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**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

|                              |        |
|------------------------------|--------|
| Reportable:                  | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates:    | YES/NO |

Case No. 08/2022

In the matter between:

**THE STATE**

**APPLICANT**

and

**MBANA PETER THABETHE**

**1<sup>ST</sup> RESPONDENT**

**LIMAKATSO MOOROSI**

**2<sup>ND</sup> RESPONDENT**

**SEIPATI SILVIA DHLAMINI**

**3<sup>RD</sup> RESPONDENT**

**IQBAL MEER SHARMA**

**4<sup>TH</sup> RESPONDENT**

**NULANE INVESTMENTS 204 (PTY) LTD**

**5<sup>TH</sup> RESPONDENT**

(Represented by the 4<sup>th</sup> Respondent)

**DINESH PATEL**

**6<sup>TH</sup> RESPONDENT**

**ISLANDSITE INVESTMENT ONE HUNDRED**

**7<sup>TH</sup> RESPONDENT**

**AND EIGHTY (PTY) LTD**

(Represented by the 8<sup>th</sup> Respondent)

**RONICA RAGAVAN**

**8<sup>TH</sup> RESPONDENT**

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**CORAM:**

GUSHA, AJ

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**HEARD ON:** 28 JULY 2023

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**DELIVERED ON:** This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 15h00 on 03 AUGUST 2023.

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## **JUDGMENT**

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### **INTRODUCTION**

[1] The respondents were arraigned in this court as follows;

Count 1: Accused 1 and 2 only.

The State alleges that the accused are guilty of contravening section 86(1) of the Public Finance Management Act (PFMA), Act 1 of 1999, read with the provisions of sections 1, 36, 38, 39, 44(2) and 76 (4)(c) of the Act, and further read with the provisions of section 217 (1) of the Constitution. In respect of this count the State conceded that the evidence against accused 1 fell short of the required threshold and accordingly the application for the discharge of accused 1 in respect of count 1 should succeed. Accordingly, I shall not take this any further than I have.

Count 2: Accused 1-8.

The State alleges that all the accused unlawfully and intentionally and with common purpose committed fraud.

Count 3: Accused 4, 5, 7 and 8 only.

It is alleged that they are guilty of contravening the provisions of section 4 read with the provisions of sections 1, 8(1) of Act 121 of 1998 and further read with the provisions of section 51(2) of the criminal law amendment act 105 of 1997.

Count 4: Accused 4, 5, 7 and 8.

It is alleged that they are guilty of contravening the provisions of section 4 read with the provisions of sections 1, 8 (1) of Act 121 of 1998 and further read with the provisions of section 51(2) of the criminal law amendment act 105 of 1997.

- [2] Subsequent to an involved trial spanning 6 weeks<sup>1</sup>, all the respondents save for the 2<sup>nd</sup>, were found not guilty and discharged in terms of section 174 of the Criminal Procedure Act, 51 of 1977 (the Act).
- [3] The 2<sup>nd</sup> respondent elected to close her case without testifying and thereby exercised her right to remain silent. As the court was not satisfied that the applicant passed muster of the *onus*, she was acquitted on both counts preferred against her.

### **CHRONOLOGY OF EVENTS SUBSEQUENT THE 21<sup>ST</sup> APRIL JUDGMENT**

- [4] For reasons which shall become apparent elsewhere in this judgment, I deem it apposite to briefly set out the chronology of events post the aforesaid judgment.
- [5] Aggrieved by the judgment (the 21<sup>st</sup> April 2023 judgment), the applicant on the 8<sup>th</sup> May 2023 lodged an application for leave to appeal.<sup>2</sup> The 23<sup>rd</sup> June 2023 was allocated for hearing. The applicant and counsel for the 7<sup>th</sup> and 8<sup>th</sup> respondents confirmed their availability<sup>3</sup>. Subsequent to this, all the remaining respondents filed their notices to oppose and advised that the agreed upon date was not suitable. On the 12<sup>th</sup> June 2023, I directed my erstwhile registrar to contact all the parties and advise them of same. On the same day, he sent an electronic mail to all the parties in the following terms;

*Greetings,*

*The honorable Judge has noted the unavailability of other legal representatives for the 23 June 2023. However she noted that all parties **involved in the leave to appeal** (my emphasis) should agree on a date that will suit all parties then forward the said date and see if it will suit her too.*

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<sup>1</sup> The trial commenced on the 23<sup>rd</sup> January 2023 and was finalised on the 21<sup>st</sup> April 2023.

