



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES / NO (3) REVISED	
2025.01.06 DATE	 SIGNATURE

CASE NUMBER: CC11/2021

DATE: 6 January 2025.

DIRECTOR OF PUBLIC PROSECUTIONS,

APPLICANT

GAUTENG DIVISION

and

KABELO JOHN MATSEPE

1ST RESPONDENT

MAMPHE DANIEL MSIZA

2ND RESPONDENT

ANDILE MALUSI ATTWEL RAMAVHUNGA

3RD RESPONDENT

PHOPHI LONDOLANI MAKHOBODWANE

4TH RESPONDENT

MULIMISI SOLOMON MAPOSA

5TH RESPONDENT

NHLANHLA KELVIN SIPHO MALABA

6TH RESPONDENT

PHALAPHALA AVASHONI RAMIKOSI

7TH RESPONDENT

THIFHELIBILU ERNEST NESANE

8TH RESPONDENT

PAUL MAGULA

9TH

MMBULAHENI ROBERT MADZONGA

10TH RESPONDENT

RALLIOM RAZWINANE

11TH

TAKUNDA EDGAR MUCHEKE

12TH RESPONDENT

TSHIANEO MADADZE

13TH RESPONDENT

THE STATE

VERSUS

ANDILE MALUSI ATTWELL RAMAVHUNGA

ACCUSED 1

PHOPHI LONDOLANI MUKHODOBWANE

ACCUSED 2

MULIMISI SOLOMON MAPOSA

ACCUSED 3

NHLANHLA KELVIN SIPHO MALABA

ACCUSED 4

PHALAPHALA AVASHONI RAMIKOSI

ACCUSED 5

THIFHELIBILU ERNEST NESANE

ACCUSED 6

PAUL MAGULA

ACCUSED 7

MMBULAHENI ROBERT MADZONGA	ACCUSED 8
KABELO JOHN MATSEPE	ACCUSED 9
MAMPHE DANIEL MSIZA	ACCUSED 10
RALLIOM RAZWINANE	ACCUSED 11
TAKUNDA EDGAR MUCHEKE	ACCUSED 12
TSHIANELO MADADZHE	ACCUSED 13

JUDGMENT

MABUSE J

[1] This matter came before me in terms of section 319(1) of the Criminal Procedure Act 51 Of 1977(the CPA), as a request for reservation of questions of law (a Request) for consideration by the Supreme Court of Appeal of South Africa. The request is opposed by the First, Second, Sixth and Nineth Respondents on grounds to which I will turn during this judgment.

[2] S 319 of the CPA provides that:

(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 the purposes of this section, be deemed to be questions of the law.

(3) The provisions of sections 317 (2), (4) and (5) and 318 (2) shall apply mutatis mutandis with reference to all proceedings under this section."

[3] According to the Applicant, the questions of law arose on the trial of the First and Second Respondents in the Gauteng High Court, Pretoria, in the matter of Kabelo John Matsepe and Mamphe Daniel Msiza v The State and Eleven Others (Case Number CC11/2021) in terms of which the court ordered that:

"The relief that the Applicants seek in prayer 2 of the notice of motion, namely that the criminal trials of Kabelo John Matsepe and Mamphe Daniel Msiza as per the respective charges delineated in the indictment in S v Andile Attwell Ramavhunga and 12 Others, Gauteng High Court, Case Number CC11/2021, be separated from that of their co- accused (i.e. accused 1 to 8 and 11 to 13).

[4] The above order has its origin in the judgment of the court following an application by the First and Second Respondents, in other words, accused 9 and 10 as they were initially in the main criminal case, in an application in which they sought the following relief:

"[1] That the criminal trial in S v Andile Malusi Attwell Ramavhunga and 12 others, Gauteng High Court, high Court Case Number CC21/2021, be stayed or held in abeyance temporarily, pending the determination of the final outcome of the prosecution of the appeal by Kabelo John Matsepe and Mampe Daniel Msiza, against the whole of the judgment of justice PM Mabuse, delivered on 26 April 2024 and 27 June 2024 in S v Tshifhiwa Calvin Matodzi and 13 Others, Gauteng High Court Case Number CC21/2021.

