THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 373/09

In the matter between:

GARY WALTER VAN DER MERWE	**Appellant**
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**1st Respondent**
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	**2nd Respondent**
THE MINISTER OF SAFETY AND SECURITY	**3rd Respondent**
SENIOR SPECIAL INVESTIGATOR PHILLIPUS DU TOIT HAYWOOD	**4th Respondent**
INSPECTOR LIONEL TAYLOR	**5th Respondent**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**6th Respondent**

Neutral citation: **Van der Merwe v NDPP (373/09) [2010] ZASCA 129 (30 September 2010)**

Coram: HARMS DP, NUGENT, SHONGWE and TSHIQI JJA and BERTELSMANN AJA

Heard: **20 AUGUST 2010**
Delivered: **30 SEPTEMBER 2010**

Summary: Fair trial – appellant charged with transgressing Exchange Control Regulations and defeating ends of justice – appellant alleging that investigation against him conducted by the Directorate of Special Operations (DSO) (Scorpions) acting outside their mandate – appellant before pleading launching application in terms of section 172(1) of the Constitution to have consequences of DSO's alleged conduct declared unlawful, invalid and unconstitutional – whether court obliged by s 172(1) to issue a declaratory order if consequences of alleged conduct are found to be such – application amounting to preliminary litigation which must be discouraged – court not obliged to issue declarator, even if appellant could have established a case on

the facts – issues arising from DSO's alleged conduct to be resolved by trial court – dismissal of application by High Court confirmed on appeal.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Olivier AJ sitting as court of first instance).

The following orders are made:

1. The appeal is dismissed with costs which include the costs of two counsel.
2. The cross-appeal is dismissed.
3. The appellant is to pay the costs of the application for condonation and of the application for a postponement.

JUDGMENT

BERTELSMANN AJA (Harms DP, Nugent, Shongwe and Tshiqi JJA concurring)

INTRODUCTION

[1] The appellant – Mr Gary Van der Merwe – is a businessman who faces two criminal charges of having contravened the Exchange Control Regulations and of defeating the ends of justice respectively. The offences are alleged to have been committed during July 2004 when the appellant was arrested at the Cape Town International Airport. Foreign currency found in his

possession was attached in terms of s 20 of the Criminal Procedure Act 51 of 1977. An application to have the currency released was dismissed by the Cape High Court. An appeal to the full court of that division was unsuccessful.[1] An appeal to the Constitutional Court also failed.[2]

[2] After several postponements the appellant's trial was set down for 9 June 2008 in the Regional Court Bellville. The appellant has not yet pleaded to the charges and indeed on 9 June 2008 he launched an urgent application for a declaratory order that the Directorate of Special Operations (DSO) (known before the unit's disbandment as the Scorpions) and one of its members, Inspector Haywood, had acted outside the legislative and operational mandate of the Scorpions by investigating the offences the appellant is alleged to have committed. Such offences, it is common cause, did not fall within the definition of serious and organised crime the Scorpions were mandated to investigate and combat. Such conduct, the appellant argued, was in conflict with the Constitution and invalid and should be declared to be such.

[3] Needless to say, conduct cannot be declared to be invalid, but only the legal consequences of that conduct. During the hearing of the appeal the order the appellant sought was amended to read: 'It is declared that the Second and Fourth Respondents acted outside of the legislative and operational mandate of the DSO and the consequences of their conduct are accordingly unlawful, inconsistent with the Constitution and invalid'.

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1 Reported as *Van der Merwe & another v Nel & others* 2006 (2) SACR 487 (C).
2 Reported as *Van der Merwe & another v Taylor N O & others* 2008 (1) SA 1 (CC).

[4] A further declarator was sought in the notice of motion that the charges brought against the appellant were unlawful, unconstitutional and invalid. This relief was not persisted with.

[5] The court below dismissed the application on the ground that the issues raised by the appellant should best be decided by the trial court. It made no order as to costs. The appellant was granted leave to appeal to this court. The first and second respondents – the National Director of Public Prosecutions and the Head of the DSO respectively – were granted leave to cross-appeal against the costs order.

[6] The Ministers of Safety and Security and of Justice and Constitutional Development were cited in the proceedings in the court below but they played no active role and abided the decision of the court. Inspector Lionel Taylor, an inspector in the service of the South African Police Service, who was the investigating officer responsible for the appellant's case docket, was also cited, and similarly abided the decision of the court. The application was opposed only by the first, second and fourth respondents, the last-mentioned being Mr Phillipus Haywood, the fourth – a senior special investigator of the DSO. He was joined in his personal capacity because of his alleged transgression of the DSO's mandate by investigating the appellant.

