THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 978/2013

In the matters between:

GARY PATRICK PORRITT	**First Appellant**
SUSAN HILARY BENNETT	**Second Appellant**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**First Respondent**
THE DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**Second Respondent**
ETIENNE MELLETT COETZEE	**Third Respondent**
JAN MAATJAN FERREIRA	**Fourth Respondent**
GLYNNIS BREYTENBACH	**Fifth Respondent**

STEPHANUS CHRISTIAAN JORDAAN **Sixth Respondent**

THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE **Seventh Respondent**

DEON VICTOR BOSHOFF **Eight Respondent**

MARTIN VAN DER MERWE **Ninth Respondent**

DEON KOEKEMOER **Tenth Respondent**

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Eleventh Respondent**

THE MINISTER OF FINANCE **Twelfth Respondent**

Neutral citation: *Porritt & another v The NDPP & others* (978/13) [2014] ZASCA 168 (21 October 2014)

Coram: Mpati P; Brand; Tshiqi; Saldulker JJA; and Fourie AJA

Heard: **11 September 2014**

Delivered: **21 October 2014**

Summary: Plea in terms of S 106(1)(*h*) of Criminal Procedure Act 51 of 1977 (CPA) – relating to title of prosecutor. Removal of prosecutor – apprehension of bias not founded on s 106(1)(*h*) but on s 35(3) of Constitution – roles of prosecutor and magistrate cannot be equated – removal of one of two prosecutors does not entitle accused to demand acquittal in terms of s106(4) – not axiomatic that perception of bias held against prosecutor will lead to accused not having fair trial – s 319(1), read with s 322(1) of the CPA intended to allow state right of appeal on question of law

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Mailula J sitting as court of first instance):

1 The appeal is dismissed and each party is ordered to pay its own costs.

2 The first question of law reserved in terms of s 319 of Act 51 of 1977 is answered in favour of the state.

2.1 The order of the high court for the removal of Advocates Coetzee and Ferreira is set aside and substituted with the following:

'The application by the appellants for the removal of Advocates Coetzee and Ferreira is dismissed'

2.2 The matter is remitted to the court below for it to proceed with the criminal trial.

JUDGMENT

Tshiqi JA (Mpati P, Brand, Saldulker JJA and Fourie AJA concurring):

[1] The issues in this appeal arise as a result of an indictment served on the appellants in 2004. The appellants were arrested in December 2002 and March 2003 respectively. They appeared before the South Gauteng High Court (Mailula J) on 5 March 2012, facing more than 3000 counts involving contraventions of the Income Tax Act[1], the Companies Act[2] and the Stock Exchange Control Act,[3] as well as racketeering and fraud. At the commencement of the trial the appellants tendered a plea in terms of s 106(1)(*h*) of the Criminal Procedure Act 51 of 1977 (the CPA), alleging that the prosecution team, consisting of Advocates Etienne Coetzee SC (Coetzee) and Jan Ferreira (Ferreira), had no title to prosecute. At the time of their appointment to conduct the prosecution against the appellants Ferreira was a senior Deputy Director of Public Prosecutions at the Specialised Commercial Crime Unit (SCCU); (formerly the Scorpions and now the Hawks) in Pretoria, while Coetzee is an advocate in private practice at the Pretoria Bar.

[2] The first ground on which Coetzee's title to prosecute was challenged was an alleged lack of compliance with the provisions of s 38(1) of the National Prosecuting Authority Act No 32 of 1998 (the NPA Act). In terms of s 38(1) the National Director may, in consultation with the Minister of Justice and Constitutional Development, engage, under agreements in writing, suitably qualified and experienced persons to perform services in specific cases. No consultation is necessary if the appointment of such persons has no financial implications for the State (see s 38(3)). The appellants alleged that such consultation with the Minister did not take place. This assertion was based on the fact that Coetzee is in private practice and had to be paid for his

[1] 58 of 1962.
[2] 61 of 1973.
[3] 1 of 1985.

