IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

The State v Wouter Basson **CCT 30/03**

Decided on 9 September 2005

MEDIA SUMMARY

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 handed down a unanimous judgment in the state's application for leave to appeal against the outcome of criminal proceedings against Dr Basson, formerly head of South Africa's chemical and bacterial weapons programme.

A preliminary hearing in this matter was held in November 2003 in order to decide if the state's grounds of appeal against the decision of the Supreme Court of Appeal (SCA) raised constitutional issues. A unanimous judgment on this preliminary issue was handed down in March 2004, holding that constitutional issues were indeed raised. That judgment did not, however, grant the state leave to appeal to the Constitutional Court.

The judgment handed down today deals with the substantive issues raised by the appeal.

Dr Basson was charged in the Pretoria High Court in 1999 on 67 counts including murder, conspiracy to commit a variety of crimes, fraud and drug offences. Six of the charges relating to conspiracy to commit murder in countries other than South Africa were quashed by the High Court upon application by counsel for Dr Basson, and were therefore not prosecuted. Counsel for Dr Basson also successfully objected to the inclusion of the record of the bail application hearing as evidence in the main trial. Early in 2000 the state applied for the recusal of the trial judge (Hartzenberg J) on the grounds that he was biased and had prejudged important issues in the case. The application was dismissed and the trial proceeded. Dr Basson was acquitted on all remaining charges in April 2002.

After the conclusion of the trial the state applied to the High Court in terms of section 319(1) of the Criminal Procedure Act to reserve certain questions of law for consideration by the SCA. Those questions included the trial court's quashing of the six charges, the refusal of the trial judge to recuse himself, and the admissibility of the bail record. Although the High Court did reserve certain questions, the SCA dismissed the application for the reservation of questions of law. Questions in these three categories formed the three grounds of appeal to the Constitutional Court.

Having decided in the preliminary judgment that the application raised constitutional issues, two remaining preliminary issues were decided by the Constitutional Court today. The first concerns whether the state's appeal lies against the High Court decision or the SCA's decision refusing leave to appeal to it. Difficulty arose in this case as a result of the legal principle that a decision of the SCA refusing leave to appeal is not itself appealable; but the SCA in considering whether to grant or refuse leave to appeal nevertheless considered the underlying constitutional issues. The Constitutional Court held that because the Constitution provides that the Constitutional Court is the court of final instance in all constitutional matters, any decision of the SCA – even one refusing

leave to appeal – that traverses constitutional issues must be appealable to it. The state's appeal was held to lie against the decision of the SCA.

The second preliminary issue was whether leave to appeal should be granted or not. The Court held that it was in the interests of justice that leave be granted, and made an order to that effect.

The Three Substantive Grounds of Appeal

1. *Bias*
The state's first ground of appeal was that the conduct of the trial judge during the proceedings either displayed bias (albeit subconscious bias) or gave rise to a reasonable apprehension of bias in the mind of a reasonable observer. The state argued before the Court that several remarks and incidents during the course of the trial and several incorrect legal findings by the trial judge led to a reasonable apprehension of bias on the part of the trial judge. After considering each of the incidents pointed to by the state, the Constitutional Court held that while some of the remarks were inappropriate, and at least some of the legal rulings or factual findings might have been mistaken or questionable, these had to be understood in the context of a marathon trial, where human error and frustration are understandable. The Court is of the view that none of the incidents complained of, seen alone or cumulatively, gave rise to a reasonable apprehension of bias. The Court accordingly held that the state had failed to show that the trial judge's decision not to recuse himself was incorrect. The appeal on the first ground was dismissed.

2. *Exclusion of the bail record*
The state's second ground of appeal was that the decision to exclude the record of Dr Basson's bail application hearing from evidence in the trial, on the basis that it would have been unfair to Dr Basson to admit it, was wrong. The admission of the bail record, the state argued, would have had a material influence on the outcome of the trial. The state argued further that the trial court had not been at large to rule on the fairness or admissibility of the bail record at the outset of the trial, before the state had tendered any part of it as evidence. The Constitutional Court did not agree, holding that the forum best placed to decide upon the fairness or unfairness of the admission of evidence is the trial court. Moreover, the decision to admit or exclude evidence is left to the discretion of the trial court. Courts of appeal will interfere in the exercise of a lower court's discretion only if the discretion is shown to have been exercised injudiciously or on the mistaken application of legal principles. In this case, the Court held, the state had failed to show that the trial court had misused the discretion to admit or exclude the bail record. The appeal on the second ground was accordingly dismissed.

3. *Charges concerning conspiracy to commit murder abroad*
The state appealed finally against the trial court's decision to quash six of the conspiracy charges. These charges all concerned alleged conduct which either falls within what are considered in international law to constitute war crimes or closely related to such conduct. The trial court had held that section 18(2) of the Riotous Assemblies Act, the statutory provision from which the crime of conspiracy arises, envisages prosecution only for conspiracies to commit crimes that are themselves triable by South African courts. The six charges all related to conspiracies concluded in South Africa to commit crimes in other countries, including Namibia (then South-West Africa). The trial court held that since the target offences could not have been tried in South Africa, having been committed beyond the borders of South Africa, the charges of conspiracy to commit those crimes disclosed no offence under the Riotous Assemblies Act. The SCA refused to reserve this question of law, holding that section 319(1) of the Criminal Procedure Act allows reservation of a question of law by the state

only upon the acquittal or conviction of an accused. Dr Basson was neither convicted nor acquitted on the six charges, and the SCA held that it was therefore not open to the state to reserve a question of law in this respect.

The Constitutional Court held that section 319(1) should rather be construed to allow the state to appeal against an order dismissing or upholding an objection to a charge. Such a reading of the section brings it within constitutional bounds by recognising the right of the state to institute criminal proceedings, and if need be, appeal adverse findings of law. In addition, the Court noted that in dismissing the appeal, the SCA had failed to take account of South Africa's international law obligations to uphold and respect principles of international humanitarian law.

The Court then turned its attention to whether the High Court had been wrong to uphold the objection to the six charges. The Constitutional Court held, having regard to certain provisions of the Riotous Assemblies Act and the Defence Act – to which Dr Basson as a member of the then South African Defence Force was subject – that there was a real and substantial connection between South Africa and the crimes to be committed in Namibia and elsewhere abroad. As such, the conspiracies were triable in South Africa, and the trial court was wrong to conclude that the charges disclosed no offence. The appeal against the SCA's decision to refuse leave to appeal on the reservation of the question of law relating to the quashing of the charges was upheld, and the order of the High Court quashing the six charges was set aside. This means that it would be open to the prosecution, if it chose, to proceed with the charges relating to conspiracy to commit murder in Namibia, Swaziland, Mozambique and the United Kingdom.

The Court did not pass judgment on whether the re-indictment of Dr Basson on the six charges incorrectly quashed by the High Court, would be precluded by principles of double jeopardy. That question, the Court said, would arise only if the state decides to re-indict Dr Basson on the quashed charges, and the issue of double jeopardy is raised as an objection to its doing so.