



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

CASE NO: CCC 63/2019

In the matter between:

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
KWAZULU-NATAL**

APPLICANT

and

DESMOND KHALID GOLDING

FIRST RESPONDENT

CEASER WALTER MKHIZE

SECOND RESPONDENT

SOFT SKILLS COMMUNICATIONS 100 CC
(Represented by Ceaser Walter Mkhize)

THIRD RESPONDENT

SHAKA HOLDINGS

(Represented by Ceaser Walter Mkhize)

FOURTH RESPONDENT

ZANDILE NONJABULO MBONGWE

FIFTH RESPONDENT

MAQHOBIZA TRADERS CC

(Represented by Ceaser Walter Mkhize and
Zandile Nonjabulo Mbongwe)

SIXTH RESPONDENT

NOTHANDO ZUNGU

SEVENTH RESPONDENT

ISHASHALAZI PRODUCTIONS CC

(Represented by Nothando Zungu)

EIGHTH RESPONDENT

MABHELENI LEEWAS NTULI

NINETH RESPONDENT

SUPER SIZE INVESTMENT 20 CC

(Represented by Mabheleni Leewas Ntuli)

TENTH RESPONDENT

NONHLANHLA BRENDA NINELA

ELEVENTH RESPONDENT

MZWANDILE BASIL NINELA

TWELVETH RESPONDENT

ISHINGA HOLDINGS

(Represented by Nonhlanhla Brenda Ninela
and Mzwandile Basil Ninela)

THIRTEENTH RESPONDENT

NTOKOZO NDLOVU

FOURTHTEENTH RESPONDENT

DMD (PTY) LTD

(Represented by Ntokozo Ndlovu)

FIFTEENTH RESPONDENT

MICHAEL MABUYAKHULU

SIXTEENTH RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 6 September 2024 (Friday) at 14:30

ORDER

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1. Condonation is granted for the late filing of the application.
 2. The application in terms of s 319 of the Criminal Procedure Act 51 of 1977 to reserve two questions of law for the Supreme Court of Appeal, is dismissed.

JUDGMENT

CHETTY J:

[1] This is an application by the Director of Public Prosecutions, KwaZulu-Natal (the 'State'), seeking to reserve questions of law in terms of s 319(1) of the Criminal Procedure Act 51 of 1977 (the 'CPA'). The application arises following the discharge of the respondents at the conclusion of the State's case in terms of s 174 of the CPA. The central issue is whether the State's proposed questions meet the jurisdictional requirements for reserving questions of law under s 319(1), which reads 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] On 30 May 2023, I handed down a judgment in respect of an application on behalf of all of the respondents for their discharge from prosecution, stemming from the various charges brought against them. The underlying basis for the discharge was that the State had failed to adduce a factual or legal basis upon which a reasonable person, acting with due care, could convict any of the respondents on any of the charges against them. I carefully examined the evidence provided by the State's witnesses in respect of each of the charges proffered against each respondent. Almost five and half months later, on 10 November 2023, the State delivered an application in terms of s319 accompanied by a substantive application for condonation. The respondents broadly contend that the State is essentially challenging the trial court's factual findings rather than a misapplication of law, rendering s319(1) an inappropriate avenue for appeal.

[3] Following the initial opposition to the application by the respondents, including their opposition to the condonation application, the State subsequently filed a 'supplementary reservation' on 19 April 2024 and written submissions 8 July 2024. Counsel for the first respondent, *Ms Shazi*, argued that the 'supplementary reservations' filed by the State, without the leave of the court, were simply an attempt at 'plugging the deficiencies in its case' after reviewing the responses filed by the respondents. *Mr Howse SC*, on behalf of the sixteenth respondent, contended that

the supplementary papers filed by the State reiterated much of the same points as initially raised, only to subsequently 'dress them up' differently. It was submitted that the State was effectively seeking further opportunities to remedy a deficient s 319 application.

[4] It was further pointed out that the initial application by the State, filed on 10 November 2023, made no reference to any aspect of this court's judgment. The supplemented papers contain extensive references to various extracts from the judgment but, importantly, as will appear from what follows, makes no reference to the evidence on record in support of the reservations on points of law. The State, despite having adequate opportunity, has formulated this application based on a synopsis of various aspects of my judgment. There is no reference to the actual evidence of the witnesses regarding the specific wrongdoing attributed to each individual respondent, which underpins the questions of law raised. I will address this aspect later in this judgment, particularly in the context where the respondents contend that the application must fail as it is directed at this court's perceived factual errors rather than mistakes of law. In *Director of Public Prosecutions, Western Cape v Schoeman and Another*¹ at paragraph 39 the following was stated on this aspect:

'The State has a right of appeal only against a trial court's mistakes of law, not its mistakes of fact. Indeed, Du Toit, De Jager, Paizes, Skeen and Van der Merwe stress that this "restriction will not be relaxed by the fact that the trial judge considered the facts incorrectly". Before a question of law may be reserved under s 319 three requisites must be met. 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.'²

[5] Much of the State's justification for the delay was attributed to it not being able to timeously obtain a 'corrected' version of the judgment handed down on 30 May 2023. To the best of my knowledge, the court's responsibility extends only to the delivery of the judgment in open court. Copies of the judgment were subsequently distributed electronically to all parties. The State, in its application for condonation,

¹ *Director of Public Prosecutions, Western Cape v Schoeman and Another* [2019] ZASCA 158; 2020 (1) SACR 449 (SCA).

