

# IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**The State v Wouter Basson**

**CCT 30/03**

**Decided on 10 March 2004**

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## MEDIA SUMMARY

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*The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

The Constitutional Court today unanimously held that the state's grounds of appeal against the judgment of the Supreme Court of Appeal (SCA) all raise constitutional issues. The judgment does not however decide whether it is in the interests of justice for the application for special leave to appeal to be granted. Further directions will thus be given by the Chief Justice for the further disposal of the application for leave to appeal.

In 1999, Dr Basson was indicted in the Pretoria High Court (the High Court) on 67 charges including murder, fraud, conspiracy to commit various crimes, and drug offences. Before the accused was called upon to plead he took an exception to charges in the indictment and the admissibility of the bail record. Both these objections were upheld. Shortly after the commencement of the trial, the state applied for the recusal of Hartzenberg J (the trial court judge) on the grounds that he was biased and had prejudged the case. The application was dismissed. Just over two years later, the accused was acquitted on all the remaining charges. The state immediately launched an application in terms of section 319(1) of the Criminal Procedure Act to have certain questions of law reserved for consideration by the SCA. The SCA dismissed the application for the reservation of questions of law.

The case came before the Constitutional Court in two forms: the first involved an application for special leave to appeal to the Constitutional Court against the judgment of the SCA (the rule 20 application); the second involved an application for leave to appeal directly to this Court against the judgment of the High Court (the rule 18 application).

The Court unanimously made the following order:

1. The application for leave to appeal directly to this Court against the judgment of the High Court in terms of rule 18 is dismissed.
2. It is declared that the grounds of appeal upon which the rule 20 application is based all raise constitutional matters or issues connected with decisions on constitutional matters, for purposes of section 167(3)(b) of the Constitution.

Three judgments were prepared by members of the Court.

Ackermann J, Madala J, Mokgoro J, Moseneke J, Ngcobo J and O'Regan J, writing for the majority, considered the following grounds of appeal: (a) whether the decision by the SCA that the trial judge's refusal to recuse himself was not appealable under section 319 of the Criminal Procedure Act; (b) whether the decision regarding the admission of the bail record by the High Court was appealable to the SCA; and (c) whether one can appeal against the decision of the SCA refusing to overturn the High Court's decision upholding the objection to the charges under the Riotous Assemblies Act.

On the first ground of appeal, it was held that recusal is a constitutional matter because the impartial adjudication of disputes in both criminal and civil cases is a cornerstone of any fair and just legal system. Furthermore the court held that a state, on behalf of all citizens is entitled to an impartial court and therefore can complain about actual or perceived bias in a criminal trial.

On the second ground of appeal, it was held that a judge exercises discretion in respect of the overall fairness of the trial when deciding whether to admit a bail record. This issue is therefore one connected with a decision of a constitutional matter, within the wording of s 167(3) of the Constitution.

On the third ground of appeal, it was held that the state should not be precluded from performing its constitutional obligation to prosecute an accused for serious offences such as murder without the opportunity to appeal a decision of a court upholding objections to charge. Since in this case the State was effectively barred from prosecuting the accused by a decision of the trial court from which it had no appeal, the issue was found to be a constitutional matter. Finally, because the case at hand deals with alleged crimes against humanity and war crimes, which may impose an added international law obligation upon the state, the Court concluded that the question of the quashing of charges raises a constitutional matter.

With regard to the application for leave to appeal directly to this Court against the judgment of the High Court on the grounds that the High Court judgment was vitiated by bias, the Court held that it was not in the interest of justice to grant direct access and the application is dismissed.

Chaskalson CJ, with whom Langa DCJ and Yacoob J concur, adopted different reasoning to the majority on the issue whether the objection to the indictment raises a constitutional matter. He takes the view that the discharge of an accused person, because of an error alleged to have been made by the High Court in its application of the statute to events that took place prior to the Constitution coming into force, is not a constitutional matter. It cannot become a constitutional matter simply because the quashing of the indictment resulted in the failure of the prosecution. He held, however, that the decision by the SCA that the order quashing the indictment is not subject to appeal deals with the powers of the SCA to hear appeals in criminal cases. Any issue as to the nature and ambit of the powers of the courts necessarily raises a constitutional matter. The proper interpretation of section 319 of the Criminal Procedure Act is thus a constitutional matter. All the judges who heard the application concurred in this judgment in so far as it pertains to the issue of the power of the SCA.

Sachs J, concurring in the main judgment, said that if the allegations contained in the charge sheet against the respondent could be proved, it would be difficult to argue that they did not constitute war crimes. The constitutional question which arose would be to determine how, if at all, South Africa's consequent international law obligations would impact on the manner in which South African criminal procedure should be understood and applied.