services, thus creating a financial burden for the state. The second ground of objection proffered was that the appointment of both prosecutors was in breach of the appellants' fair trial rights as encompassed in s 35(3) of the Constitution, read with s 179(4). Moreover, it was alleged that the appointment of the prosecutors was in conflict with the provisions of s 32(1) of the NPA Act, which provide, inter alia, that a member of the prosecuting authority shall serve impartially and carry out his or her duties and functions without fear, favour or prejudice. The complaint against Ferreira was that he had assisted in the drafting of an affidavit in support of an application for the liquidation of a company in which the first appellant was involved. In addition, it was alleged that Ferreira was tainted because he had supported the appointment of Coetzee.

[3] The history of Coetzee's appointment may be summarised as follows: He was briefed in 2004 to assist Ferreira because of the magnitude of the prosecution's case against the appellants and Ferreira's workload at the SCCU. Coetzee was chosen because he had previously been involved in other consultations, investigations and in respect of certain criminal and civil litigation which concerned the appellants in their personal capacities as well as entities to which they are linked. In all instances he was either representing or assisting the South African Revenue Service (SARS) or the NPA. Because of this previous exposure, it was felt that he would add value to the quality of the prosecution against the appellants. Although reliance was placed on his legal expertise and previous exposure as aforementioned, the final decision on the action to be taken in each instance was always that of the NPA. And in circumstances where he was involved in plea and sentence agreements, these were finalised subject to the approval of the various magistrates who presided in those matters.

[4] Mailula J dismissed the plea on the first ground and upheld it on the second ground. On the first ground the learned judge held that there had been proper consultation as required by the NPA Act; that there were no irregularities in Coetzee's appointment and that the appointment was therefore valid. The appellants do not take issue with the court's conclusion in that regard. When dealing with the second ground of objection the court criticised Coetzee's prior involvement with the cases involving the appellants and, as against Ferreira, it reasoned as follows:

'There is no reasonable explanation before the court why as a prosecutor employed with the NPA, he [Ferreira] would be involved in drafting an affidavit in respect of a civil matter. The affidavit is clearly a response to the first applicant's [Porritt's] allegations in the liquidation application…Having regard to the contents of the affidavit (directed at opposing or contradicting the first applicant's affidavit) as well as his role in the appointment of the third respondent (in light of SARS's proposal) his conducts reasonably create a perception of bias/ partiality.'

For those reasons the court held that a proper basis had been established for the objection (on the second ground) and ordered the removal, from the prosecution, of both Coetzee and Ferreira.

[5] Although the court upheld the objection on the second ground, it nonetheless rejected the contention by the appellants that they were also entitled to an acquittal in terms of s 106(4) of the CPA.

The relevant parts of s106 read:

'(1) When an accused pleads to a charge he may plead –

…

(*h*) that the prosecutor has no title to prosecute.

…

(4) An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.

With regard to the appellants' contention that they were entitled to an acquittal the learned judge said:

'The order for the recusal of the prosecutors is not based on any impropriety on their part, but on the perception of lack of impartiality… Further the decision is not based on the merits of the case… The present case is in my view akin to the recusal of a presiding officer. The proceedings in such a case (recusal of a presiding officer) are a nullity, and the accused would not be entitled to demand either "conviction" or "acquittal"….

It should be borne in mind that the plea of lack of title to prosecute relates to the individual/person who has been appointed prosecutor in the particular case… I am of the view that entertainment of such a plea is not dispositive of the matter. It is similar to interlocutory proceedings in civil litigation… The prosecuting authority should in the circumstances, be allowed an opportunity to appoint another prosecutor and to proceed with the criminal trial, in the event it so decided.'

Having ordered the removal of the two prosecutors the court added that 'in the event the National Prosecuting Authority decides to proceed with the prosecution of the applicants, a different Prosecutor(s) should be delegated, appointed or assigned, as the case may be'.

