

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG****Case number: 2014/40692****DPP ref No.: 9/2/5/7 – (2014/0474)****Date of review: 22 February 2016****In the matter between:**

Khumalo, Victor Vusi	1st Applicant
Bawa, Hoba-Bako	2nd Applicant
Cuambo, Argenia Franscico	3rd Applicant

And

The Magistrate, Mr Louw	1st Respondent
The Director of Public Prosecutions, Gauteng Local Division, Johannesburg	2nd Respondent

JUDGMENT

Van der Linde, J

Introduction

[1] The three applicants are applying under s.24 of the now repealed Supreme Court Act 59 of 1959 for a review of criminal proceedings currently pending before the Regional Court of Johannesburg. The first respondent is the Regional Magistrate and the second respondent the Director of Public Prosecutions, Gauteng Local Division, Johannesburg.

[2] The Superior Courts Act 10 of 2013 has, in terms of s.55(1)(a) read with item 1 of schedule 1, repealed the whole of the Supreme Court Act, but s.52(1) contains a savings provision in respect of proceedings pending in any court at the commencement of the Act. The Act commenced on 23 August 2013 by which date the applicants had been required to plead, and had pleaded, specifically raising the lack of jurisdiction of the Johannesburg Regional Court. So, the proceedings are deemed, by virtue of s.52(2) of the Superior Courts Act, to have been pending when this latter Act came into effect, and the Supreme Court Act continues to apply.

[3] S.24 of the latter Act provides as follows:

“24 Grounds of review of proceedings of inferior courts

(1) The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are-

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;

[Para. (b) substituted by s. 36 (1) of Act 12 of 2004.]

(c) gross irregularity in the proceedings; and

(d) *the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*

[Sub-s. (1) amended by s. 9 of Act 15 of 1969 and by s. 10 of Act 105 of 1982.]

(2) Nothing in this section shall affect the provisions of any other law relating to the review of proceedings in inferior courts.”

[4] The founding affidavit sets out three substantive grounds of review: that the first respondent failed to display the required level of impartiality by first suggesting to the prosecutor and then permitting, on the latter’s application, an amendment to the charge sheet; that the Johannesburg Regional Court had no jurisdiction because the provisions of s.111 of the Criminal Procedure Act 51 of 1977 had not been complied with; and that the first applicant was not arrested in South Africa or, at least, if he was arrested in South Africa, the heroin entered South Africa unlawfully under the instruction and assistance of the South African Police.

[5] This third ground was not pressed during the hearing before us, Mr Hamilton, who appeared for the three applicants, properly recognising that the first applicant’s case on that score involved an attack on the merits of the state evidence. It was thus rather an appeal than a review. Mr Hamilton also appreciated that the case for the second and third applicants could not be founded on the first two grounds of review, and in argument limited their case to the delays that had been caused by the state. But when it was pointed out to him that the founding affidavit in the review application does not make out such a case, and that in any event the delays were often caused by the applicants’ own conduct, he did not press the review on behalf of the second and third applicants either.

[6] We thus deal below with the first applicant’s first two grounds of review accepting that, although *in media res*, this is an appropriate case for considering the application for review concerning, as it does, the very jurisdiction of the court of first instance. We commence by setting out the procedural background.

Procedural background

[7] From the docket the following information appears. The applicants' first appearance was in the Johannesburg Regional Court on 9 April 2009 on a charge of dealing in drugs. The first applicant had however been arrested on 7 April 2009 in Komatipoort, which is outside the jurisdiction of the Johannesburg Regional Court, late at night, when 20,6kg of heroin to the value of about R20m was found in his car. The first applicant told the police that he was delivering the heroin to the third applicant in Johannesburg. In a sting operation the police drove the first applicant through to Johannesburg where the first applicant delivered the parcel to the second applicant while the police were observing. The second and third applicants were then, on 8 April 2009, arrested.

[8] From the record of the proceedings it would appear that the prosecutor explained in open court that the charge was dealing in drugs and that the heroin had been found in the first applicant's car at the Komatipoort border post. She explained too that the first applicant had given information that led to the arrest of the second and third applicants in Johannesburg. Cash that could not be accounted for was found on them. We revert below on whether the charges were then put to the applicants, and whether the charge sheet was then lodged with the clerk of the court.