<sup>2</sup> Pages 1 -41 of the application bundle.

<sup>3</sup> At the time of the allocation, only the 7<sup>th</sup> and 8<sup>th</sup> respondents had filed their notices to oppose.

- [6] On the 13<sup>th</sup> June 2023, Mr Krause the instructing attorney for the 7<sup>th</sup> and 8<sup>th</sup> respondents in an electronic mail wherein he copied Mr Serunye, counsel for the applicant, and all the other respondents' legal representatives, replied as follows;

*Dear Mr Rapulana,*

*The date of the 28<sup>th</sup> of July is also suitable to Accused 7 & 8's counsel.*

*Having discussed the matter with Mr. Mantsha (Accused 1), Mr Moroka (Accused 2) and Adv Edeling SC (Accused 3), we confirm that they have previously indicated their availability for 28 July 2023.*

*Mr. Forbay (Accused 4&5), Adv. Oldwage (Accused 6) and Ms. Witbooi (on behalf of the State) have confirmed their availability in the trailing emails below.*

*Therefore all the parties are available on the 28 July 2023 **for purposes of the application for leave to appeal** (my emphasis).*

...

- [7] Consequently and upon agreement between the parties, the application was set down for the 28<sup>th</sup> July 2023. As my acting term was to expire on the 30<sup>th</sup> June 2023, the file was then returned for reallocation. Until the expiry of my acting stint, this was the sum total of my involvement with the matter.
- [8] On the 20<sup>th</sup> June 2023 however and unbeknownst to me, the aforesaid application was withdrawn<sup>4</sup> and in tandem with the withdrawal, the applicant lodged an application in terms of section 319 of the Act for reservation of questions of law.<sup>5</sup>
- [9] On the 17<sup>th</sup> July 2023 Mr Krause addressed correspondence to the Judge President of this Division and copied both the applicant and the remaining respondents. In it he advised of the impending irregularity if the application in terms of section 319 of the Act was heard by a Judge other than me. It is accordingly only after this date that I was once more placed in possession of the file.

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<sup>4</sup> Page 60 of the bundle.

<sup>5</sup> *Ibid* pages 68-142.

[10] I pause here to mention an aspect which caused me great consternation whilst preparing for this application. Whilst perusing the file, I came across correspondence addressed for my attention and dated 30<sup>th</sup> May 2023.<sup>6</sup> For purposes of this judgment, I deem it apposite to reproduce the contents thereof herein without emendation;

**BY EMAIL:** [s\[...\]@judiciary.org.za](mailto:s[...]@judiciary.org.za) : [D\[...\]@judiciary.org.za](mailto:D[...]@judiciary.org.za)

**FOR ATTENTION:** Acting Judge N. Gusha

**Re: MBANA PETER THABETHE & OTHERS**

**BLOEMFONTEIN HC CASE 08/22**

1. The above-mentioned matter has reference.
2. On 8 May 2023, the State filed an application for leave to appeal against the whole of the judgment, ruling and orders of her Ladyship, the Honourable Acting Justice Gusha, delivered on:
  - (a) 21 April 2023 upholding the applications by Accused 1, 3, 4, 5, 6, 7 and 8 for a discharge in terms of Section 174 of the Criminal Procedure Act 51 of 1977 (**The Act**), as well as the acquittal of Accused 2; and
  - (b) 23 February 2023 ruling that “those documents as contained in Exhibit bundle three” are inadmissible as evidence against the accused.
3. The State intends to ask the Honourable Gusha AJ to reserve questions of law in terms of section 319 of the Act, for consideration by the Supreme Court of Appeal.
4. It is unclear from the judgment of the trial court what its findings of fact are. It is therefore necessary for the State to request the trial court to clarify its factual findings.
5. We therefore request that it be established what facts did the Honourable Gusha AJ accept to be facts proved by the State.