² *Ibid* para 39.

failed to specify any particular issue it encountered, if any, in filing its application based on the judgment delivered under these circumstances.

[6] I record that a request was received from the State for a record of certain interlocutory applications heard during the trial. The rationale behind the State's request for transcripts of those proceedings or the rulings remain unclear as none of the questions sought to be reserved in terms of s 319 pertain to those earlier rulings. The three questions raised by the State in the s 319 application flow directly from the judgment in terms of s 174 and have no correlation to any ruling relating to an interlocutory application.

[7] While the State describe the five-month delay in launching the s 319 application as reasonable, even if the delay is excessive, condonation must also be considered in the context of the complexity of the matter and the volume of evidence to be considered. The period of delay must also be weighed against the situation of the respondents, who have been discharged and found not guilty of the charges against them, at the conclusion of a trial that lasted nearly two years. Where an accused is found not guilty, either at the end of the State's case or at the conclusion of the trial, he or she is entitled to arrange their affairs with a degree of certainty, and move on with their lives. Therefore, where the State seeks to pursue an application in terms of s 319, it is obliged to do so as soon as reasonably possible, in a manner that would minimise the infringement on the former accused's right to enjoy the guarantee of their freedom of movement and association. *Mr Roux SC*, for the State, accepted that when seeking to reserve a point of law, the State must proceed with a degree of promptitude.

[8] In support of the application for condonation, the State submitted that the issues raised in the s 319 have important consequences for our jurisprudence, particularly where the judgment is sought to be relied upon in other ongoing 'corruption trials' in various divisions of the High Court. However, I am not persuaded by this argument, as any application for discharge in terms of s 174 must be assessed in relation to the specific facts of the matter and the nature of the evidence presented in order to surpass the threshold to place an accused on his or her defence. In the present matter, counsel informed the court that the decision to launch the s 319 application could only be taken by the Director of Public Prosecutions, KwaZulu-Natal and not by prosecutors

involved in the trial, leading to certain delays. The State in any event contends that there was no substantial opposition to the initial delay of approximately five months in bringing the application. However, the opposition pertains to the supplementary reservations filed some five months thereafter.

[9] No evidence has been presented to suggest that the delay has caused prejudice to the respondents or curtailed their ability to travel freely. The prejudice cited by the sixteenth respondent, which other respondents supported, related to the supplementary papers submitted by the State, which essentially reiterated points made in earlier iterations of the initial application papers, resulting in unnecessary legal expense. Ultimately, while there is no specific procedure that governs whether supplementary submissions in a s 319 application may be made, it is a decision that lies within the discretion of the court. The respondents who objected to the supplementary reservations had the opportunity to file their opposing submissions, and no unfairness resulted. I am therefore satisfied that the supplementary reservations do not constitute a different case from that initially presented by the State, is not an abuse of process and I accordingly, in the exercise of my discretion, admit such papers to form part of the application. I am also satisfied that good cause has been shown to grant condonation for the late filing of the application.

[10] Turning to the merits of the matter, in *Director of Public Prosecutions, KwaZulu-Natal v Ramdass*,³ the Supreme Court of Appeal held that ‘...In respect of each of the questions sought to be reserved, in addition to determining whether they were questions of law, the court a quo decided that none of them had “reasonable prospects of success”.’⁴ The question to be answered is whether there is a reasonable possibility that the appeal court will find that an error was made, and had the mistake of law had not occurred, the accused would have been convicted. Put differently, on the basis of the evidence led by the State, would a conviction have resulted but for the mistake of law? ⁵ The threshold is therefore not an academic exercise, but a real enquiry into

³ *Director of Public Prosecutions, KwaZulu-Natal v Ramdass* [2019] ZASCA 23; 2019 (2) SACR 1 (SCA).

⁴ *Ibid* para 23.

⁵ *S v Basson* [2003] ZASCA 72; [2003] 3 All SA 51 (SCA); 2004 (1) SA 246 (SCA); 2003 (2) SACR 373 (SCA) paras 10-11.

whether, but for the mistake, the accused would have been convicted. It must have a practical outcome.

[11] Without making any concessions as to the weight of the State's evidence at the end of the trial (as opposed to at the end of the State's case), counsel for the State did not present any compelling argument before me that a case had been made that would have resulted in a conviction on any or all of the charges. The strongest point made was the alleged failure (presumably by the first and third respondents) to make disclosure to the KwaZulu-Natal Department of Economic Development and Tourism ('DEDT') of the absence of a licence from MOJO (the holder of the licence for the staging of the North Sea Jazz Festival) at the time when payment was being made to the third respondent, along with the swift dissipation of the funds to the remaining respondents.

[12] It is now settled that s 319 does not permit the reservation of a question of law, which is in reality a question of fact, even if the factual findings are incorrect.⁶ Therefore, questions of fact cannot be 'dressed-up' as questions of law to circumvent the limitations imposed in s 319. The dictum in *Magmoed v Janse van Rensburg and Others*⁷ is instructive in distinguishing, for the purposes of such an application, between facts found to be proved which establish the offence charged, and those that seek to decide if the proved facts establish a factual ingredient of the offence. The court held that:

'...It is a genuine question of law (a) whether the evidence against an accused was such that there was a case to go to the jury or that there were grounds upon which the jury could legally convict the accused of the crime charged; or (b) whether the proven facts bring the conduct of the accused within the ambit of the crime charged...category (b) involves an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in the particular case constitute the commission of the crime. This is clearly a question of law. But, in my opinion, a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to

⁶ *S v Khoza en Andere* [1984] ZASCA 50; 1984 (1) SA 57 (A) at 797B; *Attorney-General Transvaal v Kader* [1991] ZASCA 135; 1991 (4) SA 727 (AD); [1991] 2 All SA 543 (A) at 739.

⁷ *Magmoed v Janse Van Rensburg and Others* [1992] ZASCA 208; 1993 (1) SA 777 (AD); [1993] 4 All SA 175 (AD); [1993] 1 All SA 396 (A).

what those ingredients are.⁸

[13] It is apposite to briefly outline the factual context against which the application arises. The charges of fraud and corruption pertain to a payment of R26.8 million made by the DEDT to Soft Skills Communications (the third respondent) for hosting the North Sea Jazz Festival ('NSJF') in 2012. Payments were made to various respondents, including Ntokozo Ndlovu (the fourteenth respondent) and DMD Capital Pty Ltd (the fifteenth respondent) were charged in relation to a R3.3 million payment received from Ceaser Walter Mkhize (the second respondent) in May 2013. Additionally, they were charged with two counts of money laundering in terms of ss 4 and 6 of the Prevention of Organised Crime Act 121 of 1998 ('POCA'). The State alleged that these respondents entered into a transaction and acquired or used property, knowing or reasonably ought to have known, that it stemmed from the proceeds of unlawful activities, namely, fraud and corruption.

[14] At the close of the State's case, I granted the respondents' application for a discharge under s174, having found there was insufficient evidence that the respondents knew, or ought to have known, the funds were the proceeds of unlawful activities. Consequently, I held that the State failed to prove the essential elements of money laundering, and that there was 'not a shred of evidence' compelling the respondents to be placed on their defence.

[15] The State acknowledges that the judgement of the trial court accurately outlines its case. It is contended by the State that despite the first respondent being aware that the third respondent was not in possession of the rights to host the festival, which licencing rights under the banner of the NSJF were held by a Dutch entity named MOJO, the first respondent nonetheless knowingly instructed that payment be made to the third respondent on 21 November 2012. Furthermore, the State contended that the first respondent was aware that the concert could not proceed without the necessary licence agreement in place, yet he facilitated the payment. Subsequently, monies were paid hastily to the other respondents, all of whom knew or ought to have known that the concert could not be staged, but nonetheless benefitted from monies

⁸ Ibid para 27-28.

paid out to them.

[16] Despite the first respondent ensuring that the funding agreement and payment to the third respondent were formally approved by Cabinet, the State strenuously argued in this court that the cancellation of the licence agreement between the rights holder to the NSJF (MOJO) and MPM was a critical factor which I overlooked in determining that the respondents had no case to answer. The thread of Mr Roux's argument was that, in the absence of a valid binding licence agreement by the third respondent to stage the festival, the third respondent (and by implication, all the other respondents who transacted with it, or received payments in anticipation of work to be done in connection of the festival) ought reasonably to have known that any or all of such monies were from the proceeds of crime. It was incumbent, particularly on the first and third respondents, despite the Provincial Treasury complying with a series of procedures prior to payment, to have drawn to their attention that a licence with the host entity (MOJO) was yet to be finalised, alternatively that such licence agreement had been terminated, but steps were being taken to reinstate the agreement. This omission warranted an inference being drawn from the evidence that the respondents had a case to answer. In those circumstances, it was submitted that the respondents ought not to have been discharged.

[17] In *Schoeman*⁹ the court set out three requirements which must be met before a question of law may be reserved:

'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.'¹⁰

Additionally, in *Attorney-General of Transvaal v Flats Milling Company (Pty) Limited and Others*¹¹ it was held that questions of law should not be reserved where they will have no practical effect on the acquittal of the accused. The respondents argued that the questions of law sought to be reserved were essentially a reconsideration of questions of fact, which s 319 does not permit. They further contended that reserving

⁹ *Schoeman* above fn 1.

¹⁰ *Ibid* para 39.

¹¹ *Attorney-General of Transvaal v Flats Milling Company (Pty) Limited and Others* [1958] ZASCA 34 at 373-374.

these questions of law would not result in a conviction on any of the counts. Therefore, the entire exercise would serve no practical purpose. It is important to emphasise that, at the conclusion of the State's evidence, this court found, based on the facts and evidence presented by the State, that there was no evidence that the respondents committed the offences charged. This was interpreted to mean that there was no evidence upon which a reasonable court, acting carefully, could convict.

[18] Despite initially setting out seven questions of law to be reserved for consideration by the Supreme Court of Appeal, at the time of argument of this application, the State had reduced these questions to the following:

- (a) Whether the court could have discharged the accused in terms of s 174, in view of the evidence before the court, constituting evidence upon which a reasonable person might convict; and
- (b) Whether the court relied or could have relied on the exculpatory statements in the plea explanations of the accused to determine that the State had failed to present prima facie evidence or evidence justifying reasonable inferences of the commission of the offences for the purposes of s 174.

[19] It is necessary to examine the underlying contentions that generate each enquiry. The first question concerns the sufficiency of evidence to establish a prima facie case. The State's argument rests on several factors: the cancellation of the licensing agreement with MOJO, the absence of a valid agreement with DEDT, and the first accused's knowledge of these circumstances. The State asserts that these elements, collectively, constitute a prima facie case for the offences charged. Furthermore, the State argues that an adverse inference should have been drawn from the swift dissipation of the monies once it was paid to the third respondent.

[20] The second question concerns the evidentiary weight accorded by the trial court to exculpatory statements in the plea explanations. The State's position is that the trial court erroneously elevated these statements to a status comparable to probative evidence. While acknowledging that plea explanations form part of the evidential material before the court, the State argues that such explanations do not carry the same weight as evidence adduced through witness testimony.

[21] The Supreme Court of Appeal in the recent decision of *DPP Western Cape v Bongo*¹² noted the following, referring to its decision in *Basson*¹³ that but for the mistake of law, the accused would have been convicted:

‘In an application before the trial court for the reservation of issues in terms of s 319 of the CPA, that court is only required to decide whether the issues sought to be reserved are questions of law. When, however, an application for leave to appeal against a decision of the trial court refusing to reserve a question of law comes before this Court, it will only exercise its discretion in favour of the state if there is a reasonable prospect that a mistake of law was made. In addition, there must at least be a reasonable prospect that, if the mistake of law had not been made, the accused would have been convicted.’¹⁴

[22] Regarding the first question, it was argued that the trial court was presented with evidence upon which a reasonable person might convict, and therefore, the court committed a mistake of law by discharging the respondents at the end of the State’s case. It was contended that the prima facie proven facts brought the conduct of the respondents within the ambit of the offences charged. *Mr Howse*, for the sixteenth respondent, took issue for the formulation of the first question sought to be reserved, which the authorities explain, must be ‘framed accurately’. Concerning the sixteenth respondent, it was pointed out that the trial court concluded that he was unaware of the payment of R26.8 million to the third respondent until February 2013, which was approximately three months later. This much was conceded by the State. On that basis, it was contended that the sixteenth respondent could not have reasonably known or been expected to know that the payment of R300 000 into his bank account was from the proceeds of crime. The State did not suggest that any credibility findings against witnesses were made as a basis for granting the discharge. However, counsel for the State further contended that apart from the direct evidence presented, the court made a mistake of law by failing to draw inferences from such evidence. For the reasons set out below, it is difficult to reconcile how inferences could be drawn against the respondents, particularly in the case of the sixteenth respondent, in light of the concession by the State.

¹² *DPP Western Cape v Bongo* [2024] ZASCA 70; 2024 (2) SACR 183 (SCA).

¹³ *Basson* above fn 5.

¹⁴ *Bongo* above fn 12 para 29.

[23] The State submitted that these inferences are not those traditionally referred to in *S v Blom*¹⁵, as they need not be the only reasonable inferences to be drawn in the circumstances. Although no authority was advanced in support of this proposition, accepting for the moment the correctness of this argument, I however could find no evidence from which adverse inferences against the respondents could be drawn, necessitating them being placed on their defence. This too would be a factual enquiry. It was further submitted that the first respondent had prior knowledge that the agreement between MOJO and the third respondent had been cancelled before the payment was made by the DEDT. The evidence simply did not support such a conclusion being drawn.

[24] As I understood the argument, I ought to have drawn the inference that, given the knowledge the first respondent possessed, he could not have, acting honestly, instructed the payment of the amount agreed upon to the third respondent to host the NSJF. The absence of the license, a point repeatedly emphasised by *Mr Roux*, was sufficient grounds for drawing an inference against the respondents, as it would render any payment or facilitation thereof *prima facie* unlawful. However, this submission contradicts the direct evidence from the State's witnesses, who testified that the payment of R26.8million was made to the third respondent in the anticipation of resolving the licence dispute between MOJO and the third respondent, and the potential reinstatement of the licence to host the festival. More importantly, the argument advanced by the State raises the question of whether I should have drawn certain inferences from the testimony of the State witnesses. In my view, relying on the dictum in *Schoeman*¹⁶ it appears to me that this issue constitutes a factual enquiry rather than a point of law. The court stated the following:

'In this case, it is apparent from the analysis of the two questions in *Magmoed* that we have discussed that the State's attempt to reserve its first point of law on the basis of the alleged failure of the trial court to evaluate the circumstantial evidence in accordance with legal principle must founder. First, it is evident from the reasons dismissing the application for the reservation of the point of law that the trial judge was aware – as one would expect – of the rules regarding the drawing of inferences from circumstantial evidence as set out in *R v Blom* and applied them in this case. Secondly, if the trial judge drew incorrect inferences from this

¹⁵ *S v Blom* 1939 AD 188.

¹⁶ *Schoeman* above fn 1 para 57.

evidence, he committed factual, not legal, errors. Thirdly, there is no suggestion that the trial court made any errors relating to the elements or scope of the offences with which the respondents were charged. Finally, it is also apparent that the State's real complaint is that having regard to all the evidence, including the circumstantial evidence, no reasonable court would have acquitted the respondents. That is quintessentially an attempt to reserve a question of law from what a value judgment of the trial court regarding the facts.'

[25] The alleged omission by the first and third respondent pertains to their failure to forewarn the DEDT that, at the time when payment was being awaited, they did not hold the licence to host the festival. Counsel for the first and third respondents countered this assertion, arguing that none of the charges against the respondents include an obligation to disclose such information as a requisite for conviction. *Mr Roux* submitted that proof of an omission of this nature would be sufficient to require the respondents to be placed on their defence.

[26] It is further contended that the first respondent was obliged to testify as to the circumstances surrounding the payment of R1million paid to his attorneys towards the transfer of a property, which occurred shortly after the payment of the amounts to the first respondent. However, as I set out in the judgment on the s 174 application, I was not persuaded by the correctness of this submission. It is trite that there is no obligation on the court to draw conclusions or 'fill in the gaps' where the State has not led evidence of witnesses. *Mr Roux's* contention is that I should have drawn an inference from such evidence, requiring the first respondent to refute the allegation that he benefited from the proceeds of crime.

[27] It was further submitted that I should have drawn adverse inferences from the haste with which the funds were paid out to various respondents, which occurred almost immediately after the third respondent received payment of R26.8million from the DEDT. However, there was no basis for such inference, as the State's own witnesses confirmed that it is customary practice in the arts industry for service providers and entertainers to request payment 'up-front' at the time when their services are reserved or 'booked'. *Mr Roux* submitted that artists could only be paid in advance in circumstances if the license to host the event is secured. The same argument applied to the contention that it was not enough for the first respondent to have relied

on the DEDT's legal department, which, after scrutinising the contracts, was satisfied that the terms were fair and that the interests of the DEDT were protected.

[28] The evidence presented to the court indicated that the first respondent consistently insisted that all processes and procedures be observed in vetting the contracts before any payments were made to the contracting parties. However, the State now contends that his caution was not enough, and that he was still under a duty to have informed the legal advisors of the DEDT that, as at time of payment of R26.8million, MOJO had cancelled the contract to host the festival with the third respondent. In essence, the State submits that the first, second, third and fourth respondents knowingly concealed the absence of a licence from the Treasury officials, in circumstances where if such disclosure were to be made, no payment would have been authorised by the provincial Treasury. I must point out that the state witnesses in the trial were never led by the prosecution on the aspect of this omission, as contended for by Mr Roux. The failure to disclose is something which can only be deduced by inferential reasoning. It was contended that, against that backdrop, there was reasonable evidence upon which a court, acting reasonably, might convict the respondents. For those reasons, counsel submitted that there exists a reasonable likelihood that the appeal court may conclude that I committed an error of law. This is based on the existence of prima facie evidence derived from reasonable inferences, requiring that the respondents provide answers, and to have been placed on their defence.

[29] In contrast to the argument of the State, counsel for the first respondent submitted that inferential reasoning is generally resorted to in the absence of direct, eye-witness evidence. During the trial, the State witnesses, Mr Magagula, Mr Shezi and Ms Mapisa, testified that, in their opinion, there were no instances of irregular expenditure attributable to the first respondent. At no time was it suggested to any of these witnesses that the absence of the licencing agreement would have halted Cabinet approval of the eventual payment to the third respondent. In fact, it was the first respondent who sought assistance from the Chief Director of Budget at the Treasury, Ms Tania Stileu, before authorising payment of the fee for the activation process in Rotterdam. Various witnesses testified in relation to the meeting of the Major Events Sub-Committee, and the court meticulously examined the minutes of

these meetings. At no stage during the trial did the prosecution present to any of its witnesses the argument advanced by *Mr Roux*, namely that had the Treasury officials and members of Cabinet been aware of the absence of the licence for the third respondent, the payment would have been halted. It was also addressed with Mr Shezi during cross examination whether he had been influenced in any way to authorise the disputed payment, to which he had answered, 'No'.

[30] The judgment of this court found that although the first respondent was involved in negotiations with MOJO to try to resuscitate the agreement, an agreement to this effect had been reached on the basis that payment for the licence could be made before 1 December 2012. The request for payment was subsequently reviewed by the Treasury, which was satisfied that the request was in order and accordingly authorised payment. The point made on behalf of the respondents is that even after payment had been made to the third respondent, negotiations were still being pursued in an attempt to reinstate the licence agreement with MOJO or Ms Cornille.

[31] In light of the direct evidence presented, I am unable to ascertain how I could employ inferential reasoning to arrive at a conclusion different from that testified to by the witness. I agree with the submissions on behalf of the respondents' that the State's dissatisfaction stems not from a legal error, but from discontent with the court's evaluation of the State's witnesses' evidence, which led to the determination that no case was established requiring the respondents to present a defence. It is pertinent to note that in *Basson*,¹⁷ the Constitutional Court, at paragraph 49, addressed the issue of inferential reasoning and its relation to questions of fact or law:

'(a) If the inferential process is directed at determining a fact (often referred to as a secondary fact) no question of law arises. Thus, inferences drawn as to whether the accused had paid money as an inducement or reward in a statutory corruption charge, that the accused may have acted in self-defence based on a factual misdirection, and that the accused was party to a common purpose with others have all been held to be inferences of fact. In none of these cases can it be said that the proof of any of these matters involves the decision as to whether the proved primary facts measure up to an objective legal norm or standard.'

¹⁷ *Basson* above fn 5 para 49.

[32] In *Schoeman*¹⁸ the court remarked that the 'distinction between questions of law and questions of fact is often notoriously difficult to draw.' The court noted at paragraph 39 that:

'The State has a right of appeal only against a trial court's mistakes of law, not its mistakes of fact. Indeed, Du Toit, De Jager, Paizes, Skeen and Van der Merwe stress that this 'restriction will not be relaxed by the fact that the trial judge considered the facts incorrectly'. Before a question of law may be reserved under s 319 three requisites must be met. 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.'

[33] This raises a problem for the State in the context of a s319 application, where the factual basis for the reservation of the questions of law must be evident from the record. As stated earlier, I have not been referred to any extracts from the transcript of the proceedings, and I am unable to reject the submissions made on behalf of the first respondent in the present application, regarding the evidence provided by the State witnesses who authorised the payment on behalf of the provincial Treasury. Moreover, those averments accord with the conclusions I reached in the judgment. It is not the responsibility of the trial court or the appeal court to sift through the transcripts to ascertain the relevant facts. That duty falls on the State. The failure to comply with this duty results in non-compliance with one of the essential requirements which underpin an application in terms of s 319.

[34] The fundamental problem, which I underscored in the s 174 judgment, is that it is not the court's role to disentangle various threads to determine whether the State has established a prima facie case of an unlawful and corrupt scheme involving all respondents conspiring to launder money from criminal proceeds. The contention now is that, in the absence of direct evidence, I should have relied on inferential reasoning to conclude that the respondents knew, or ought to have known, that without a contract, the funds received by the third respondent were likely from a corrupt relationship. Furthermore, that payments which were made to all of the remaining respondents, I should have inferred 'as compensation for the recipients' participation in the unlawful scheme and therefore prima facie constituted money laundering'.

¹⁸ *Schoeman* above fn 1 para 39.

[35] In this context, it was submitted that I made an error of law in discharging the respondents as their 'web of conduct', supported by evidence, remained undisturbed. Ultimately, the issue to be determined in these proceedings is whether the appeal court will conclude that, as a practical outcome, that in these circumstances, I should not have granted a discharge. I concluded that the proven facts, on the evidence of the State witnesses, did not establish a prima facie case against the respondents. Despite this, the State now contends that I should have drawn an inference of wrong doing against the respondents. The State did not call Ms Cornille (who featured prominently throughout the trial) nor any of the directors of MOJO to testify in relation to the licence arrangements, following the payment of R26,8million to the third respondent. The State witnesses conceded that efforts were made to revive the license to host the festival. At the stage of the s 174 application, the trial court considered the entire body of evidence. The trial court's perception and assessment of the evidence, and its decision on whether to draw any inferences, is a question of fact, not law. The State's approach of broadly implicating the respondents collectively led to several defence counsels arguing that little, if anything, was specifically attributed to individual respondents to justify drawing inferences. The State's strongest contention was that the first and third respondents were obligated to disclose the absence of a license agreement during discussions with the DEDT and before payment approval. In my view, this was the high-water mark of the first question. For all of the reasons already stated, I am not persuaded that the first question sought to be reserved is a question of law. In reality, it raises a question of fact. Therefore, the first question proposed must fail.

[36] The second question sought to be reserved is that I made a mistake of law in treating the exculpatory plea explanations of the respondents as evidence to refute the evidence presented by the State. As I understood this leg of the argument, the contention by the State is that the evidential value of the plea explanation cannot be elevated to test the credibility of the State's evidence and plays no role at the stage of a s174 application. To do so, it was submitted, improperly attributes a measure of truth to a plea explanation in terms of s 115 of the CPA. In short, such explanations have no status or meaning in a discharge application, as there is no certainty whether the accused would confirm or deny their explanations. In essence, unlike an inculpatory statement or an admission in terms of s 220 of the CPA, an exculpatory statement has

no evidential value.

[37] *Mr Roux* was unable to point to any case authority in support of this proposition. However, *Mr Cele*, on behalf of the eleventh, twelfth and thirteenth respondents, pointed out that his clients confirmed receiving the amount of R2 650 000 from the third respondent. An amount of R2.2million was then immediately transferred to the tenth respondent. The explanation for the payment was that the eleventh, twelfth and thirteenth respondents were service providers for a Gala Dinner scheduled to have taken place on 11 December 2012, which was cancelled at the last minute. Excluding the plea explanation, it was submitted that there is no evidence linking any of these aforementioned respondents to the receipt of any monies paid out by the third respondent. Furthermore, Mr. Cele argued that the State failed to present any factual basis requiring the eleventh, twelfth and thirteenth respondents to answer a case against them. He referenced the decision of *Cupido v S*¹⁹, which addressed the evidential value of exculpatory statements:

[32] Exculpatory statements in explanations of the plea should, as a general rule, be repeated by the accused under oath in the witness-stand for them to have any value in favour of the accused In *S v Mkhize (Mkhize)* it was stated:

“It follows that any statement made by an accused or any answer to questions put to him in terms of s 115 has no evidential value.”

[33] Unlike formal admissions made in terms of s 220, exculpatory statements made in terms of s 115 do not constitute proof of the facts and furthermore do not relieve the State of the burden of proving those facts. When a defence is raised in the exculpatory part of an explanation of plea, the State need only negate that defence to the extent of a prima facie case.

[34] Furthermore, an accused person is under no obligation to testify. However, once the prosecution had produced sufficient evidence that establishes a prima facie case, such evidence may become conclusive if not dislodged by credible evidence of the accused. Thus, absent a credible version from the accused, the version advanced by the prosecution, if found credible, has to be accepted. In *S v Dlamini and Others* Kriegler J emphasised the importance of freedom of choice in a democracy. He stated that liberty to make choices brings with it a corresponding responsibility and 'often such choices are hard.' (my underlining)

¹⁹ *Cupido v S* [2024] ZASCA 4 paras 32-34.

[38] Mr. Cele's argument is that, based on *Cupido*²⁰, when an exculpatory plea explanation is provided, it implies that the State has a duty to disprove the defence presented, which can be established through prima facie evidence. However, I do not interpret *Cupido*²¹ as negating the argument raised by *Mr Roux* as to the evidential value (or lack thereof) of an exculpatory explanation. It is important to note that in my judgment, I did not elevate the plea explanations to a higher status or consider them to be evidence. My approach to the plea explanations was that they outlined the elements of the offence which the State was required to prove. The point emphasised by several counsel on behalf of the respondents was that the plea explanations cannot be seen in isolation from the evidence of witnesses elicited under cross examination, where the versions set out in the pleas are corroborated. An example alluded to is the sixteenth respondent's explanation that he sourced a loan to repay a debt due to the South African Revenue Service ('SARS') which was corroborated by the State witness, Mr S Govender, who when testifying had the benefit of bank statements and letters of demand issued by SARS, which matched the dates set out by the sixteenth respondent in his plea explanation. This is just one of the many examples during the course of the trial.

[39] Similarly, also in respect of the sixteenth respondent's plea explanation of the deposit made into his account, it was contended that I made a mistake of law by elevating his exculpatory plea to constitute evidence, which I then used incorrectly, to test the cogency of the evidence presented by the State. The sixteenth respondent, as noted in the judgement, submitted in his plea explanation that he secured such financial assistance from a Mr Xaba to settle a tax liability. Mr Xaba has since passed away. This explanation, according to the State, was not sufficient to release the sixteenth respondent from the burden of adducing evidence to rebut the allegation of the State that such payment originated from the proceeds of crime.

[40] Despite the judgment recording that the plea explanations of the respondents, including that of the eleventh, twelfth and sixteenth respondents, detailed the basis of their defence thereby allowing the State to call witnesses to rebut their versions, it was

²⁰ Ibid.

²¹ Ibid.

contended that I improperly elevated the evidential value of such explanations to that of actual evidence at the end of the State's case. It was contended that, at the end of the State's case, I should have inferred with respect of the various charges against the respondents, that they were obliged to adduce evidence to rebut the allegations that the monies received were derived from the proceeds of crime. In this way, for example, the sixteenth respondent would have been obliged to adduce evidence of various amounts, including a payment of R300 000, into his account.

[41] *Ms Shazi*, for the first respondent, took the view that the plea explanations before court formed part of the 'evidentiary material' on the basis that what was stated by the first respondent was confirmed by various witnesses called by the State. I am not fully persuaded by this argument, as it appears to be an artificial distinction. Ultimately, the respondents contend that the State's complaint is that I erred in evaluating the evidence of the State witnesses in determining whether a prima facie case was established thereby requiring the respondents to be placed on their defence. This is a question of fact that finds no application in s319. As contended for by *Mr Naidoo* on behalf of the second, fourth, sixth, ninth and tenth respondents, this court had regard to the probative value of the s115 statements, in the context of all of the evidence presented. Counsel for the respondents cross examined the State witnesses extensively on the contents of the plea explanations. Those answers must have some weight, particularly where the answers corroborate what is set out in the s115 statements. Those answers cannot be simply ignored. This is not to suggest, as the State does, that the plea explanations were elevated to the status of evidence. As stated earlier, the plea explanations provided a basis for the State to continue with its investigations even while the trial was proceeding, and to call any further witnesses it deemed necessary in order to address the defences set out. None was forthcoming.

[42] In conclusion, I find no basis to depart from the finding which I made at the time of adjudicating the application in terms of s174 where I said that there was not a shred of evidence presented to the court requiring the respondents to be placed on their defence. The further comments I made regarding the duty of the prosecution has been aptly summed up in *S v Doorewaard and Another*²² where Ponnar JA in a separate

²² *S v Doorewaard and Another* 2021 (1) SACR 235 (SCA) para 81.

concurring judgment said

'Prosecutors have at their disposal the full machinery of the State. It is for a prosecutor to establish, through the presentation of evidence, the guilt of the accused beyond reasonable doubt. The prosecutor must provide proof of the accusation made. To that end, the prosecutor must place before a court credible evidence in support of the alleged crime. It is for a prosecutor to evaluate the conduct of the police and the strength of the State's case that will be actively presented to a court. It is not the function of a prosecutor 'disinterestedly to place a hotchpotch of contradictory evidence before a court, and then [to] leave the court to make of it what it will.'

[43] After careful evaluation of the grounds on which the application in terms of s 319 has been brought, I remain of the view that the respondents were entitled to be discharged at the close of the State's case as there was no possibility that a conviction would result without them testifying and incriminating themselves. In the context of s 174, the words 'no evidence' does not mean 'no evidence at all', but rather 'no evidence on which a reasonable court, acting carefully, might convict'. Even if my judgment in the s174 application reveals that I may have been mistaken in my assessment of the evidence, this 'does not justify permitting s 319 to be used by the State to reserve a point of law for what is in truth misdirection of fact'.²³ In addition, I am not convinced that there are reasonable prospects that the Supreme Court of Appeal will find that a mistake of law has been committed, and more importantly, that there is also a reasonable prospect that this would lead to the respondents being convicted. The State's application fails to meet that threshold, and I find no basis to reserve for the Supreme Court of Appeal the purported questions of law as set out in the application.

Order

[44] In the circumstances, I make the following order:

1. Condonation is granted for the late filing of the application.
2. The application in terms of s 319 of the Criminal Procedure Act 51 of 1977 to reserve two questions of law for the Supreme Court of Appeal, is dismissed.

²³ *Schoeman* above fn 1 para 74

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Date of Judgment: 6 September 2024