THE RELEVANT FACTS

[7] The DSO was created by s 7 of the National Prosecuting Authority Act

32 of 1998 ('the NPA Act') and commenced operations in 2001. It was created to deal with national priority crimes, in particular organised crime and other specified serious offences. It was disbanded during 2009 after the amendment of s 7 of the NPA Act by s 3 of the National Prosecuting Authority Amendment Act 56 of 2008.

[8] At the time that is relevant to this appeal the appellant was under investigation by the DSO. The investigation was authorised in terms of s 28(1) prior to the amendment referred to above. Various charges of fraud, theft and contraventions of the Company Act were preferred against the appellant and others allegedly acting in concert with him.

[9] Mr Haywood was the lead investigator in the DSO investigation. He received information on 7 July 2004 that the appellant intended to take more than R 1 million in foreign currency out of South Africa on 11 July 2004.

[10] After discussing the matter with his superiors it was decided to inform the relevant law enforcement agencies; the Commercial Crime Unit of the SAPS, the SAPS Border Unit and SARS.

[11] It is common cause that the conduct or the anticipated conduct of the appellant – if it constituted an offence – did not fall within the definition of serious and organised crime that the Scorpions were mandated to investigate. That notwithstanding, Mr Haywood took an interest in the matter and he travelled to the airport on 11 July 2004 in the company of Mr Louw of SARS.

There he learnt that the appellant had changed his flight to 13 July 2004.

[12] On that day Mr Haywood returned to the airport with another DSO member, Mr Koekemoer. There they met Captain Koegelenberg and Inspector Gululu of the Border Unit and Mr Guerreiro of Customs. Mr Haywood pointed the appellant out to the Border Unit.

[13] Mr Nico Maree of the SARS was requested by Mr Guerreiro to assist by obtaining a customs declaration from the appellant. The appellant agreed to a search of his luggage in which the foreign currency was discovered.

[14] The matter was handed to the Border Unit. Captain Koegelenberg and Inspector Gululu allowed the appellant to board the plane as they were uncertain which regulation of the Exchange Control Regulations the appellant might have transgressed. Enquiries from the Commercial Branch and from Mr Haywood elicited the information that regulation 3(1)(a) was contravened. Inspector Gululu then had the appellant removed from the aircraft. He was arrested and the currency confiscated. The appellant was handed over to the Commercial Branch.

[15] The next morning Inspector Taylor was assigned to investigate the matter and he interviewed the appellant on 14 July 2004. At the subsequent bail application on the same day, Adv Van Vuuren of the DSO appeared, duly authorised by a written delegation by the Director of Public Prosecutions; Western Cape. Another member of the DSO, Adv Bunguzana, received a

similar delegation. Inspector Taylor consulted with Adv Van Vuuren on the bail application and the bail amount. Mr Haywood was present at the bail hearing.

[16] On 28 October 2004 the appellant was arrested on the fraud charges that were being investigated by the DSO. According to Mr Haywood he approached Inspector Taylor with an eye to a joinder of the fraud and exchange control charges, but met with a negative response. Nonetheless, it is common cause that from that date until the end of 2007 the matters were dealt with on the basis that the appellant would be tried in the High court on all the charges.

[17] According to the appellant, all postponements of the matter, of which there were several, were, with one exception, attended to by members of the DSO. On 22 April 2005, Adv Bunguzana informed the court at one such postponement that the case was investigated by the Scorpions after initially having been the responsibility of the SAPS. Correspondence on behalf of the prosecution and the investigators was sent on the DSO letterhead. One potential witness to the exchange control charges, Ms Rohr, informed the appellant that Mr Haywood had told her that he was the investigating officer when he subpoenaed her.

[18] As it turned out, the appellant was arraigned for trial in the regional court. The trial was postponed when the present application was launched and has still not commenced.

THE ARGUMENT IN THE COURT A QUO

[19] The appellant's case is that the entire investigation against him was conducted surreptitiously by the DSO, using other agencies as puppets, and the process of identifying witnesses, collecting evidence and preparing the prosecution was orchestrated by the department because of an improper intention on the part of the DSO to persecute the appellant.

[20] The appellant submitted that in doing so the DSO – and in particular Mr Haywood – acted outside its statutory authority by becoming engaged in the case against him. It was submitted that the investigation was not and could not be authorised in terms of s 28 of the NPA Act, which restricted the DSO mandate to organised crime and other specified offences. Exchange control violations admittedly did not resort under the DSO. Mr Haywood and the other members of the DSO, so it was submitted, therefore acted unconstitutionally, irregularly and unlawfully by orchestrating the investigation against him.

[21] The appellant argued that s 172(1) of the Constitution obliged the court to issue a declaration that the investigation conducted in the manner alleged was unlawful. That section provides, amongst other things, that when deciding a constitutional matter within its power, a court 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. The appellant sought no consequent relief.