[9] The case was remanded to 20 April 2009, and on that occasion it was recorded that the applicants raised as a special plea s.106(1)(f) of Act 51 of 1977:

"106 Pleas

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

(f) that the court has no jurisdiction to try the offence; ...".

This was followed by the words, *"Application subsequently abandoned"*.

[10] The matter was again remanded to a later date for further investigation, but in the meanwhile also to 29 April 2009 for a bail application. On that day matters did not progress because, amongst others, there was a change in legal representation. The case was thus

remanded to 5 May 2009 for a bail application; on that day there was no stenographer and it was remanded to 14 May 2009 for that purpose. Bail proceedings commenced on that day, and were remanded to 18 May 2009 for further evidence. The application did not conclude on this day either, and was postponed to 25 May 2009 for further evidence. The application was concluded on this day, and remanded to the next day for judgment.

[11]On 26 May 2009 bail was refused. The matter was remanded to 5 June 2009 for a forensic report and also to arrange a trial date. On that day the matter was postponed by agreement to 25 July 2009. As it happened the next appearance was a day earlier, on 24 July 2009, when the case was again remanded, at the request of both sides, to 18 August 2009. On that day the first respondent presided for the first time. The matter was then remanded to 25 August 2009 for a trial date to be arranged.

[12]On 24 August 2009 the acting deputy NDPP issued a direction in terms of s.11 of the Criminal Procedure Act, read with s.22(3) of Act 32 of 1998. It was not suggested by anyone that the acting deputy NDPP did not have the written authority so to act. In terms of the direction, the acting deputy NDPP deemed it in the interests of the administration of justice that count 1, dealing in drugs, and its alternative, possession of drugs, allegedly committed by the first applicant at or near Komatipoort within the area of jurisdiction of the DPP of the North Gauteng Provincial Division of the High Court, be tried within the area of jurisdiction of the DPP of the South Gauteng Provincial Division of the high Court.

[13]The acting deputy NDPP accordingly wrote: *"I hereby direct that the criminal proceedings against the said person in respect of the said offences, be commenced in the area of jurisdiction of the Director of Public Prosecutions of the South Gauteng Provincial Division of the High Court of South Africa."*

[14]When this direction was issued the applicants, including the first applicant, had been arrested and kept in custody; and they, including the first applicant, had applied for bail and had had the bail application be refused. They had not yet pleaded; it was only later, on 9

May 2011, that the charges were formally put to all three of them, and all three pleaded not guilty, and specifically also denied that the Regional Court had jurisdiction to try them.

[15] Returning to the chronology: on 25 August 2009 the matter was postponed to 8 September 2009 for some issue relating to the docket; and on 8 September 2009 it was postponed again to 3 February 2010 for trial. From this latter date the matter was again postponed on a number of occasions for a variety of reasons: to 23 March 2010; to 16 April 2010; to 21 May 2010; to 18 June 2010; to 14 July 2010; to 23 August 2010; to 7 September 2010 for what was noted as being *“for charge sheet and quashing application”*; to 7 October 2010 *“for application by defence”*; to 18 October 2010 for the same reason; to 21 October 2010 for argument; to 1 November 2010 *“for all pre-trial issues to be finalised”*; to 9 May 2011 for trial, when in fact the applicants pleaded not guilty and raised lack of jurisdiction; and to 10 May 2010 to allow the prosecutor time to deal with the special pleas.

[16] On 10 May 2010 the state handed in the original direction by the acting deputy NDPP, and also applied to amend the charge sheet to include a reference to the offences having been committed *“at or near Johannesburg and or Komatipoort.”* The application was opposed but after argument, the first respondent gave a judgment in which he allowed the amendment. The applicants then applied for a remand to deal with the amended charge sheet, and this was granted to 25 October 2011, *“for further trial.”* It could not proceed on that day for lack of an interpreter, and stood down to 26 October 2011.