[[2] That the criminal trials of Kabelo John Matsepe and Mampe Daniel Msiza, as per the respective charges delineated in the indictment in S v Andile Attwell Ramavhunga and 12 Others, Gauteng High Court Case Number CC21/2024 be separated from that of the co- accused or the Respondents.”

[5] The aforesaid applications were heard on 14 August 2024. The court made the above order on 16 August 2024. Immediately after the order was made the Applicant, then the First Respondent, asked the court to furnish it with reasons for the order as it intended to launch an application for leave to appeal. Written reasons were delivered on 6 September 2024.

[6] The First Respondent then, now the current Applicant, delivered an application for leave to appeal on 18 September 2024. On 9 November 2024, all the parties were given timelines to file their papers in response to the Applicant's application for leave to appeal. Despite all the counsel having been afforded an opportunity to file their responses to the Applicant's application for leave to appeal, only the First, Second, Sixth and Ninth Respondents filed their further papers. The aforementioned Respondents indicated that they would oppose the application for leave to appeal. Then on 4 October 2024 the Applicant filed its Request. A question of law is a question that must be answered by the application of relevant legal principles to the interpretation of the law.

[7] On 9 October 2024, the date on which it was agreed that the court would proceed to hear the Applicant's application for leave to appeal, the court could not do so because some counsel objected to hearing the Request. They expressed their dissatisfaction that the court had not heard their voices on the Request. Timelines were then set and agreed upon that those who wanted to file their papers, whether to

oppose or to abide, the said Request, should file their affidavits or further papers on or before 18 October 2024; and that those who oppose the Request, together with the Applicant, should file their heads of argument by 25 October 2024 and that both the application for leave to appeal and Request would be heard on 11 November 2024.

[8.1] On 11 November 2024, at the beginning of his submissions, Mr. Van Der Merwe, counsel for the Applicant, informed the court that the Applicant was abandoning its application for leave to appeal and that it would only proceed with its Request. He informed the court furthermore that the grounds for the Request will however be found in the application for leave to appeal and that the Applicant relied on those grounds as set out in the original application for leave appeal for its Request. This was so, even though paragraphs 4.3 to 4.13 of the Request contained reasons or the grounds upon which the Request was made.

[9] But first, the Applicant had a hurdle to jump before dealing with its Request. That hurdle was an application for condonation for the late filing of the Request. According to the affidavit of Mr. Johannes Hendrik Van Der Merwe (Van Der Merwe), used in support of an application for condonation for the late filing of the Request, the Applicant had subsequently reconsidered its application for leave to appeal and was of the view that a Request is a more appropriate mechanism to deal with the application to appeal the court order set out in the application.

[10] In his affidavit in support of the condonation application, Mr. Van der Merwe stated that the grounds upon which the Applicant makes its Request are the same as set out in the application for leave to appeal filed in terms of s 17(1)(a) (i) and (ii) of the Superior Courts Act 10 of 2013 (the Superior Act), filed on 18 September 2024. According to the said affidavit, there are no new grounds in the Request. In his view,

the amendment of the application, or the conversion of the application for leave to appeal to the Request, will not delay the prosecution of the appeal by the Applicant. Moreover, as there are no new grounds upon which the Request is made, Mr Van der Merwe submits that, based on the foregoing reasons, there would be no prejudice to any of the Respondents.

[11.1] The First and Second Respondents opposed the Applicant's application for condonation on the basis that the said Request was not filed within a reasonable time. Counsel for the First and Second Respondents, Mr. Shaun Abrahams, relied on **S v Legote en Andere 1999(1) SACR 269 (O) at 275G-276G**, where the court held that reasonableness is determined from the time of the finalization of the matter to the time of the filing of the application following relief.