[6] It is against the refusal by the court below to acquit the appellants that they now appeal to this court, leave having been granted by the court below. The NDPP, on the other hand, successfully applied for the reservation of a point of law in terms of s 319 of the CPA. The court below formulated the point of law reserved for this court as follows:

(a) What is the legal test to be applied, either in terms of s 106(1)(*h*) of the CPA, or the common law, for the removal of a prosecutor; and

(b) was this test correctly applied by the trial court on the facts as found by the court?

[7] It is convenient to deal with the appellants' appeal first. The appellants contended that once the court below upheld their plea for the removal of the prosecutors on the basis that their retention as prosecutors in the case would infringe on their (the appellants') fair trial rights entrenched in s 35(3) of the Constitution, it should have acquitted them in terms of s 106(4) of the CPA. The contention was that once a plea tendered in terms of s 106(1)(*h*) is successful, an accused person is, without more, entitled to an acquittal. The legislature, so the argument went, viewed the title to prosecute as being fundamental to the validity of a trial and that if a plea in terms of s 106(1)(*h*) is upheld, the accused has a right to demand an acquittal. The NDPP, on the other hand, contended that once the plea challenging the title of a prosecutor was dismissed, and no other plea, such as a plea of not guilty had been tendered, the appellants cannot rely on s 106(4) to demand an acquittal.

[8] The appellants were unsuccessful in their invocation of the provisions of s 106(1)(*h*) to challenge the title of the prosecutors. The decision of the court below to remove the prosecutors was not based on their lack of title but on a different basis,

namely, that there was an apprehension on the part of the appellants that the two prosecutors were biased. But counsel for the appellants submitted, in this court, that where a prosecutor is found to be biased, his or her removal may be said to be based on his or her lack of title to prosecute. The appellants were therefore entitled to demand an acquittal in terms of s 106(4), so the argument proceeded. In my view, that cannot be so. It was not necessary for the appellants to place reliance on s 106(1)(*h*) for their application for the removal of the prosecutors on the basis that they were biased. The appellants did not have to tender a plea in order to place that objection before the court. Indeed, counsel for the appellants advised from the Bar that the application for the removal of the prosecutors on the ground of an apprehension of bias was separate from the s 106(1)(*h*) plea. But the two issues were argued together by agreement between the two sets of counsel. I conclude that the removal of the prosecutors was not grounded on a lack of title in terms of s 106(1)(*h*) of the CPA and the appellants were therefore not entitled to demand an acquittal in terms of s 106(4) of the CPA.

[9] It is in any event doubtful whether a plea in terms of section 106(1)(*h*), where an accused has not pleaded on the merits of the matter, entitles him or her to an acquittal. However, I refrain from expressing a firm opinion on the issue.

The questions of law:

[10] Counsel for the NDPP, Ms Nkosi-Thomas, elaborating on the first question of law reserved, submitted that the question that could now be posed was whether the role of prosecutors in a criminal trial should be equated with the role of magistrates? This question was prompted by the test applied by the court below in considering whether the prosecutors should be removed from the appellants'

criminal case. The test applied by the court is that applied when the recusal of a judicial officer is sought on grounds of an apprehension of bias, which was formulated as follows by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) para 48 (*SARFU*):

‘ 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.’

[11] There is a fundamental difference between the role and functions of a prosecutor as opposed to those of a magistrate or a judge. The judiciary is held to the highest standards of independence and impartiality because they are the decision-makers in an adversarial judicial system. Prosecutors neither make the final decision on whether to acquit or convict, nor on whether evidence is admissible or not. Their function is to place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime. Their role excludes any notion of winning or losing. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.[4]

[12] The United Nations Guidelines on the Role of Prosecutors requires prosecutors to perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system (see paragraph 12 thereof).

[4] See *Bourcher v The Queen* [1955] SCR 16 (SCC) 23-24.

Further (in terms of paragraph 13), prosecutors are enjoined, in the performance of their duties, to:

"(a) carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(b) protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect".