[22] It was not entirely clear from the appellant's papers why a declaratory order was sought in vacuo, without any consequent relief. In the course of

argument before us, however, counsel for the appellant informed us quite frankly that a declaratory order would bind the trial court when it was called upon to decide what evidence might be admitted.

[23] The respondents denied any suggestion that the DSO had played any part in the investigation against the appellant, other than to pass information of the possible commission of an offence on to other law enforcement agencies. The DSO had co-operated with the prosecution services while it was intended to prosecute all charges in one trial.

[24] The respondents furthermore submitted that the issue raised by the appellant was one that ought not to be decided piecemeal, but that the trial court was the appropriate forum to deal with questions relating to the admissibility of evidence, the authorisation of the public prosecutor to prefer the charges against the appellant and the appellant's right to a fair trial.

[25] The court a quo found in a meticulous and closely reasoned judgment that the appellant had failed to establish that the DSO had driven the investigation against him. It also held that the respondents' version was neither so unreliable nor so far-fetched that it would justify a referral to oral evidence.

[26] That notwithstanding, the court below considered the question whether the declaratory relief in terms of section 172(1) of the Constitution should be granted in the event of its findings on the merits being incorrect. After a

careful consideration of relevant authorities the court concluded that it had the discretion to consider whether an order of this nature should be issued or not. Weighing the facts of the matter the learned judge concluded that it would be inappropriate to decide the constitutional issue raised by the appellant, which should best be left to be decided by the trial court. The application was therefore dismissed. No costs order was made.

THE ARGUMENTS BEFORE US

[27] The court below held against the appellant on the merits and found that the allegedly, unlawful and unconstitutional conduct of the DSO and Haywood had not been established. Although it would be difficult to fault the court below on this finding, I will assume for present purposes that the appellant indeed made out a case that the DSO exceeded its statutory mandate and that its conduct was thus inconsistent with the Constitution. The question that remains is whether a court is obliged in the circumstances to issue a declaratory order, notwithstanding that no consequent relief is claimed.

[28] It was argued on behalf of the appellant that s 172(1) of the Constitution allows no room for the exercise of a discretion once conduct is found to be unconstitutional. But that argument does not find support in the decided cases. On the contrary, the following was said in *Islamic Unity Convention v Independent Broadcasting Authority & others:*[3]

'A Court's power under s 172 of the Constitution is a unique remedy created by the Constitution. The section is the constitutional source of the power to declare law or conduct that is inconsistent with the Constitution invalid. It provides that when a Court

3 2002 (4) SA 294 (CC) paras 10-11.

decides a constitutional matter, it *must* declare invalid any law or conduct inconsistent with the Constitution. It does not, however, expressly regulate the circumstances in which a Court should decide a constitutional matter. As Didcott J stated in *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others:*

"Section 98(5) admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration."

. . .

In determining when a Court should decide a constitutional matter, the jurisprudence developed under s 19(1)(a)(iii) will have relevance, as Didcott J pointed out in the *J T Publishing* case. It is, however, also clear from that judgment that the constitutional setting may well introduce considerations different from those that are relevant to the exercise of a Judge's discretion in terms of s 19(1)(a)(iii).'

[29] The appellant's counsel relied for the proposition that a court before whom a constitutional issue is raised has no alternative but to rule on the matter on *Dawood & Minister of Home Affairs & others,*[4] and *Matatiele Municipality & others v President of the RSA & others (No 2).*[5] Neither decision supports the argument. In both matters the court was faced with constitutional issues that needed to be decided in the interests of justice.

4 2000 (3) SA 936 (CC).
5 2007 (6) SA 477 (CC).

[30] The very wording of section 172 (1) imposes a duty upon a court that is approached to decide a matter said to be constitutional in nature to consider whether an order should be granted or not: '**When** deciding a constitutional matter . . .'

[31] In its context the word 'when' means 'in the, or any, case or circumstances in which' (The Shorter Oxford English Dictionary on Historical Principles Oxford University Press 1988 reprint p 2534). A court faced with an unmeritorious forensic finesse, clothed in constitutional garb, designed to delay or avoid the necessity of having to plead in a criminal trial, or to pre-empt a consideration by the trial court of the admissibility of evidence in terms of s 35(5) of the Constitution, has a duty to refuse an order that would encourage preliminary litigation. In *National Director of Public Prosecutions v King*[6] Harms DP said:

'Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation - a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges - and especially minimum sentences - have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of

6 2010 (2) SACR 146 (SCA) para 5.

exploitation to obstruct and delay'.[7] One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution.'