[11.2] On 14 August 2024, the application for certain relief brought by the First and Second Respondents was heard by this court. In this application the First and Second Respondents had sought the following relief:

"[1] That the Criminal Trial in State vs Andile Malusi Attwell Ramavhunga and 12 Others, Gauteng High Court, Case Nr. CC21/2021, be stayed or held in abeyance temporarily, pending the determination of the final outcome of the prosecution of the appeal by Kabelo John Matsepe and Mamphe Daniel Msiza, against the whole of judgments of Justice PM Mabuse delivered on 26 April 2024 and 27 June 2024 in State versus Tshifhiwa Calvin Matodzi and 13 Others, Gauteng High Court, Case Nr. CC 21/2021.

[2] that the criminal trial of Kabelo John Matsepe and Mamphe Daniel Msiza, as per the respective charges delineated in the indictment in State vs. Andile Malusi Attwell

Ramavhunga and 12 Others, Gauteng High Court, Case Nr. CC21/2024, be separated from that of the rest of the co-accused or Respondents.”

On 16 August 2024 the court dismissed the first prayer but granted the second prayer without giving reasons. Immediately thereafter, counsel for the First Respondent requested the court verbally to furnish written reasons for its order. The parties were provided with written reasons on 6 September 2024.

[11.3] On 18 September 2024, the Applicant delivered its application for leave to appeal in terms of s 17(1)(a)(1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). It will be noted that no rule in, or section of, the CPA provides that an application for leave to appeal against an interlocutory order, such as the current one, should be lodged in terms of the Superior Courts Act. Furthermore, it will also be noted that no period within which such an application for leave to appeal against an interlocutory order has been prescribed, either in the Superior Courts Act or the CPA. In this circumstance, this court may not quarrel with the Applicant for using the provisions of the Superior Courts Act. The court is satisfied though that the application for leave to appeal was delivered within a reasonable time of 6 September 2024.

[11.4] The Applicant received notices of opposition to the application for leave to appeal for the from the First, Second, Sixth and Ninth Respondents only. The Applicant then changed course entirely by delivering a new application in terms of s. 319(1) of the CPA on 4 October 2024. This application in terms of s 319(1) was accompanied by the Applicant's application for condonation for the late filing of s 319(1) application. The rule or section of the law under which the Applicant brought the application for condonation was unknown. When the Applicant delivered the application for condonation it was under an erroneous belief that the provisions of the Superior Courts

were applicable in this case. I have already found that no rule under the CPA or Superior Courts Act provides for the delivery of an application for leave to appeal and consequently, for the application for condonation for the late delivery of the application in terms of s 319(1) of the CPA. No rule of law regulates the bringing of an application in terms of route 319(1) of the CPA.

[11.5] Mr Abrahams complained to the skies that:

“the applicant changed course entirely and substantially, without notice or application to amend and or substitute its earlier application, by filing an entirely new application in terms of s 319 one of the CPA” on 4 October 2024 together with an application for condonation for late filing of the of its application.”.

[11.6] There are no rules in either the CPA or Superior Courts Act that govern:

[11.6.1] the launching of an application for leave to appeal against an interlocutory order, such as the current one.

[11.6.1] the launching of an application in terms of section 319(1) of the CPA.

[11.6.2] the bringing of an application for condonation.

[11.6.3] the periods in which to bring all the above applications

[11.6.4] if there is no allegation that the applicant has failed to comply with certain rules in bringing any one of those applications.

[11.6.5] If there is no complaint that the bringing of anyone of the above applications by the Applicant has prejudiced the Respondents, I see no valid reason to be angry the Applicant for any step it took, whether in the bringing of an application for leave to appeal and/ or in bringing of an application in terms of s 319(1) of the CPA.

Accordingly, I have made no order in this regard.

The Sixth and Ninth Respondents do not oppose the application for condonation for the late filing of the Request.