Thank you.

Yours Faithfully,

Adv Peter Serunye

State Advocate

[11] I deem it apposite to mention this correspondence herein because, evidently from the date thereof, albeit its contents appear to conflate the applications filed in terms of sections 317 and 319 of the Act, the correspondence was authored

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<sup>6</sup> Pages 143-144 of the application bundle.

whilst the application in terms of section 317 was still alive. In its application filed in terms of section 319 of the Act and its heads of arguments, the applicant regrettably seems to suggest that their correspondence to me went wilfully unanswered. This I find most regrettable and disquieting. I have painstakingly set out the chronology of events precisely to illustrate that I did not ignore any correspondence, I was simply unaware thereof. For the applicant to assert otherwise in its papers is truly lamentable. I must however hasten to add that when I broached this aspect with counsel during arguments, he proffered somewhat of an apology.

### **THE APPLICATION IN TERMS OF SECTION 319 OF THE ACT**

[12] I revert to the present judgment.

#### **In limine: Condonation**

[13] *In limine* the respondents raised that the application was filed out of time. It was contended on behalf of the respondents that the delay in filing was excessive and that the application fell to be dismissed on this score alone. To fortify their point, the respondents argued that the applicant is the author of its own misery as it wasted time by filing an application, which in law was not available to it. Furthermore, when the latter was aborted, the applicant moved an application to reserve questions of law *sans* an application for condonation.

[14] The applicant in turn contends that its application is not out of time as the applicable section does not prescribe a time limit, only providing that it be filed within a reasonable time. The applicant further contends that as its application is not out of time, there was no reason for it to bring an application for condonation.

[15] The applicable provision, section 319 of the Act, provides as follows;

- (1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially

entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division. "

- (2) The grounds upon which any objection to an indictment is taken shall, for purposes of this section, be deemed to be questions of law.
- (3) The provisions of section 317 (2), (4) and (5) and 318 (2) shall apply, mutatis mutandis with reference to all proceedings under this section.

[16] It is evident from the aforesaid section that it does not prescribe a time within which the application of reservation of a question of law ought to be made. It however needs no restating that applications of this nature must be brought within a reasonable time. The question whether the application has been brought within a reasonable time is determined from the time after the finalization of the case and the filing of the application and not the time when the application is heard.<sup>7</sup> In the present matter therefore the delay, if any, will be determined from the 21<sup>st</sup> April 2023 until the 20<sup>th</sup> June 2023 when the application was filed. The applicant's application is accordingly filed 39 court days after the 21<sup>st</sup> April 2023 judgment.

[17] Notwithstanding the delay in filing the application and the reasons advanced by the applicant therefor, I am of the view that the interests of both parties to finality, the absence of prejudice on the respondents (none was alleged) as well as the interests of justice, dictate that I should find in favour of the applicant and conclude as I do, that all things considered the application was filed within a reasonable time. That being said, I would be the remiss if I do not remark that the cavalierly manner in which the applicant approached this matter post the 21<sup>st</sup> April 2023 judgment is to be deprecated, it is after all established law that applications in terms of section 317 of the Act are not available to the applicant.