[13] The principles that govern prosecutorial conduct must therefore be seen and understood in the context of the role that prosecutors play. In adversarial criminal proceedings such as ours, it is inevitable that prosecutors will be partisan. They conduct the case for one of the two sides in a trial, namely the State, as representing the citizenry. They often carry out their prosecutorial functions vigorously and zealously. A prosecutor's role in a criminal prosecution therefore makes it inevitable that he or she would be perceived to be biased.[5] Prosecutors usually approach criminal prosecutions with a view, sometimes a very strong view, that accused persons are guilty. That is permissible, subject to the caveat that they must not prosecute in single-minded pursuit of a conviction. They have a duty towards the accused to ensure that an innocent person is not convicted. In this regard, they have a duty to disclose, in certain circumstances, facts harmful to their own case.[6] In *S v Van Der Westhuizen*[7] this court made the following observation:

'In our practice it is not the function of a prosecutor disinterestedly to place a hotchpotch of contradictory evidence before a court, and then leave the court to make of it what it wills. On

[5] *S v Du Toit* 2004 (1) SACR 47 (T) at 65.
[6] *S v Riekert* 1954 (4) SA 254 (SWA) at 261F, referring to *S v Steyn* 1954 (1) SA 324 (A) at 337A-C.
[7] *S v Van Der Westhuizen* 2011 (2) SACR 26 (SCA) para 11.

the contrary, it is the obligation of a prosecutor firmly, but fairly and dispassionately, to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and other defence witnesses, with a view to discrediting such evidence, for the very purpose of obtaining a conviction. That is the essence of a prosecutor's function in an adversarial system and it is not peculiar to South Africa.'

[14] The protection of an accused person, therefore, lies not in a general standard of independence and impartiality required of all prosecutors, but in the right to a fair trial entrenched in s 35(3) of the Constitution. That right was described in *S v Shaik*[8] in these terms:

'The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one - way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires "fairness to the public as represented by the State. 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."'

[15] It is to be noted that our law recognises a wide range of other types of prosecutors. In terms of s 22(8) of the NPA Act certain state officials are authorised to prosecute. Section 8 of the CPA makes provision for entities or persons 'upon whom the right to prosecute in respect of any offence is expressly conferred by law', to 'institute and conduct a prosecution in respect of such offence' (s 8(1)). An example of one of those entities is a Municipality which, if it institutes a prosecution, is entitled to all the fines recovered pursuant to the prosecution.[9] It accordingly has a

[8] *S v Shaik*[8] 2008 (2) SA 208 CC para 43.
[9] Section 24(2) of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972; s 25(2) of the Hazardous Substances Act 15 of 1973 and s 20(8) of the Health Act 63 of 1977.

direct financial interest in the outcome of the prosecution. Can it be said that simply because the Municipality instituted a prosecution and benefited from the fines the individual prosecuted did not get a fair trial? I think not. In *Marshall v Jerrico Inc*[10] the Employment Standards Administration of the Department of Labor (ESA) administered the prohibition of child labour under the Fair Labor Standards Act. Under s 16(*e*) of that Act the penalties collected for the unlawful employment of child labour were paid over to the ESA to reimburse their costs of the administration of the prohibition. The question was whether an ESA prosecutor was disqualified from prosecution because his office had a financial interest in the outcome of the case. The court unanimously held that he was not disqualified because prosecutors 'need not be entirely neutral and detached'.[11]

[16] Private prosecutions are permitted in terms of s 7 of the CPA. In those instances the prosecutor would have a direct and substantial interest in the case and might even be the complainant. That right was described by Lord Wilberforce in *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) 477 as a' valuable constitutional safeguard'. The English Court of Appeal, in *R (on the application of Haase) v Independent Adjudicator* [2008] EWCA Civ 1089 para 24, held that the right to a fair and public hearing by an independent and impartial tribunal did not include a right to an independent and impartial prosecutor, inter alia, because such a right would be incompatible with prosecutions by statutory and private prosecutors.