[12] The Applicant requests the court to reserve the following questions of law:

[12.1] *Whether the court had exercised its discretion judicially or had been influenced by wrong principles of law or a misdirection on the facts or whether its decision had been unreasonable in granting the separation of trials.*

[12.2] *Whether the court duly considered the prosecutorial prerogative as to how the accused should be charged as provided for in section 179(2) of the Constitution.*

[12.3] *Whether the court erred in not considering the provisions of Prevention of Organised Crime Act 21 of 1998(POCA) and the authorities in relation thereto when it interfered in the directive by the National Director of Public Prosecutions in terms of section 2(4) of POCA that the Respondents must be prosecuted together.*

[12.4] *Whether the court erred mero motu in applying its inherent powers in terms of section 173 of the Constitution instead of correctly conducting an inquiry in terms of section 342A of the CPA.*

[12.5] *Whether the court erred in relying on section 342A of the CPA where it did not properly apply the provisions of the section and failed to hold an inquiry providing all parties the opportunity to respond and provide due recognition to the impact of all the parties including the victim's interest."*

The applicant believes that the above-mentioned questions of law have reasonable prospects of success and that there are compelling reasons why the appeal should be heard, before the trial resumes.

[13] The First and Second Respondents oppose the Request on seven grounds, namely, that:

[13.1] S 319(1) is not applicable in this case because the questions formulated by the Applicant and which it requests the court to reserve did not arise "*on the trial*" of the First and Second Respondents.

[13.2] The Applicant has not fully complied with the peremptory requirements of s 319(1) of the CPA, which requires strict compliance, in that the questions of law are not properly and or intelligently and or accurately framed by the Applicant. *S v Pooe* 2021(2) SACR 115 (SCA)

[13.3] The requirements of law framed by the Applicant do not have the practical effect on the outcome of the trial of the First and Second Respondents.

[13.4] S 319(1) does not apply in interlocutory applications, such as separation orders in terms of section 157 of the CPA.

[13.5] The order is not appealable.

[13.6] The Applicant's questions are purely factual and cannot be reserved as questions of law.

[13.7] The Applicant does not enjoy any reasonable prospects of success.

[13.8] The applicant has failed to have regard to the policy considerations underlying the spirit and purport s 319(1)e of the CPA.

[13.10] The Tenth Respondent initially filed an affidavit deposed to by his counsel in which he opposed the Applicant's application for leave to appeal, only to withdraw it later. Like the rest of the Respondents, the Tenth Respondent has not filed any papers in connection with the Request.

[14] I now turn to dealing with the grounds, singly, upon which the First and Second Respondents oppose the Applicant's Request.

14.1] Section 319 of the CPA is not applicable in this matter in that the questions formulated and which the Applicant requests the court to reserve for consideration by the Appeal Court did not arise "on the trial" of the matter of the First and Second Respondents.

With regards to the reservation of questions of law in terms of s 319(1) of the CPA, the position in our law is that only questions of law which arise in the trial of a person in Superior Court may be reserved under s 319(1) of the CPA. A question of law cannot be said to arise from the trial if the record of the trial completely fails to disclose it. See **S v Mulayo 1962(2) SA 522 AD**. The issue in this appeal was whether the questions of law reserved by the trial Judge arose on the trial of the appellant in a Superior Court. The circumstances that led to the impugned reservation of questions of law by the trial are set out in the judgment of Hoexter J.A. on page 526 of the judgment. I do not think it necessary to repeat them in this judgment.

[14.2] Having listened to the argument on whether the questions of law reserved by the trial Court arose "on the trial" of the appellant's case, the Appellate Division held that in terms of section 366(1) of the Criminal Procedure Act 56 of 1955, the questions of law which may be reserved are those which arise from the trial of the person in a Superior Court. According to the judgment, a question of law can only arise on a trial if the record of the proceedings discloses it. The court accepted the argument that as to whether the question of law reserved arose on the trial of the appellant in terms of sec 366(1) of Act 56 of 1955, a trial has been held to take place when there is an issue raised between the accused and the State by a plea of not guilty. It means that when

an accused person has pleaded to the charges or indictment on being called to do so, anything that happens thereafter happens “*on the trial*” of the accused.

[14.3 Counsel for the First and Second Respondents argued that section 319(1) is not applicable where the charges have not been put to the accused. He found support in the judgment of **S v Mene 1978(1) SA 832 (A A) paragraph 838c-d**. According to his argument, s 319(1) requires questions of law to arise during the trial. S 319(1) permits a trial court to reserve questions of law which arise “*on the trial*” of an accused. In this case of S v Mene, although the issue regarding “*on the trial*” was raised, it was not decided.