[17] On 26 October 2011 the first applicant informed the court that, despite the direction of the acting deputy NDPP, and despite the amendment of the charge sheet, he was challenging jurisdiction because, in fact, he had been arrested before he had entered South Africa, and not Komatipoort. He told the court that he was not legally in South Africa, and for that reason the court had no jurisdiction over him. He submitted that no element of the crime had been committed in South Africa. He submitted that he had been abducted.

[18]He submitted too that the so-called centralisation procedure had not been correctly followed and for that reason too the court had no jurisdiction. And he contended that he had not, as was required by s.35 (1)(d) of the Constitution, been brought before a court within 48 hours of having been arrested. After a lengthy exchange between the first applicant's attorney and the first respondent, the matter was remanded to 14 March 2012 *"for further hearing re the s.106 (f) objection/plea"*.

[19] Further postponements followed to 15 March 2012; to 16 April 2012; to 21 May 2012; to 5 September 2012 for trial; and then to 10 September 2012. On this date the state began calling witnesses dealing with the jurisdiction issue. Ms Kapp, a SARS employee, testified that she arrested the first applicant on the South African side, and handed him over to inspector Fritz of the SAPS. Inspector Fritz then testified. The state then closed its case in respect of the jurisdiction plea.

[20]The first applicant then testified in support of his special plea and closed his case. Following a range of difficulties, including with interpreters and legal representation, the matter was postponed frequently, until it resumed again on 15 May 2013. On that day the second and third appellants withdrew their objection to the jurisdiction of the court.¹

[21]After a further remand to 5 June 2013, the first applicant addressed the court on the special plea of jurisdiction. After addressing the court, the second and third applicants' new representative told the court that they were persisting in their plea of lack of jurisdiction. The matter was then postponed to 18 September 2013 to receive further submissions concerning jurisdiction. The first respondent was not available then, and it was postponed again to 9 October 2013. On that day the first respondent gave a brief judgment dismissing the special pleas. It was then remanded to 14 April 2014 for trial.

[22] On that day there was a withdrawal of legal representatives, and the matter was remanded to 24 April 2014 for the second and third applicants to obtain legal representatives. It was

¹ Record, p531.

then remanded to 7 August 2014 for trial. The record does not reflect what happened in that day and the next matter of moment is the notice of motion in terms of rule 53 dated 5 November 2014. We were informed from the Bar that in fact the trial is proceeding on the merits, and that the state had not yet closed its case.

[23] Against this background it is convenient first to deal with the validity of the direction issued by the acting deputy NDPP, and thereafter with the submission of perceived bias evidenced by the first respondent's conduct relative to the amendment of the charge sheet.

The direction issued by the acting deputy NDPP

[24] The direction is quoted above. The trawl of relevant statutory provisions starts with s.35(1)(d) of the Constitution:

"35 Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right-

(d) to be brought before a court as soon as reasonably possible, but not later than-

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released;...".

[25] The earlier suggestion by the first applicant that he had not been brought before a court in accordance with these precepts is not raised in the review. One must accept that the first appellant was arrested on 7 April 2009 and brought before the Johannesburg Regional Court on 9 April 2009, within 48 hours, or at least before the end of the first day after the expiry of the 48 hours.

[26]The point here is that he was, at best for the state, arrested in Komatipoort, which is within the area of jurisdiction of the DPP for the North Gauteng Provincial Division, and immediately driven through to Johannesburg, where his first appearance was before the Regional Court of the South Gauteng Local Division. This is in the area of jurisdiction of the DPP for the South Gauteng Local Division, which is a different area of jurisdiction. At that stage the direction of the acting deputy NDPP had not yet been given.

[27]At the first appearance on 9 April 2009 before that regional court, the applicants were, according to the record, told that the charge against them was dealing in drugs. It is not clear from the record whether they were actually charged, in the sense of the charges being put to them, or whether they were simply told that such a charge was being investigated, and that they were being detained for that reason.

[28]It is also unclear from the record whether as of that date the charge sheet was lodged with the clerk of the court. S.76 of the Criminal Procedure Act provides:

“76 Charge-sheet and proof of record of criminal case

(1) Unless an accused has been summoned to appear before the court, the proceedings at a summary trial in a lower court shall be commenced by lodging a charge-sheet with the clerk of the court, and, in the case of a superior court, by serving an indictment referred to in section 144 on the accused and the lodging thereof with the registrar of the court concerned.”