And in *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma & another v National Director of Public Prosecutions & others*[8] Langa CJ said:

'I nevertheless do agree with the prosecution that this court should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5). Allowing such litigation will often place prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The courts' doors should never be completely closed to litigants.'

In *Key v Attorney-General, Cape Provincial Division, & another*[9] Kriegler J emphasized that, if evidence is tendered to which the accused objects, it is for the trial court to decide in the light of all the circumstances of the case whether fairness requires the evidence to be led or to be excluded.

[32] The same considerations must apply in this case. It was well-established before the present constitutional era that a criminal trial is not to

7 R v H; R v C [2004] UKHL 3 ([2004 2 AC 134; [2004] 1 All ER 1269; [2004] 2 WLR 335; [2004] HRLR 20; [2004] 2 Cr App R 10; 16 BHRC 332 para 22 *per* Lord Bingham of Cornhill.
8 2009 (1) SA 1 (CC) (also reported at 2008 (2) SACR 421 (CC)) para 65.
9 1996 (4) SA 187 (CC) para 13-14.

be conducted piecemeal, and that continues to apply today. An accused is not entitled to have the trial interrupted – or to have it not even begin – so as to have alleged irregularities reviewed by another court in the course of the trial. It is important to bear in mind that while the Constitution guarantees to an accused a fair trial that does not mean that the prosecution must satisfy the accused in advance that the trial will indeed be fair. It is the duty of the trial court to try a charge, and to ensure that the trial is fair, and if it turns out that it was not, then any conviction that followed might be set aside. It might even turn out that the accused is acquitted, in which case the alleged irregularities will be irrelevant. Litigation of the kind that is before us falls squarely into the category of preliminary litigation that ought to be avoided and discouraged. As Davis J said in *Sapat & others v The Director: Directorate for Organised Crime and Public Safety & others:*[10]

'For these reasons, I find that the essential purpose of applicants' notice of motion was directed to the constitutionality and hence admissibility of certain evidence which has been extracted by way of blood, semen and other samples. I consider that these questions should be determined by the trial court when appraised of the full factual context within which this evidence is sought to be admitted. In this way a correct balance between the right to due process and the imperative of crime control can be struck.'

[33] No grave injustice would result were the issues raised by applicants to be determined by the trial court. It was said on behalf of the appellant that a regional court has no jurisdiction to decide constitutional issues, but that is only partly correct. A regional court, as with any criminal court, has the duty to

10 1999 (2) SACR 435 (C) 443 c-f.

ensure that a trial is fair, and that duty necessarily requires it to determine at times whether the accused's constitutional rights have been breached.

[34] I have pointed out above that a court is not obliged to entertain a constitutional claim in a vacuum and thus declaratory relief is not there for the asking. At this stage the appellant asks for a declaration to be made in vacuo. No good reason commends itself why a court should consider such a claim. The court below was correct in dismissing the claim and the appeal must fail.

THE CROSS-APPEAL

[35] The trial court made no costs order in the light of what it regarded as serious constitutional issues that the appellant raised.

[36] The first and second respondents submit that the application was vexatious and purely intended to delay the criminal proceedings. For this reason, it was submitted that the costs of the proceedings a quo should be awarded to the respondents.

[37] Had this court sat as court of first instance, I would have been strongly minded to grant a costs order against the appellant. However, it cannot be said that the trial court exercised its discretion not to award costs to the successful respondents capriciously or injudiciously. There are no exceptional circumstances that might justify interference with the order.

[38] The cross-appeal must therefore be dismissed.

[39] As the hearing of the cross-appeal only occupied a short period of the hearing of this appeal no costs order will be made in respect thereof.

THE CONDONATION AND POSTPONEMENT APPLICATION

[40] While the appeal was pending, the appellant failed to adhere to the time limits laid down for the prosecution thereof. The record was filed late. The appellant launched an application for condonation of the late filing of the appeal and for a postponement thereof, but arranged an extension for the filing of the record with the office of the Registrar of this court. The respondents opposed the application for condonation and the application for a postponement.

[41] The application for a postponement was not persisted with, nor was the opposition to the application for condonation. The respondents are nonetheless entitled to the costs of those applications as neither was withdrawn and remained live issues until the matter was called. The respondents are entitled to have this aspect disposed of in their favour.

[42] The following orders are made:

1. The appeal is dismissed with costs which include the costs of two counsel.
2. The cross-appeal is dismissed.
3. The appellant is to pay the costs of the application for condonation and

of the application for a postponement.

E BERTELSMANN
ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant:	A Katsz SC D Simonsz Instructed by: Carl van der Merwe Attorneys c/o Cornel Stander Attorneys, Cape Town Webbers Attorneys, Bloemfontein
For respondent:	A de V la Grange SC A Erasmus Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein