

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A30/2006

In the appeal between:

NKOSINATHI EMMANUEL THABETE 1st Appellant

SEFISO FUMESANE MKHIZE 2nd Appellant

and

THE STATE Respondent

CORAM: RAMPAL, J *et* MATHEBULA, AJ

HEARD ON: 13 FEBRUARY 2006

JUDGEMENT: RAMPAL, J

DELIVERED ON: 23 FEBRUARY 2006

[1] This appeal served before us on Monday the 13th of February 2006. At the commencement of the hearing counsel for the State, Miss Bester, raised a point *in limine* whereby the procedure followed by the appellants was challenged. Counsel for the appellant, Mr. Skibi, opposed her. After hearing their argument on the point *in limine* we

reserved judgement and postponed the hearing of argument on the merits of the appeal for later adjudication in the event of the point *in limine* not succeeding.

[2] The appellants were arrested at Harrismith on the 9th September 1999 in connection with the hi-jacking of a cargo carrier on the N3 highway at Van Reenen on that same day.

[3] Subsequent to their arrest the appellants were charged with four criminal charges.

3.1 The 1st charge was robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act No. 51/77.

3.2 The 2nd charge was possession of an unlawful firearm in contravention of section 2 Arms and Ammunition Act No. 75/69.

3.3 The 3rd charge was unlawful possession of ammunition in contravention of section 36 Arms and Ammunition Act No. 75/69.

3.4 The 4th charge was possession of fake banknotes in contravention of section 1 Banking Act No. 90/39 and section 34(1)(1) The South African Reserve Bank.

[4] Their trial commenced in the Harrismith Regional Court on the 17th August 2000. Neither of them was legally represented. Both pleaded not guilty to all the 4 charges. All in all 9 witnesses testified during the course of the trial, 7 for the state and 2 for the defence, namely the accused themselves.

[5] At the end for the trial on the 18th October 2000 the 1st appellant was convicted in respect of the 1st, 2nd and 3rd charges. The 2nd appellant was similarly convicted. Both were acquitted in respect of the 4th charge.

[6] The appellants were sentenced on the same day, the 18th October 2000. In respect of the 1st charge each was sentenced to 15 years imprisonment. In respect of the 2nd

and the 3rd charges which were taken together for the purposes of sentence, each was sentenced to 5 years imprisonment. The court below directed that the 5 year jail term should run concurrently with the 15 year jail term. Therefore the effective sentence they have to serve is 15 years imprisonment.

[7] Still on the same day, the 18th October 2000, the appellants applied to the trial magistrate for leave to appeal against their convictions and their sentences. This they did in terms of section 309B Criminal Procedure Act No. 51/77. Both applications were dismissed.

[8] Section 309B Act No. 51/77 was applicable to the appellants at the time of their convictions and sentences on the 18th October 2000. In terms of this section they were required to apply to the magistrate in the court below for leave to appeal.

[9] The above section was declared unconstitutional

subsequent to the conviction of the appellants – vide **S v STEYN** 2001 (1) SACR 16 (CC) per Madlanga, AJ. The declaration of constitutional invalidity was handed down on the 29th November 2000.

[10] The declaration of invalidity was, however, suspended for six months from the date of the said court order on the 29th November 2000. The suspension period of constitutional invalidity expired on the 28th May 2001.

[11] Section 309C Act No. 51/77 prescribed the procedure to be followed in a case where an accused was aggrieved by a magistrate's refusal to grant the prerequisite leave to appeal. The section granted an accused person an automatic right independent of the restrictive route via the magistrate to approach a judge president of a division concerned for leave to appeal to a high court with jurisdiction. This section applied to the appellants at the time of their conviction on the 18th October 2000.

[12] Miss Bester, counsel for the respondent, argued *in limine* that the appellants had not sought and obtained leave to appeal from a judge president of this division by way of a petition in terms of section 309C Act No. 51/77. She contended that since the appellants were sentenced prior to the 28th May 2001 they did not have the automatic right of appeal from the magistrate's court to the high court. Section 309C, she contended further, still applies to the appellant's because its constitutional invalidity only became operative from the 29th May 2001. From the 29th November 2000 when the constitutional invalidity was declared until the 28th May 2001 when the suspension of a constitutional invalidity expired it was business as usual. That business was governed by section 309B and section 309C, so she contended. Therefore she submitted that the appellants were not properly before us since they did not have the special leave of the judge president to come to this court.

[13] Mr. Skibi, counsel for the appellants, disagreed. He responded by submitting that the appellants were properly before us. His contention was that the appellants were not legally obliged first to seek and obtain from the judge president of this division the special leave to appeal by way of a petition in terms section 309C Act No. 51/77. He contended that the decision in **S v STEYN** *supra*, correctly interpreted, meant that section 309B and section 309C became invalid not upon the expiring of the six months suspension period but from the date those two sections were enacted on the 29th May 1999.

[14] For this proposition he relied on the decision in **S v DANSTER** 2002 (2) SACR 178 CPD per Davis, J which was heard at the same time with **S v NQIDO**. He urged us to follow that full bench decision and not the single judge decision of this division in **S v LESALA AND ANOTHER** 2002 (2) SACR 8 (OPD) per Musi, J.

[15] As from the 29th May 1999 a person sentenced in the

lower court but aggrieved by such a decision was required to approach such lower court within fourteen days for leave to appeal against its decision (sec 309B). If leave to appeal was granted then the accused was allowed to proceed from the lower court to the relevant high court. However, if leave to appeal was refused an accused person concerned could petition the judge president of the high court having jurisdiction over the matter for leave to appeal (section 309C).

[16] In **S v DANSTER** and **S v NQIDO** *supra* at 181i – 182c Davis J said:

°Had the Constitutional Court not acted in terms of s 172(1)(b) of the Republic of South Africa Constitution Act 108 of 1996 (the Constitution) and suspended the order of invalidity for a period of six months, such a declaration of invalidity would have taken effect immediately from the date on which the impugned sections had been introduced into the Act, that is from 28 May 1999.

In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) the Court accepted the principle of objective constitutional invalidity in terms of which a law declared to be unconstitutional is considered to be invalid from the date of its

enactment. See Ferreira (supra at paras [27] - [30]), and National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (2) SACR 556 (CC) (1999 (1) SA 6; 1998 (12) BCLR 1517) at paras [84] - [96].

In recognition of the principle of objective constitutional invalidity, 172(1) of the Constitution empowers the Constitutional Court to alter the effect of the doctrine. Thus 172(1)(b) provides that the Court may make any order that is just and equitable including

(i) an order limiting the retrospective effect of the declaration of invalidity;”

[17] The principle of objective constitutional invalidity as I understand it obtains that the impugned provision immediately becomes invalid upon the pronouncement of the declaration of invalidity. The impugned provision immediately ceases to have the force of law. The declaration invalidates the provision from the day it became operative as law (Knoll J in **S v BRANDT** as cited with approval by the full bench in **S v DESAI et S v NQIDO** *supra* at 182 c – d read with 182 g – h).

[18] The two provisions relating to the appeal procedure,

namely section 309B and 309C became law on the 29th May 1999 but were declared invalid on 29th November 2000 (**S v STEYN** *supra*). The appellants were sentenced on the 18th October 2000. According to the principle of objective constitutional invalidity they had and had always had an unfettered right to appeal from the lower court to the high court in terms of the original section 309(1) and section 309(2) before they were amended on the 29th May 1999 (**S v DANSTER** *et S v NQIDO* *supra* at 182 d – e).

- [19] The second leg of the court order in **S v STEYN** *supra* suspended the declaration which invalidated section 309B and section 309C for six months from the 29th November 2000. The practical effect of the suspension was that the normal backward operation of the principle of constitutional invalidity was reversed. The two impugned sections were in a sense revived and their lifespan effectively extended by six more months. During that period of suspension the impugned sections were conditionally deemed to be valid.

They were given the force of law until the 28th May 2001 by the court in terms of section 172(1)(b) of the constitution limiting the retrospective effect of the principle in this way meant that the sections which were no longer valid and logically had never been valid were for practical considerations of public expediency and good governance deemed to be still valid and to have always been valid. Of course this was an artificial device designed to expedite the administrative transition. The appellants were therefore required to petition the judge president of this division in terms of section 309C seeing that they had already applied unsuccessfully for leave to appeal (**S v LESALA & ANOTHER** *supra*). But they did not. Compare **S v NQIDO** *supra*.