[29]It is accordingly not clear whether in this sense the “*proceedings*” had commenced against the applicants on the date of the first appearance. When the matter was argued before us we were however told by the state from the Bar that we could accept that the charge sheet would have been lodged with the clerk of the court on that day, since this was the invariable practice in the lower courts. We were also told that we could accept that the charges were not formally put to the applicants, in the sense of expecting of them to plead to these then and there. We accordingly approach the review on that basis.

[30]After that first appearance there followed a number of appearances before the direction was issued on 24 August 2009 in terms of s.111 of the Criminal Procedure Act, read with s.22(3) of the National Prosecuting Authority Act 32 of 1998.

[31]S.111 of the Criminal Procedure Act provides in relevant part as follows:

“111 Minister may remove trial to jurisdiction of another attorney-general

(1)

[Sub-s. (1) substituted by s. 6 (a) of Act 26 of 1987 and deleted by s. 44 of Act 32 of 1998.]

(1) (a) The direction of the National Director of Public Prosecutions contemplated in section 179 (1) (a) of the Constitution of the Republic of South Africa, 1996, shall state the name of the accused, the relevant offence, the place at which (if known) and the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced.

(b) A copy of the direction shall be served on the accused, and the original thereof shall, save as is provided in subsection (3) be handed in at the court in which the proceedings are to commence.

[Sub-s. (1), previously sub-s. (2), amended by s. 6 (b) of Act 26 of 1987 and renumbered and substituted by s. 44 of Act 32 of 1998.]

(2) The court in which the proceedings commence shall have jurisdiction to act with regard to the offence in question as if the offence had been committed within the area of jurisdiction of such court.

[Sub-s. (2), previously sub-s. (3), renumbered and substituted by s. 44 of Act 32 of 1998.]

(3) Where the National Director issues a direction contemplated in subsection (1) after an accused has already appeared in a court, the original of such direction shall be handed in at the relevant proceedings and attached to the record of the proceedings, and the court in question shall-

(a) *cause the accused to be brought before it, and when the accused is before it, adjourn the proceedings to a time and a date and to the court designated by the Director in whose area of jurisdiction the said criminal proceedings shall commence, whereupon such time and date and court shall be deemed to be the time and date and court appointed for the trial of the accused or to which the proceedings pending against the accused are adjourned;*

(b) *forward a copy of the record of the proceedings to the court in which the accused is to appear, and that court shall receive such copy and continue with the proceedings against the accused as if such proceedings had commenced before it.*

[Sub-s. (3), previously sub-s. (4), amended by s. 6 (c) of Act 26 of 1987 and renumbered and substituted by s. 44 of Act 32 of 1998.]”

[32]And s.22(3) of the National Prosecuting Authority Act provides as follows:

“22 Powers, duties and functions of National Director

(3) Where the National Director or a Deputy National Director authorised thereto in writing by the National Director deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one Director be investigated and tried within the area of jurisdiction of another Director, he or she may, subject to the provisions of section 111 of the Criminal Procedure Act, 1977 (Act 51 of 1977), in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other Director.”

[33]Some preliminary remarks must be made. First, the reference in s.111(1)(a) to s.179(1)(a) of the Constitution does not add anything to our present enquiry. That section of the Constitution simply says:

“179 Prosecuting authority

(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; ...”.

[34]Second, our focus for present purposes is not on the basis that the charge sheet was lodged with the clerk of the court only on or after 24 August 2009; then there is no issue. Our focus is based on our assumption, already made as explained above, that the charge sheet was lodged with the clerk of the court before that date, and therefor that before 24 August 2009 “proceedings” had already “commenced”, at least for the purposes of s.76 of the Criminal Procedure Act, by the time the NDPP direction was issued on 24 August 2009.

[35]Third, our approach is that the interpretation of statutes is to be done consistently with the Constitution. As was said in *Cool Ideas 1186 CC v Hubbard and Another*:² “[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;*
- (b) the relevant statutory provision must be properly contextualised; and*
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”*

[36]We would respectfully add that most documents, whether commercial contracts or statutes, convey a structure or scheme, and the interpretative function must seek to establish what it is. Words then have a meaning that fit that scheme.