[17] But this does not mean that a prosecutor can never be disqualified on grounds of bias or apprehension of bias. Where his or her bias affects the accused's right to a

[10] *Marshall v Jerrico Inc*[10] 446 US 238 (1980).
[11] At 248

fair trial, a prosecutor may well be disqualified. In *Smyth v Ushewokunze*[12] Mr Smyth ran several youth camps in Zimbabwe. He was charged with culpable homicide as a result of the drowning of a boy at one of the camps and with five counts of *crimen injuria* arising from his alleged molestation of some of the boys at the camp. The prosecutor was the brother of a boy who had attended both camps and was a potential state witness. He conducted the prosecution in a manner which was manifestly over – zealous, vindictive and at times patently dishonest in that he deliberately misled the court. The court removed him from the case, holding that the facts:

'Instil a belief that if the case were to remain in his hands there is, at the very least, a real risk that he will not conduct the trial with due regard to the basic rights and dignity of the applicant.'[13]

It concluded that there was 'an inherent danger of unfairness to the applicant attendant upon the first respondent prosecuting at the trial'[14] and accordingly held that Mr Smyth had shown that his right to a fair trial 'is in jeopardy if the first respondent proceeds as the prosecutor in this matter'.[15]

[18] In the present matter the allegations of bias against Coetzee were based largely on the fact that his appointment had been proposed by SARS; that his fees were paid by SARS and that he had previously represented SARS in investigations conducted and litigation contemplated or instituted against the appellants. As has been mentioned above, the objection against Ferreira was based mainly on his involvement in the drafting of an affidavit in the process of the liquidation of one of

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[12] *Smyth v Ushewokunze & another* 1998 (3) SA 1125 (ZS) at 1132A to 1134B.
[13] At 1132A
[14] At 1134B
[15] At 1134J

the companies in which the first appellant had an interest as well as his support for SARS's proposal regarding Coetzee's appointment. In *Director of Public Prosecutions, Western Cape v Killian*[16] a trial prosecutor had fallen ill and was replaced with another prosecutor, who had earlier interrogated the accused during an enquiry held in terms of s 5(6) of the Investigation of Serious Economic Offences Act 177 of 1991. After his conviction the accused launched a review application, contending that his trial had been unfair. The crux of his complaint was that the prosecutor had played the role of an investigator and later acted as prosecutor. This court dealt with the issue in this way:

'The question remains whether the prosecutor's dual role in this case created a substantive unfairness *per se*. Neither precedent nor principle persuades me that it did. Whether fulfilment of that dual role does involve or bring about substantive unfairness in an ensuing criminal trial will be a matter to be decided on the facts of each case by the trial court. Unfairness does not flow axiomatically from a prosecutor's having a dual role.'[17] (My emphasis)

[19] SARS has a statutory duty and obligation to enforce the tax laws of the country on behalf of the government for the benefit of the citizens of South Africa. In order to achieve that objective, it is required to 'secure the efficient and effective and widest possible, enforcement' of the various pieces of legislation concerned.[18] To the extent that SARS has any direct interest in any prosecution, its interest is no more than that of the NPA. It is an interest enforced on behalf of and for the benefit of the

[16] *Director of Public Prosecutions, Western Cape v Killian* 2008 (1) SACR 247 (SCA).
[17] Para 28; see also *R v Sole* 2001 (12) BCLR 1305 (Les) at 1332F-H.

[18] Section 4(1)(*a*) of the South African Revenue Services Act 34 of 1997.

public.[19] There are sufficient structural guarantees in place in the South African justice system to ensure that an accused's right to a fair trial is protected, irrespective of whether the prosecutor concerned is an employee of the NPA or an outside counsel funded by SARS, or any other entity. It follows that the mere fact that Coetzee was funded by SARS and linked to it through his previous role detailed above does not provide a basis to conclude that the appellants would not get a fair trial. As was said in *Killian*, unfairness does not flow axiomatically from a prosecutor's having a dual role.

