the point when the accused is sentenced. This principle brings one to the relevant provision of the Criminal Procedure Act 51 of 1977 (“the CPA”), namely section 316(1)(a), upon which the State relies for the submission that the decisions of Hlophe JP are not appealable.

[8] Section 316(1)(a) of the CPA reads as follows:

“Subject to section 84 of the Child Justice Act, 2008, any accused convicted of any offence by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order.”

[9] When this subsection is read with the provisions of sections 316B, 318 and 319 of the CPA, it is clear that, absent a conviction, the CPA does not afford an accused a right of appeal. A distinction is drawn in the case of bail proceedings, where an accused is afforded the right to appeal to a superior court

with regard to the refusal of bail and the conditions on which an accused was granted bail. See sections 65 and 65A of the CPA.

[10] The State is no doubt correct in its submission that the proceedings before Hlophe JP, were criminal proceedings, being part of a criminal pre-trial conference. It therefore follows that the provisions of section 20 of the Supreme Court Act No. 59 of 1959, which deal with appeals in civil proceedings, do not assist the appellants. The State therefore submits that, as the appellants have not yet been convicted and sentenced, they have no right of appeal against the decisions made by Hlophe JP at the relevant two pre-trial conferences.

[11] It seems to me that the decisions made by Hlophe JP at the pre-trial conferences, that the appellants are not to be provided with an English version of the indictment, cannot be regarded as final judgments or orders which are appealable. It should be borne in mind that Hlophe JP is not seized with the trial of this matter. He was merely presiding at a pre-trial conference held to facilitate the smooth running of the criminal trial which would take place some time in the future. What the learned Judge President did, was to give a direction or ruling that the appellants would not to be provided with an English version of

the indictment. In my view, this ruling is capable of reconsideration by a judge presiding at any subsequent pre-trial conference, as well as the judge who would be presiding at the trial. In that sense, the court *a quo*'s authority over this issue has not ceased and the decisions of Hlophe JP are therefore not final in law. Nor do the rulings dispose of any part of the issues to be decided at the trial. I therefore conclude that the decisions merely embodied directions or rulings against which no appeal lies.

[12] I should also mention that, in my view, the decision in *S v Western Areas Ltd, supra*, does not detract from the conclusion that I have reached in this matter. In that case the Supreme Court of Appeal held that, by virtue of the provisions of section 39(2) of the Constitution, a judicial pronouncement in criminal proceedings may be appealable prior to conviction, if the interests of justice so demand. However, it is clear from the judgment that it was common cause that the finding of the court *a quo* in that instance (rejecting an objection to the charge sheet) was appealable and the only question was when to appeal.

[13] In *Broome v Director of Public Prosecutions, Western Cape, and Others; Wiggins & Another v Acting Magistrate Regional Magistrate, Cape Town, &*

Others, 2008 (1) SACR 178 (C), the court held, on the strength of *S v Western Areas Ltd & Others*, supra, as follows at para 41:

“Section 39 (2) of the Constitution therefore enjoins this court and imposes an obligation to construe that a judicial pronouncement in any criminal proceedings may be subject to an appeal, even before plea, where the interests of justice so requires.”

[14] It is clear from the latter judgment, that, as in the *Western Areas Ltd* – case, the issue was not whether the ruling appealed against was appealable, but when such an appeal should be brought. This is clear from para 42 of the judgment where the court put it as follow:

“I consider for the reasons that appear from the body of this judgment, that this court should entertain the challenge to the acting regional magistrate’s decision now, rather than at the end of the criminal trial.”

[15] In the instant matter the question is not when an appeal against the decisions of Hlophe JP would lie, but whether the decisions are appealable. The decisions of Hlophe JP were, for the reasons already furnished, mere interlocutory rulings and therefore not subject to an appeal. I should add that, in the *Western Areas Ltd* – case, it was stressed that there are no constitutional

imperatives for declaring orders of this nature appealable. It was put as follows at para 12:

“...no reason suggests itself that the framers of the Constitution would have wanted to render decisions such as rulings on evidence or interlocutory procedure appealable.”

[16] This conclusion does not mean that the appellants are without a remedy. If they are able to show that their constitutional rights have been infringed by the refusal to provide them with an English version of the indictment, they may, apart from renewing their applications, consider seeking a declaratory order in terms of section 19(1)(a)(ii) of the Supreme Court Act 19 of 1959 and/or section 38 of the Constitution, together with appropriate ancillary relief. I wish to emphasize that I do not express any view on whether or not appellants would be entitled to such relief.

[17] In the result I propose that the appeal be dismissed.

PB Fourie J

I agree.

E Baartman J

I agree and it is so ordered.

JHM Traverso DJP