- [20] The suspension of constitutional invalidity came to an end on the 28th May 2001. The condition of the suspension did not materialise. The Minister of Justice and Constitutional Development did not have the Criminal Procedure Act No. 51/1977 amended by parliament. I suppose he could have

approached the Constitutional Court, if the six month suspension period was too short, for an extension of the period of the suspension of the constitutional invalidity. The practical effect of the expiry of the suspension coupled with the executive omission to take any remedial steps led to the final demise of section 309B and section 309C. The suspension did not destroy the principle of constitutional invalidity. The result of this was the constitutional invalidity which was supposed to operate as from the 29th May 2001 after expiry of the six months suspension period, reverted to its natural place and objective date of enactment of section 309B and section 309C – in other words the 29th May 1999. In turn the retrospective invalidation of these two sections revived section 309(1) and section 309(2) in their original forms as they were on the 28th May 1999 (**S v NQIDO** *supra*).

[21] In **S v LESALA & ANOTHER** *supra* at 12 i – j, Musi J correctly held:

“I conclude therefore that the declaration of invalidity in Steyn does not have the effect of invalidating the pending application for leave to appeal and petition proceedings validly commenced under the impugned provisions during the period of suspension of invalidity.”

(my emphasis)

While this passage is a correct statement of law, the decision in **S v DANSTER** *et* **S v NQIDO** *supra* went a step further beyond the period of suspension. In the latter case unlike in the former the court also considered the practical effects of the eventual expiry of the suspension of the 28th May 1999. The failure of the executive organ to take some remedial measures timeously during the suspension period created the dilemma.

- [22] Had the executive taken appropriate steps between the date of declaration of constitutional invalidity and the expiry date of the suspension of such constitutional invalidity the principle of constitutional invalidity would not have shifted

backwards but would have remained frozen on the 28th May 2001. The expiry of the suspension period would not have triggered off the backward shifting of such principle again. The pending applications for leave to appeal and the pending petitions for special leave to appeal would then have remained on track as valid proceedings initiated before the expiry of the suspension in terms of impugned sections and to be completed after the expiry of the suspension in terms of the same impugned sections. The accused in those incomplete proceedings would not have had an automatic right of appeal from the lower courts to the high courts after expiry of the suspension.

[23] In the instant case the appeal process had not been completed as at the 29th May 2001. The application of the appellants in terms of section 309B for leave to appeal which failed on the 18th October 2000 became a legal nullity on the 29th May 2001. This is so because it stemmed from a provision which was subsequently

declared invalid by the court decision on the 29th November 2000 and ultimately obliterated by the operation of the principle of constitutional invalidity on the 28th May 2001. As on 29th May 2001 there was nothing in place to protect and to preserve the pending processes initiated before or during the suspensions period against the corrosive and retrospective operation of the principle of objective constitutional invalidity.

[24] On the 3rd November 2000 and on the 7 March 2002 the second appellant and the first appellant respectively intimated to the lower court that they were still aggrieved by the refusal of the trial court magistrate to grant them leave to appeal. On the 21st November 2005 after considerable delays and comedy of errors by the magistrate personnel the director of public prosecutions notified the appellants through their counsel, Advocate N. Skibi that their appeal would be heard on Monday the 13th February 2006.

[25] For the reasons advanced above I have come to the conclusion that the appellants were not required to seek and obtain from the judge president of this division special leave to appeal by way of a petition in terms of section 309C. I hold a firm view that their appeal is properly before us. As I see it their appeal falls to be determined in terms of section 309 as it was before the 29th May 1999 when sections 309B and 309C were first introduced. The appeal procedure as provided in the latter sections was erased by the operation of the aforesaid principle. In these circumstances I would therefore dismiss the point *in limine*.

[26] Accordingly I make the following order:

26.1 The point raised *in limine* by the respondent fails.

26.2 The appeal of each appellant is properly before us.

M.H. RAMPAI, J

I concur.

M.A. MATHEBULA AJ

On behalf of the appellants:

Adv. N. Skibi
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. A. Bester
Instructed by:
The Director: Public
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