[37]Against this background we suggest that the following observations correctly discern the legislative scheme and accord with the ordinary grammatical meaning of the language used.

² 2014(4) SA 474 (CC) at [28].

[38]First, by virtue of s.35 of the Constitution, persons who are arrested become “*accused*” persons within 48 hours of arrest. They will, within that time frame, have been brought before a court for their first appearances. When the Criminal Procedure Act and the National Prosecuting Authority Act then refer to an “*accused*” in the sections we will interpret, it is this person who is either in custody, or on bail or warning, after the first appearance.

[39]However, it is not necessarily a person who will have been asked to plead; in fact, it is likely not a person who will have been asked to plead, since the investigation will likely still be ongoing. It is also not necessarily a person to whom a charge has been put, because in terms of s.35(1)(e) of the Constitution the accused may simply be informed of the reason for the detention to continue. Is it necessarily a person in respect of whom a charge sheet will have been lodged with the clerk of the court?

[40]We have taken cognisance of what Mr Mohamed for the state has told us from the Bar. He has explained that the procedure of continued detention and postponements pending further investigations cannot be set in motion and be continued unless a form J15, which is headed “Charge Sheet”, is completed, thereby in effect establishing a charge sheet. At the early stages its attachment, intended to reflect the charges preferred against the accused, may be in broad terms; but it is no less a charge sheet.

[41]That document is given to the clerk of the court, and so, we were advised, a charge sheet is inevitably then lodged with the clerk of the court, whether or not a charge is actually put to the accused, and whether or not the matter is postponed for further investigation.

[42]Second, one then moves to s.22 (3) of the National Prosecuting Authority Act. The scheme of the power there conferred is concerned with and involves the moving of two things: both the investigation and the criminal proceedings from the area of territorial jurisdiction of one DPP to the area of territorial jurisdiction of another DPP. The exercise by the director of the power concerned requires only that she deems it in the interests of justice that an offence

committed as a whole or in part within the area of territorial jurisdiction of one DPP, be investigated and tried within the area of territorial jurisdiction of another DPP.

[43]Importantly, however, the exercise of the power is subject to the provisions of s.111 of the Criminal Procedure Act, to which we revert. It is also important to underscore that the necessary prerequisite for the exercise of the power is that, as an objective fact, the whole or at least part of the offence is required to have been committed within the transferring area of territorial jurisdiction of a DPP.

[44]Third, the timing of the exercise of that power is also alluded to in s.22(3), although not expressly; in respect of the criminal proceedings, as opposed to mere investigations, it is said that the NDPP shall direct that the criminal proceedings “*be ... commenced*” within the area of jurisdiction of the transferee director. The section does not deal expressly with the case where “*proceedings*” have already “*commenced*” in a court for the purposes of s.76 of the Criminal Procedure Act.

[45]As regards investigations, s.22(3) does not say that these will only be “*commenced*” within the second area of jurisdiction; it simply says that the investigations shall be “*conducted*” in that second area. This does not suggest that the fruits of that part of the investigations that had already been conducted, somehow become inadmissible.

[46]This makes sense, because one would assume that in a perfect world, first come the investigations, and only thereafter, once the NDPP knows what charges to prefer against the accused, then come the criminal proceedings. The factors that the NDPP will want to take into account might only become known to her after the investigation will in fact have commenced.

[47]Fourth, one then moves back to the Criminal Procedure Act, this time to s.111(3). Thus far we have seen that according to s.76 “*proceedings*” “*commence*” already when at the first appearance in the lower court the charge sheet is lodged with the clerk of the court. We have also seen that s.22(3) is silent as to when the direction may be issued; and that the

exercise of the s.22(3) power is “*subject to*” s.111. The focus now is therefore whether s.111(3) deals with when the direction may be issued.

[48] We suggest that from that subsection it is expressly evident that the NDPP may actually issue the direction later than at the first appearance, and only some way into the subsequent appearances before the transferor court. This appears from the following. One, the express hypothesis of the subsection is that the accused will already have appeared in court. Two, these appearances are described as “*proceedings*” in the introductory part of the subsection. Three, in paragraph (a) of s.111(3) the legislature uses “*proceedings*” to refer to the proceedings then on-going before the first court, and refers to the second court as the court in whose area of jurisdiction “*the said criminal proceedings shall commence*”. Four, finally, in paragraph (b) the legislature expressly envisages that the proceedings will have commenced before the first court, but then despite that deems the second court as the court before whom the proceedings had commenced: “*... and that court shall receive such copy and continue with the proceedings against the accused as if such proceedings had commenced before it.*”

[49] We therefore conclude that there can be no doubt that a direction in terms of s.22(3) of the National Prosecuting Authority Act may validly be issued after “*proceedings*” had “*commenced*” for the purposes of s.76 of the Criminal Procedure Act.

[50] But it is equally clear, we suggest, that irrespective of when the power is exercised, it is an essential prerequisite for its exercise that either the whole or at least a part of the offence is required to have been committed, as a fact, within the area of the transferor jurisdiction. The question is whether one is concerned with the area of jurisdiction of a DPP or the area of jurisdiction of a court.

[51] If the power is exercised before the accused will have appeared in a court, that presents no difficulty. S.22(3) of the National Prosecuting Authority Act applies, and the offence, either in

whole or in part, is expressly required to have been committed, as a fact, within the area of territorial jurisdiction of a DPP.

[52]However, if the power is exercised only after the accused will have appeared in a court, the necessary implication is that, either the whole or at least a part of the offence is required to have been committed, as a fact, within the area of jurisdiction of the first court, in which the proceedings will actually have commenced. We say that this is a matter of necessary implication, for the following reasons.

[53]One, there is a deliberate change in wording between s.22(3) and s.111(3): in s.22(3) the reference is to the jurisdiction of a DPP, whereas in s.111(3) the reference is to the jurisdiction of a court. For example, in paragraph (a) of s.111(3) it is expressly stated that the direction of the NDPP will designate a court in whose jurisdiction the proceedings will commence, whereas s.22(3) refers to the proceedings commencing within the area of jurisdiction of a DPP. Yet, since the fountain of the power is s.22(3) and not s.111(3), one can accept that the same underlying concept, namely that the offence is required to have been committed wholly or in part, as a fact, within the area of the first jurisdiction, will apply also under s.111(3).

[54]Two, and perhaps simply put differently, the s.22(3) power was not intended to infuse jurisdiction into a court in which proceedings have commenced without there being jurisdiction in the first place to have conducted those proceedings. The power was, to the contrary, intended to remove an accused from the area of jurisdiction of one DPP where there was in fact territorial jurisdiction, to the area of jurisdiction of another DPP where there was in fact no territorial jurisdiction. Where the court will have become involve since the accused will have already appeared in it, this being the hypothesis of s.111(3), the court and its jurisdiction is substituted for the DPP and her jurisdiction.

[55]Three, if the s.22(3) power is exercised only once the accused has already appeared in a court, the power created by s.22(3) was intended to serve the same purpose; but since

proceedings will already have commenced, it is implicit that the proceedings will now have come under the authority of the court, and no longer the authority of the DPP.

[56]Four, although s.22(3) of the National Prosecuting Authority Act states that it is “*subject to*” s.111 of the Criminal Procedure Act, it is the former and not the later which is the power-creating or taxing section or provision; s.111 deals with procedural aspects of the direction, but s.22(3) creates it. There is no basis for supposing that the purpose for which the power was granted will have undergone a change once the court has assumed authority over the proceedings.

[57]When this conclusion on the interpretation of the relevant statutory provisions is then applied to the facts of this case, the inevitable result is the following. The conduct of the first applicant which is said to constitute the criminal offence, was committed at or near Komatipoort. Criminal proceedings against the applicant commenced on 9 April 2009 in the Johannesburg Regional Court.

[58]Since the offence with which the first applicant was charged was not committed in whole or in part in the territorial jurisdiction of the Johannesburg Regional Court, that court had no territorial jurisdiction to commence and to continue the criminal proceedings against the first applicant. Later during that year the acting deputy NDPP issued the direction. Since the first applicant had by then already appeared in a court, s.111(3) of the Criminal Procedure Act applied to that direction.