[20] The appellants' argument that the involvement of Ferreira, a senior prosecutor in the employ of the NPA, would compromise their right to a fair trial simply because he had previously assisted in litigation to which the appellants were linked cannot be sustained. There are no allegations of impropriety on his part during the course of the previous litigation, or during the course of the present proceedings. There is no suggestion of conduct on his part that could have constituted a basis for the existence of a reasonable apprehension in the minds of the appellants that he was biased against them. That he at all times performed his normal duties as a prosecutor and senior official of the NPA was uncontroverted. The complaint by the appellants against Ferreira amounts to this: An official in the employ of the NPA should not be allocated to a matter to which he had previously been involved, for to do so would create an apprehension of bias on the side of an accused. That cannot be so. An acceptance of that contention would undermine the independence of the NPA and the NDPP and their powers to determine which official is suitable to handle cases at any given time. So too, would the concept of the separation of powers be undermined. All the prosecutors in the employ of the NPA prosecute in cases where

[19] *Metcash Trading Ltd v South African Revenue Service & another* 2001 (1) SA 1109 (CC) para 60.

the state is the complainant with a direct interest in the case. They cannot be removed simply because they are not independent of the complainant. That applies to both Ferreira and Coetzee. The fact that Coetzee is linked to SARS, which is another component of the state, cannot be held to be a basis for his removal from the case. He, like Ferreira, was not alleged to have conducted himself in an improper manner at all. Considering the facts of the case in respect of both of them, I am not persuaded that their previous roles would *per se* bring about substantive unfairness in the ensuing trial.

[21] To answer the question posed by Ms Nkosi-Thomas, the role of prosecutors in a criminal trial cannot be equated with that of magistrates or judges. Their duties, functions and responsibilities are different. In my view, the court a quo erred in applying the test enunciated in *SARFU* (above para 10) for the removal of the two prosecutors in this matter. That test applies where the recusal of a judicial officer is sought on the basis of an apprehension of bias. The test that should have been applied is that formulated by this court in *Killian*.

[22] As to the second question reserved, Ms Nkosi-Thomas was constrained to concede that it was not a question of law but a matter of fact. In any event, in view of the fact that a wrong test was applied by the court below, the second question does not arise.

[23] The first question of law having been answered in favour of the NDPP, the next question for consideration is the appropriate order that should issue. In *S v Basson* the constitutional court remarked as follows:[20]

'It is plain from the legislative history of s 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… This legislative history of s 319 makes it clear that it was intended to afford the State the right to appeal a question of law to the SCA… 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.'

Section 322 of the CPA reads:

'(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may –

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

(b) give such judgment as ought to have been given at the trial . . . ; or

(c) make such other order as justice may require . . . .'

Ms Nkosi-Thomas submitted that an appropriate order would be for this court to set aside the order of the court below, substitute it with an order dismissing the appellants' application for the removal of the two prosecutors and remit the matter to the high court to proceed with the criminal trial. That is the order that I propose making.

[20] *S v Basson* 2007 (1) SACR 566 at 620.

[23] I mention, in conclusion, that SARS was admitted as *amicus curiae* and its counsel was afforded an opportunity to make submissions on its behalf. We are extremely grateful to counsel for his helpful contentions.

Costs

Although the appeal is unsuccessful, the substantial part of this matter related to the reserved question of law which was initiated by the state. It follows that it would be appropriate for each party to bear its own costs.

[24] In the result, I make the following order:

1 The appeal is dismissed and each party is ordered to pay its own costs.

2 The question of law reserved in terms of s 319 of Act 51 of 1977 is answered in favour of the state.

2.1 The order of the high court for the removal of Coetzee and Ferreira is set aside and substituted with the following:

'The application by the appellants for the removal of Advocates Coetzee and Ferreira is dismissed'

2.2 The matter is remitted to the court below for it to proceed with the criminal trial.

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JUDGE OF APPEAL

APPEARANCES

For Appellants:	Advocate KJ Kemp SC
Instructed by:	Frank Cohen Attorneys, Sandton
	Honey Attorneys, Bloemfontein
For Respondents:	Advocate L.G Nkosi – Thomas SC
	Advocate P.J Louw
	Advocate DWM Broughton
	Instructed by:
	Director of Public Prosecutions
For Amicus Curiae	Advocate WM Trengrove
	Instructed by:
	South African Revenue Services