[14.4] The issue in the Mene case was whether a question of law would arise “*on the trial*” of the accused in a Superior Court where the court a quo quashed the indictment without the accused being called upon to plead. The indictment was quashed by the trial court under the following circumstances:

“Met verwysing na sekere beslissings van ons Howe, het die Hof a quo die klagstaat nietig verklaar omdat daar nie voldoende besonderhede verskaf sou gewees het nie. Na die nietigverklaring van die klagstaat is die volgende regsvraag voorbehou:

“did the Court err in law in holding that the indictment, as read with the particulars requested by the defence and supplied by the State, was calculated to prejudice or embarrass the accused in his defence, more particularly having regard to the onus resting on the accused in terms of sec. 2(1)(b) of Act 83 of 1967, and sec. 12(1) Act 44 of 1950.”

[14.5] A point in limine was raised against the appeal that because the (a) order quashing the indictment and was not made “*on the trial*” of the accused and (b) there had been no acquittal of the accused, the court a quo had no jurisdiction under sec.

366 of Act 55 of 1956 to reserve the questions of law. The court found that, under the circumstances, the trial court could not, on application by the prosecutor, reserve a question of law. The appeal court accepted this point in limine and for that reason struck the appeal from the roll. It stated that:

“Die beswaar in limine moet gehandhaaf word en dit is nie nodig verder te oorweeg of die bevel tot nietigverklaring “on the trial” plaasgevind het nie.” page 838c.

According to Mr. Abrahams’ interpretation of the judgment of *S v Mene*, a trial starts only when the charge is put to the accused and the accused pleads thereto. According to him, the question of law in terms of s 319(1) cannot arise in this case because:

14.5.1] no one has objected to the indictment.

[14.5.2] no one has raised any exception against the indictment; and,

[14.5.3] no one has pleaded.

Therefore, the questions of law raised by the Applicant in terms of s 319(1) did not arise during the trial of the First and Second Respondents, and by implication, of the Sixth and Ninth Respondents.

[15] I have not been told that the law as set out in the *Mulayo* and *Mene* judgments has changed materially or that the two judgments have been overruled.

[16] **R v Tucker 1953 3 SA 150 [A.D]** at page 159H, the court held that the words “*on the trial*” denote the proceedings after arraignment whether upon a plea of not guilty or guilty.

“But in my opinion the word “trial” in sec. 372, as in sec. 370, is used to denote the proceedings after arraignment, whether upon a plea of guilty or not guilty. It follows

that the question whether an indictment discloses an offence is one which arises "on the trial" of an accused, even if he pleads guilty."

According to the law then, a prosecutor was only entitled to have a question of law reserved under section 366 in the case of an acquittal and in no other circumstance. See *R v Gani and Others* 1957(2) SA 212 (A) and *R v Solomon* 1959(2) SA page 359e-360A.

"Artikel 366 maak voorsiening vir die voorbehoud van 'n regspraak indien daardie vraag by die verhoor ontstaan "arises on the trial." Die gekursieeerde woorde is deur die gewysdes geïntepreter as synde op die stadium nadat die klagte aan die beskuldigde gestel is. See R v Tucker 1953(3) SA 150 AD at p. 159h.....Die Klagte is nie aan die beskuldigde gestel nie en hy het daarom ook nie op die klagte gepleit nie."
This position has however changed since 1948.

[17] In *R v Mene supra*, the court relied on the case of **R v Adams and Others 1959(3) SA 753 (A.D)**. In *R v Adams* the matter came before court, the Appellate Division, by way of a reservation of questions of law for its consideration. Two questions of law were reserved, one related to an exception against the indictment while the other was an application to quash the indictment. The exception was raised and the application to quash the indictment was made before the accused could plead. The Special Criminal Court decided not to allow the exception and not to grant the application to quash the indictment. Instead, the Special Criminal Court reserved the two questions of law and postponed the trial. The appellants approached the appellate division to reverse the decision of the Special Criminal Court. The respondent raised a point in *limine* that the appellate division did not have jurisdiction at that stage of the proceedings against the appellant to decide the questions of law reserved. The

appellant division took the point that the point in *limine* was well taken. It accordingly struck the appeal from the roll.

In the *R v Mene*, the point *in limine* raised was that the order that nullified the indictment was not made “*on the trial*” of the respondents and that there was also no acquittal of the respondent. Those were the days when an acquittal of the accused was still a requirement before a point of law by the State could be reserved. The court held in *R v Adams and Others* that in enacting s 366(1) of Act 56 of 1955, the Legislature did not contemplate applications for reservations of questions law during the trial: the inference is therefore that the making of the request must abide the conclusion of the trial. It is of paramount importance to point out that, at the time of the judgment of *Adams and Others*, the court was dealing with section 372 of the Criminal Procedure and Evidence Act 31 of 1917, the predecessor of section 366 of the Act 56 of 1955, which is now section 319 of the CPA. That section 372 at the time read 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 court of appeal.

2. When the Superior Court reserves any such question and the accused is convicted, the court shall state the question, or the questions reserved and shall direct such case to be specially entered in the record and a copy thereof to be transmitted to the register of the court of appeal.

(3) The grounds upon which any exception or objection to an indictment is taken shall, for the purposes of this section, be deemed to be a question of law.

[18] In interpreting s 366, regard will be had not only to the literal meaning of the words used, but also to other considerations, such as the previous policy of the law in connection with appeals, reviews, the aim, scope and object of the Criminal Procedure Act as a whole, the cause and necessity of the amendment and effect and consequences of the possible construction of this section or questions. It is a fundamental principle of our law in criminal procedure that save, for exceptional cases or circumstances, the Court of Appeal will not interfere in criminal proceedings until conclusion thereof and will not entertain appeals piecemeal.

[19] In *R v Adams and Others* counsel for the respondent had argued that there was nothing in s 366(1) which prevented a Superior Court from reserving a question of law as and when it arose, or which required it to defer such reservation until the conclusion of the case nor was there any such provision to be implied. The court rejected this argument. Counsel were, however, unable to refer the court to a single reported case showing that a special entry or questions of law reserved has, in the legal history of this country, ever been considered on appeal before conviction or before the conclusion of the proceedings or before the matter was finalized. That policy accorded with the attitude consistently adopted by the courts. The courts have acted upon the general principle that it would be inconvenient and undesirable to hear appeals piecemeal and have declined to do so, except where unusual circumstances called for such a procedure. Reliance or support was found in **McComb v Assistance Resident Magistrate, Johannesburg, and the Attorney-General 1917 TPD 717 page 719**, where the court, per Gregorski J, had the following to say:

"The idea of a trial is that it should be as much as possible continuous, and that it should not be stopped. If this kind of procedure were to be allowed, it would mean that a trial may become protracted and may extend over a number of months. The

magistrate would sit on one day and hear part of the evidence of a witness; then the hearing would have to be postponed till the opinion of the Supreme Court could be taken, perhaps a month or two later. Thereafter the trial would again be continued, after some months and immediately it is resumed objections might again be raised in connection with some evidence, with an application again to the Supreme Court, and again back to the magistrate. I think that we produced an intolerable condition of things.

[20] Equally, in enacting s 319(1) of the CPA, the Legislature did not contemplate reservation of a question or questions of law, where there has never been a trial of the accused or respondent. A question of law can only be reserved '*on the trial*' of a matter of the accused in that matter and even then, according to the authorities cited above, at the conclusion of such a trial. Therefore, reservation of questions of law must abide the conclusion of trial. This, of course, is to avoid hearing piecemeal appeals.

[21] The Sixth and Ninth Respondents oppose the grounds upon which the Applicant seeks the Request. Their position is that s 319(1) of the CPA is only applicable after a matter has been finalized. This is in keeping with *R v Adams and Others* supra.