[59]However, the direction could not comply with s.111(3), for these reasons: first, the court in whose area of territorial jurisdiction the proceedings had already commenced by then did not have jurisdiction over the first applicant. There was accordingly no power to issue a direction under s.22(3), because the essential prerequisite for its exercise was lacking. Second, since only one court was involved as both transferor and transferee court, there could not be a transfer from one court to another court as envisaged in s.111(3).

[60]The upshot of this is that, given the timing, what was required for the lawful exercise of the direction, was that such proceedings as had by then already commenced, must have commenced in a court of the same territorial jurisdiction as that of the DPP in which the whole or at least a part of the offence had been committed, being the DPP of the North Gauteng Provincial Division of the High Court. That did not happen and the proceedings commenced in a court which had no jurisdiction over the applicant.

[61]The result that we have reached is consonant with the result reached by the Supreme Court of Appeal in *S v Mamase*.³ That court, however, in reaching its conclusion, approved of the reasoning of Neppen, J in the unreported judgment of *S v Mpanbaniso*,⁴ who concluded that no other court than the court in which criminal proceedings commenced, can have jurisdiction in terms of a written direction. The learned judge thus concluded that this of necessity requires, “...such written direction to have been issued prior to the commencement of the criminal proceedings.”

[62]These two courts were concerned with criminal trials in the high court, and the dimension of the charge sheet being lodged already with the first appearance, does not apply there. Likewise, the impact of s.111(3) of the Criminal Procedure Act on that scenario was not required to be considered; but given the same result, nothing turns on this.

[63]Given the similarities in the result to which we have come, and the inordinate delays that have taken place, the dicta in the penultimate paragraph applies equally here:

“[17] What is alarming about this case is that considerable delay and costs could have been avoided if a simple and practical solution to the problem was adopted: the charges could have been withdrawn, another direction issued and the appellants served with a fresh indictment. There was no apparent reason why such a course could not be followed and completed in a matter of hours. Counsel on behalf of the respondent could not offer any reason why such a course was not open to it.”

³ 2010(1)SACR 121 at [10] to [16].

⁴ Case no 32/2006, decided in Bisho High Court.

[64]In conclusion then, since in our constitutional democracy all public power must be exercised in terms of the Constitution or legislation under it, it follows, in our view, that the exercise of the power in this case was not lawful. We deal with the consequence of that conclusion below when discussing remedies.

Amending the charge sheet and perceived bias

[65]The events that give rise to this ground of review occurred on 9 and 10 May 2011. On a thumbnail, it is that the first respondent coaxed the prosecutor into amending the charge sheet to include the reference to the offences having been committed in Komatipoort. It is said that this conduct led to a reasonable perception of bias on the part of the first applicant.

[66]Mr Mohamed raised essentially two points in response. The first is that in a criminal trial the judge or magistrate is not simply an objective umpire, there to observe that the rules are observed by both sides. The judge or magistrate has to see, first and foremost, that justice is done. Reliance was placed on *R v Hepworth*.⁵

[67]The second point was that the first applicant had a remedy which he could have exercised at the time; it was to have applied for the recusal of the first respondent. And since he did not exercise that remedy, a review is not open now.

[68]In our view a case for perceived bias has not been made out, not on the facts, and not on the law. Starting with the latter, the first respondent in his reasons referred to a judgement in the Supreme Court of Appeal in *Take and Save Trading CC and Others v Standard Bank of SA Ltd*.⁶ The court was concerned with the test to be applied when a recusal application was brought on the basis of a perception of bias.

[69]We quote liberally from this judgement, including the first paragraph which provides the correct perspective:

⁵ 1928 AD 265 at 277.

⁶ 2004(4) SA 1 (SCA) at [1] to [4].

“[1] During the course of the plaintiff's case in a trial, and at a crucial stage when the last of the plaintiff's witnesses had to be cross-examined, the defendants' legal team withdrew without proffering any reason. The defendants represented by one of them (Mr Mansoor) then applied for a postponement of the trial. The learned trial Judge (P C Combrinck J in the Durban and Coast Local Division) debated the merits of the postponement application with him because it seemed to the Judge that the application was nothing but a tactical move to gain time. During the course of the debate the Judge expressed in no uncertain terms that he thought that there was little merit in two aspects of the defendants' case and that the postponement would have amounted to an exercise in futility; the other defences depended on Mansoor's evidence, which he, the Judge suggested, could give without the benefit of counsel. Eventually, however, the Judge granted a postponement. When the matter was again enrolled, the defendants, now represented by another counsel, applied by way of notice of motion for the Judge to recuse himself. He refused the application and the subsequent one for leave to appeal met the same fate. This Court eventually granted leave.

[2] Everyone is entitled to a fair trial and that includes the right to a hearing before an impartial adjudicator. This common-law right is now constitutionally entrenched. Present a reasonable apprehension of bias, the judicial officer is duty bound to recuse him or herself. The law in this regard is clear, having been the subject of recent judgments of both this Court and the Constitutional Court, and does not require any restatement. It is nevertheless convenient for present purposes to quote the following extracts from a Constitutional Court judgment for purposes of emphasis and because they are particularly germane to this case:²

'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.'

'At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

*[3] That is one side of the coin. The other is this:*³

'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.'

The same applies to civil proceedings: a Judge is not simply a 'silent umpire'.⁴ A Judge 'is not a mere umpire to answer the question "How's that?"' Lord Denning once said.⁵ Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.

[4] A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court's aberration.⁶ In any event, an appeal in medias res in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience⁷ more often than not requires that the case be brought to a conclusion at the first level and the whole case then be appealed."

[70]As to the facts: the whole issue concerning the first applicant having been arrested at Komatipoort loomed large. Three aspects here are relevant. First, the first respondent had earlier refused the state's application to put in the direction on what appeared to us to be a flimsy ground: that a copy and not the original was being tendered. This was a strange ruling, because although s.111(1)(b) required the original to be handed in, everyone must have known that it would be a mere administrative step to obtain the original and then to hand it in. When the prosecutor then asked that the case stood down till the next morning to get hold of the original, this too was refused.

[71]That ruling could hardly have pleased the prosecutor, and likely enamoured the first applicant. And it is not impossible that the first respondent was concerned that his ruling did not serve the interests of justice when later, predictably, the original was in fact availed and handed up.

[72]Second, the original direction was handed in without objection. It expressly (though ineffectually, as we have found) sought to confer jurisdiction over the Komatipoort conduct on the Johannesburg Regional Court. Aligning the charge sheet with the direction which was handed in by consent, hardly seems momentous or unfair.

[73]And third, certainly at some stage the charge sheet likely expressly asserted that the offences were committed also at Komatipoort. This much appears from the third applicant's request for further particulars, paragraph 2, where she asked: *"Precisely where in 'Komatipoort and or Johannesburg' in the Regional Division of Gauteng did the accused allegedly commit the offence of having contravened the provisions of section 5(b) read with sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992 (dealing in drugs)?"*

[74]The poor state of the record does not reveal that charge sheet, but it was in existence before the amendment was sought, as the request for further particulars was dated 16 June 2010.

[75]In summary, the conduct of the first respondent on this issue reveals rulings both for and against the first applicant. Moreover, the original direction having been handed in by consent, the amendment of the charge sheet was really a shoe-in.

[76]We therefore conclude that this ground of review has not been shown.

Remedy

[77]We have concluded that the direction, an administrative act, was not lawfully issued. The question is as to the appropriate remedy, since it is not every unlawful administrative act that is set aside. It depends on the interests of justice. Here however the fair trial rights of the applicant are involved as is the jurisdiction of courts of law.

[78]In our view the direction must be declared unlawful and it must be set aside. Such consequences as may flow from this order must be left to the parties to resolve. No costs were asked.

[79]In the result we make the following order:

- (a) It is declared that the direction purportedly issued by the acting deputy National Director of Public Prosecutions on 24 August 2009 in the case of *The State v Victor Vusi Khumalo* is of no force or effect, and it is set aside.

WHG van der Linde
Judge of the High Court

I agree

R Francis
Acting Judge of the High Court

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