#### The applicable legal principles

[18] I now turn to deal with whether the questions sought to be reserved are questions of law or of fact. As a starting point, it is a salutary principle of our law that the applicant has a right of appeal only against a trial court's mistakes of law,

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<sup>7</sup> *S v Legote en 'n Ander* 1999 (1) SACR 269 (O).

not its mistakes of fact. However the distinction between questions of law and questions of fact is often notoriously difficult to draw.<sup>8</sup>

- [19] What is clear is that the provisions of section 319 of the Act are peremptory and require strict compliance, as its purpose is to limit appeals by the State. In *Director of Public Prosecutions: Limpopo v Molope and Another* [2020] ZASCA 69 wherein the court cited with approval *Director of Public Prosecutions, Natal v Magidela and Others* [2000] 2 All SA 337 (A) (SCA) the court remarked as follows;

*'The provisions of section 319 and its predecessors have been the subject of judicial interpretation over the years and in order to see whether the requirements of the section were complied with in this case it is important to consider how the section has been construed. The first requirement is not complied with simply by stating a question of law. At least two other requisites must be met. The first is that the question must be framed by the Judge "so as accurately to express the legal point which he had in mind" (R v Kewelram 1922 AD 1 at 3). Secondly, there must be certainty concerning the facts on which the legal point is intended to hinge. This requires the court to record the factual findings on which the point of law is dependent (S v Nkwenja en 'n Ander 1985 (2) SA 560 (A) at 567B-G). What is more, the relevant facts should be set out fully in the record as part of the question of law (S v Goliath 1972 (3) SA 1 (A) at 9H-10A). These requirements have been repeatedly emphasised in this Court and are firmly established (see, for example, S v Khoza en Andere 1991 (1) SA 793 (A) at 796E-I). The point of law, moreover, should be readily apparent from the record for if it is not, the question cannot be said to arise "on the trial" of a person (S v Mulayo 1962 (2) SA 522 (A) at 526-527). Non constat that the point should be formally raised at the trial: it is sufficient if it "comes into existence" during the hearing (R v Laubscher 1926 AD 276 at 280; R v Tucker 1953 (3) SA 150 (A) at 158H-159H). It*

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<sup>8</sup> *DPP, Western Cape v Schoeman & another* (904/2017) [2019] ZASCA 158 (28 November 2019)



*follows from these requirements that there should be certainty not only on the factual issues on which the point of law is based but also regarding the law point that was in issue at the trial.'*

- [20] From the aforementioned it is therefore clear that in order to avail the provisions of section 319, three jurisdictional facts must be satisfied. First, it is essential that the question is framed accurately leaving no doubt what the legal point is. Secondly, the facts upon which the point hinges must be clear. Thirdly, they should be set out fully in the record together with the question of law.<sup>9</sup>
- [21] Unless the State does this, it may not be possible for a court of appeal to establish with certainty what the conclusions on the legal point, which the trial court arrived at, are. Where it is unclear from the judgment of the trial court what its findings of fact are, it is therefore necessary to request the trial judge to clarify its factual findings. Where this is not done, the point of law is not properly reserved.<sup>10</sup>

#### The questions of law sought to be reserved

- [22] In its application the applicant seeks the following to be reserved as questions of law;
- 3.1 *Whether, on the proven facts, the conduct of Respondents 1, 2, 3, 4, 5, 6, 7, and 8 prima facie was brought within the ambit of the offences of Contravention of Section 86 (1) of the Public Finance Management Act 1 of 1999, Fraud and Money Laundering, as charged respectively.*
  - 3.2 *Whether in light of the prima facie evidence that was placed before the Court the decision to discharge the Respondents at the end of the State's case, contrary to legal precedent, was such an error of law that it constituted a gross irregularity in the trial, and it prejudiced the State and should be set aside.*
  - 3.3 *Whether the learned trial judge erred in law by misinterpreting, misapplying or overlooking legal precedent as authority for the discharge of the accused under*

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<sup>9</sup> *DPP, Western Cape v Schoeman & another* (904/2017) [2019] ZASCA 158 (28 November 2019) at para 39.

<sup>10</sup> *Ibid* at para 40.

*section 174 of the Criminal Procedure Act; specifically whether the learned judge applied the law in context of a case involving several accused who may implicate each other.*

- 3.4. *Did the Court err in terms of the law of documentary evidence in that after the Court found TJM11 (Sundry Payment Advice), TJM12 (Transaction log sheet) and TJM13 (Nulane tax invoice dated 12 March 2012, for the amount of R8 328 080.00) to be originals, she later ruled the very same documents inadmissible.*
- 3.5. *Whether the Court in respect of its ruling of 23 February 2023, that documents tendered into evidence by the State were inadmissible, wrongly applied the law on the best evidence rule, had not exercised its discretion judicially or that it had been influenced by the wrong principles.*
- 3.6. *Did the Court, in respect of its application of the Doctrine of Common purpose, contrary to established law, wrongly expect the State to prove prior agreement between the parties or that they knew each other?*
- 3.7. *Whether the Court correctly applied the law in terms of Section 204 (2) that requires the witness to answer frankly and honestly all questions put to him.*
- 3.8. *Whether the court misdirected itself when conflating the question of indemnity of the witness in terms of Section 204(2) of the Act with the judgment in terms of Section 174 of the Act*
- 3.9. *Whether the Court's failure to make findings of fact as enjoined by Section 146(a) of the Act and Article 9 of The Code of Judicial Conduct adopted in terms of Section 12 of the Judicial Service Commission Act 9 of 1994 rendered the trial unfair.*

[23] In support of its contention that the court erred in its application of various legal principles to the evidence, the applicant expansively refers to the evidence in chief as constituting the facts upon which the questions sought to be reserved hinge. In my view, it is not necessary to repeat same herein, as same has been fully and extensively traversed in the papers as well as during arguments. What is clear from the application and indeed oral argument is that the facts upon which the questions sought to be reserved pivot are not clear. In this regard the applicant contends that *it is unclear from the judgment of the trial court what it's*

*finding of fact* were hence the correspondence to request that I clarify my factual findings. I have considerable difficulty with this aspect. Firstly that which is sought by the applicant in order to satisfy the requirements of section 319, is to be found in the judgment. The fact that same is not tabulated and or found under a particular heading does not suggest that no factual findings were made.

- [24] Secondly, I am alive to the fact that the applicable authorities do not prescribe how the request ought to be made, I however hold the view that in order to ensure that the parties are even-steven, that request cannot be in the form of a letter directed to a Judge in chambers and without so much as copying the opposing side. In my view that request ought to be in a form of an application.
- [25] To the extent that the applicant refers in the application and the heads of argument, to the facts upon which the legal questions hinge, a proper reading of the application reveal that all that the applicant does is to rehash primarily the evidence in chief and in some instances not even accounting for the cross examination that followed.
- [26] In my view the facts upon which the legal question should pivot, are those facts found to be proven by the trial court, no more no less.
- [27] This in my view ought to be the end of the matter, for if the applicant is in the dark about the very proven facts on which its questions of law pivot then clearly the strict and peremptory requirements have not been met. What the applicant attempts to achieve<sup>11</sup> is exactly what the court in *Schoeman* cautioned against;

*If we were to entertain the appeal on the merits, we would face the task of having to ascertain the relevant facts. To this end, we would have to read the entire record and re-evaluate all of the evidence, thereby second-guessing the trial judge who was best placed to do this. We would thus have to approach the matter as if this were a full appeal on the merits. The problem does not end there. Having embarked on this task, we would have to decide whether the facts established by us accord with those found by the trial court. It is only if we find that the factual findings of the trial court were wrong and the result of a legal error would we be obliged to interfere with the decision of the trial court.*

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<sup>11</sup> By the applicant's own admission the record is in excess of 2000 pages.

[28] I shall however, perhaps for the sake of finality, take the matter further and determine whether that which is sought to be reserved are in fact questions of law or of fact.

[29] I now turn to deal with the individual questions sought to be reserved.

(i). Whether, on the proven facts, the conduct of Respondents 1, 2, 3, 4, 5, 6, 7, and 8 prima facie was brought within the ambit of the offences of Contravention of Section 86 (1) of the Public Finance Management Act 1 of 1999, Fraud and Money Laundering, as charged respectively.

[30] This question as framed illustrates the point already made in this judgment. The difficulty the applicant faces is that as pointed out already, it contends that it does not know the factual basis upon which the court based its decision. Furthermore the question sought to be reserved is not a question of law but rather an attempt to send to the appeal court that which it has no power to do; to discern for itself the facts found to be proven and then make an assessment as to whether as a matter of fact, the applicant's case was *prima facie* proved or not.

[31] On the test as set out in *Schoeman*, this question falls foul of the requirements. In any event to the extent that it can be successfully argued that I misdirected myself in the evaluation of the evidence before me, the following *dictum* in *Schoeman* is instructive in this regard;

[74] *Put simply, the mere fact the judicial process has become flawed by the way a trial court goes about assessing the evidence before it, does not justify permitting s 319 to be used by the prosecution to reserve a point of law for what is in truth misdirection of fact. That impermissibly undermines the clear language of the section and the deliberate choice of the legislature to restrict appeals in terms of the section to questions of law. The law as reflected in Canadian cases cited in Pistorius does not reflect the position in our law.*

(ii). Whether in light of the prima facie evidence that was placed before the Court the decision to discharge the Respondents at the end of the State's case, contrary to

legal precedent, was such an error of law that it constituted a gross irregularity in the trial, and it prejudiced the State and should be set aside.

- [32] This question too poses extreme difficulty for the applicant for the same reason as alluded to in the 1<sup>st</sup> question sought to be reserved. It needs no restating that evidence must be seen through the prism of the evaluation thereof by the trier of fact. On this score too, in my view the judgment speaks for itself.
- [33] Furthermore what the applicant attempts to do is frame questions of fact as questions of law. In arriving at the decision to discharge the 1<sup>st</sup>, 2<sup>nd</sup> to 8<sup>th</sup> respondents the court applied established legal principles as set out amongst others in *S v Lubaxa* 2001 (2) SACR 703 (SCA) and *S v Dewani* CC15/2012)[2014] ZAWCHC 188(8 December 2014. In any event it needs no restating that the decision to discharge an accused involves an exercise of a discretion by the trial court. The question whether there is any evidence upon which a court acting reasonably might convict, is essentially a matter of the court's assessment of the evidence, that is quintessentially a question of fact.
- (iii). Whether the learned trial judge erred in law by misinterpreting, misapplying or overlooking legal precedent as authority for the discharge of the accused under section 174 of the Criminal Procedure Act; specifically whether the learned judge applied the law in context of a case involving several accused who may implicate each other.
- [34] Once more the fact that certain aspects were not mentioned in the judgment, does not necessarily mean that they were not considered. It seems to me that the applicant suggests with the question above, that I overlooked (which I did not) the following from the *Lubaxa* judgment;

[20] *The same considerations do not necessarily arise, however, where the prosecution's case against one accused might be supplemented by the evidence of a co-accused. The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when*

*evaluating the evidence of an accomplice might at times render it futile to continue such a trial (Skeen, supra, at 293 ) that need not always be the case. (my emphasis)*

[35] This is precisely what the judgment of the 21<sup>st</sup> April illustrates.

[36] The *Lubaxa* judgment however goes further;

[21] *Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, **one can envisage circumstances in which to do so would compromise the proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances.** In the present case those circumstances do not exist, for the reasons that follow, and I do not think it is appropriate to deal with the problem. (my emphasis)*

[37] To ascertain what those circumstances might be, is purely a question of fact and not of law. It is a fact based enquiry.

(iv). *Did the Court err in terms of the law of documentary evidence in that after the Court found TJM11 (Sundry Payment Advice), TJM12 (Transaction log sheet) and TJM13 (Nulane tax invoice dated 12 March 2012, for the amount of R8 328 080.00) to be originals, she later ruled the very same documents inadmissible.*

[38] Once more the answer to this question is to be found in the judgment.

[116] *However even if it could somehow be successfully argued that I misdirected myself on the admissibility of the disputed documents, the fact still remains, if admitted, what was the court expected to do with same, in the face of the evidence it was presented with. The answer is zilch. With the findings I made in respect of Mr Cezula, what weight, if any, could I attach thereto? Secondly the fact that Accused 3 appended her signature on the submission is still not corroboration for the veracity of Mr Cezula's evidence. If regard is had to the Gentle decision supra, corroboration is other evidence which supports the evidence of the complainant, and which, **on the issues in dispute**, renders the evidence of the accused less probable. Accused 3 does not dispute her signature*

*she disputes the circumstances under which it was appended. The state did not lead evidence to fortify Mr Cezula's evidence on this aspect.*

[39] This is not a question of law at all, if anything it is once more an illustration of how the applicant misconstrues the judgment complained of. This is quintessentially a matter of evaluation of the evidence as presented. It is patently clear from the judgment that there were no contradictory rulings. The ruling of the 23<sup>rd</sup> February 2023 was a provisional ruling on the admissibility of the documents. To illustrate this, Mr Semenya, the erstwhile counsel for the 2<sup>nd</sup> respondent, after the aforesaid ruling, attempted to bring an application in terms of section 317 of the Act, he however later withdrew same after having had the benefit of the transcribed record reflecting that the ruling at the time was a provisional one.

[40] In any event and at the risk of repetition, *the mere fact the judicial process has become flawed by the way a trial court goes about assessing the evidence before it, does not justify permitting s 319 to be used by the prosecution to reserve a point of law for what is in truth misdirection of fact. That impermissibly undermines the clear language of the section and the deliberate choice of the legislature to restrict appeals in terms of the section to questions of law. The law as reflected in Canadian cases cited in Pistorius does not reflect the position in our law.*

(v). *Whether the Court in respect of its ruling of 23 February 2023, that documents tendered into evidence by the State were inadmissible, wrongly applied the law on the best evidence rule, had not exercised its discretion judicially or that it had been influenced by the wrong principles.*

[41] Here too the applicant has difficulty. This too is purely a question of fact and not law. The question whether the best evidence rule has been satisfied for the admissibility of a document is a factual question. In the judgment the court found that same was not satisfied. Furthermore, as already alluded, the exercise of a discretion and whether it was exercised judiciously is a fact-based enquiry.

(vi). *Did the Court, in respect of its application of the Doctrine of Common purpose, contrary to established law, wrongly expect the State to prove prior agreement between the parties or that they knew each other?*

[42] Proof of an existence of a common purpose is a fact-based enquiry. In the judgment it was found that on the proven facts, same was not established. Furthermore, a proper reading of the judgment reveals that at no stage did the court intimate that common purpose can *only* be established by proving prior agreement between the accused. In fact what was found is that the applicant did not prove any common purpose between the accused. This is a factual finding.

(vii). *Whether the Court correctly applied the law in terms of Section 204 (2) that requires the witness to answer frankly and honestly all questions put to him.*

[43] In my view this question in so far as it is disguised as a question of fact, is of no moment. In its own arguments during the application for discharge, the applicant submitted that when dealing with the provisions of section 204, the court correctly applied the provisions and properly warned Mr Cezula. This in my view puts paid to this question, in any event on this score too, the judgment is instructive.

(viii). *Whether the court misdirected itself when conflating the question of indemnity of the witness in terms of Section 204(2) of the Act with the judgment in terms of Section 174 of the Act*

[44] This question too is not a question of law but rather one of fact disguised as a question of law. Having properly applied the provisions of the section, as submitted by the applicant, how was the court to arrive at the decision whether Mr Cezula answered questions put to him frankly and honestly? The answer is simple; by making credibility findings regarding his evidence. I found that he did not factually admit to committing any offence let alone the one that would have availed him the protection in the Act, accordingly he could not be indemnified. Did I conflate the two? The answer is no. In any event even if it could be successfully argued that I did, that would not have affected the acquittal of the



1<sup>st</sup>, 3<sup>rd</sup> to 8<sup>th</sup> respondents, for the question whether Mr Cezula is indemnified or not has no bearing on whether the acquittal is good or bad in law.

(ix). *Whether the Court's failure to make findings of fact as enjoined by Section 146(a) of the Act and Article 9 of The Code of Judicial Conduct adopted in terms of Section 12 of the Judicial Service Commission Act 9 of 1994 rendered the trial unfair.*

45. In answer to this question I can do no better than this paragraph from the heads of argument of the 7<sup>th</sup> and 8<sup>th</sup> respondents;

74. *The findings of fact and law are those to be found in the judgment itself. There are no further reasons required. One must ask rhetorically what more does one seek of a judge than to set forth the evidence of a witness, analyse it on terms of both the evidence given and the evidence as cross –examined, and make an evaluation as a trier of fact of the worth of that evidence, and the cogency of that evidence in establishing the case that the State was required to make. That is the very function of a court, and that is the function that the judgment performed.*

## CONCLUSION

[46] Having gone through the questions sought to be reserved I am of the view that the questions sought to be reserved are questions of fact and not law. In any event I align myself with the following sentiments in *Schoeman*;

*'As Corbett CJ pointed out in Magmoed, even where there are "strong indications" from the evidence that there were cogent reasons to convict an accused "[t]hese considerations" must not. . . be allowed to obscure one's perception of the legal and policy issues involved in permitting s 319 to be utilized in the manner the prosecution in this case wishes to use it; or to weaken one's resolve to maintain what appears to be sound legal practice.*

***Put simply, the mere fact the judicial process has become flawed by the way a trial court goes about assessing the evidence before it, does not justify permitting s 319 to be used by the prosecution to reserve a point of law for what is in truth misdirection of fact. That impermissibly undermines the clear language of the section and the deliberate choice of the legislature to restrict appeals in terms of the section to questions of law. (my emphasis).***

[47] In conclusion, even if it were to be successfully argued that the questions of law sought to be reserved were indeed such, the question becomes, what would the practical effect of that judgment be in the face of the evidence as led. It is after all a salutary principle of our law that courts do not normally decide academic questions of law the decision must be of practical effect.<sup>12</sup>

## **ORDER**

[48] In the result I make the following order;

1. The application is dismissed.

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**NG GUSHA, AJ**

On behalf of the applicant

Adv. N Cassim SC, Adv. Peter  
Serunye, Adv J Witbooi (she)

Instructed by:

Director of Public Prosecutions  
BLOEMFONTEIN

On behalf of the 1<sup>st</sup> respondent:

Mr L Mantsha

Instructed by:

Mantsha Attorneys c/o Bokwa Attorneys  
BLOEMFONTEIN

On behalf of the 2<sup>nd</sup> respondent:

Adv. M.S Mazibuko

Instructed by:

Moroka Attorneys  
BLOEMFONTEIN

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<sup>12</sup> *Director –General Department of Home Affairs and Another v Mukhamadiva* Case CCT 61/13 [2013] ZACC 47 at para 34, *Attorney-General, Transvaal v Flats Milling Co (Pty) Ltd and Others* 1958 (3) SA 360 (A).

On behalf of the 3<sup>rd</sup> respondent:

Instructed by:

Adv. W J Edeling SC

Bokwa Attorneys

BLOEMFONTEIN

On behalf of the 4<sup>th</sup> and 5<sup>th</sup> respondent:

Instructed by:

Mr B Forbay

Forbay Attorneys

BLOEMFONTEIN

On behalf of the 6<sup>th</sup> respondent:

Instructed by:

Adv. K Oldwage

Stan Fanaroff and Associates c/o Blair  
Attorneys

BLOEMFONTEIN

On behalf of the 7<sup>th</sup> and 8<sup>th</sup> respondents:

Instructed by:

Adv. M Hellens SC and Adv DJ Joubert  
SC

Krause Attorneys Inc

BLOEMFONTEIN