[22] Mr Van der Merwe, for the Applicant, has a different view. Despite the law as authoritatively established by the pre-Constitutional authorities, the Applicant submits that the Constitutional Court and the Supreme Court of Appeal have interpreted s 319(1) of the CPA in the light of the Constitution to be also available to the State in circumstances where the matter has not been finalized. In support of such interpretation, the Applicant relied on several authorities, the first of which is **S v Basson 2007(1) SACR 566 (CC) at paragraphs [149] to [152]**, where the court stated that:

"[149] In holding that a question of law can only be reserved at the conclusion of the trial, the court in Adams relied among others, upon the long established legislative and judicial policy which precluded piecemeal appeals to the Appellate Division. The problem of midstream appeals does not arise where the only charge against the accused is quashed by the High Court. The quashing of such a charge brings the proceedings to an end. Yet the Adams rule remains that there is no right of appeal in such situations because an order upholding an exception is neither an acquittal nor a conviction. Even in those cases where there are multiple charges, the quashed charge or charges may have no relation to the remaining charges. In such a case, there is no reason why the trial should not proceed in relation to the remaining charges while the question of law arising from the quashing of the charges is taken on appeal. Where the exception is dismissed, fairness may require that the accused not be subjected to a full-blown trial where in fact the exception is well founded found

[150] The effect of the Adams rule is to take away the right of the state to appeal an order of the High Court upholding an to objection that a charge does not disclose an offence in law. The court suggested that if an objection to an indictment is upheld, the state can amend the indictment document or present a new one. But this does not overcome the situation where, as here, the order upholding the objection has the effect of barring the state from prosecuting the accused on charges which were quashed.

[151] There effect of the Adams rule is not only to prevent the state from instituting criminal proceedings where the court quashes an indictment on the ground that it does not disclose an offence, but it also takes away the right of the state to appeal against the decision upholding an exception to its indictment for another reason. Such an interpretation of Section 319 is inconsistent with the right of the state to institute criminal proceedings and thus with the Constitution. In addition, such an interpretation

is inconsistent with both the purpose and language of section 319, namely, to allow the state to appeal the question of law arising from an order upholding an exception to an indictment. We agree with the observations made by the court in Mene and in the court below that section 319 is capable of another construction

[152] In our view, section 319 should not be construed so as to prevent an appeal against an order dismissing or upholding an exception. The section should be construed so as to allow the state or accused to appeal an order upholding or dismissing an exception. Such a construction of section 319 brings it within the Constitutional bounds by recognizing the right of the state to institute criminal proceedings and, if need be, to appeal an adverse finding on a question of law. It is this construction section 319 which must be adopted. It follows therefore that section 319 did not prevent SCA from considering an appeal against the order of the high Court quashing the charges relating to the conspiracy. The SCA therefore erred in concluding that the Adams rule constituted a bar to the reservation of the question of law relating to the quashing of the charges”

Based on the foregoing paragraphs, the state contends that the state may request the court to reserve questions of law where the matter has not been finalized. I disagree with the state’s interpretation of the said paragraphs. The relevant part of paragraph [151] of the Basson case states that:

“The section should be construed so as to allow the state or the accused to appeal against an order upholding or dismissing an exception.”

An examination of the said judgment fails to reveal any such ruling of the reservation of a question of law before the conclusion of a matter. It only deals with the power of

the state to apply for a reservation of a question of law to appeal an adverse finding on a question of law.

Since 1948 following the amendments introduced by the 1948 Criminal Procedure Amendment Act 37 of 1948, the State always had a right to appeal against any adverse ruling against it provided such a ruling had a final effect.

In my view, the interpretation that the Applicant puts on the paragraph does not commend itself to the Applicant's case that a request for a reservation of question of law can be made at any stage before the conclusion of the trial.

[23] The Applicant relies on three other authorities, namely, **S v Boekhoud 2011(2) SACR 214 (SCA) at par. [33]; Porrit and Another v National Director of Public Prosecutions and Others 2015(1) SACR 533 (SCA) at par. [23]** to demonstrate that, in the light of the Constitutional Court's interpretations, 319(1) is available to the State in circumstances where the matter has not been finalized.

[24] In the *Porrit and Another v NDPP*, the Applicant finds support in paragraph [23] which states that:

"[23] The first question of law having been answered in favour of the NDP, the next question for consideration is the appropriate order that should issue. In S v Basson the Constitutional Court remarked as follows: [20] 'It is plain from the legislative history of s 319 that its purpose was, among others, to allow the State to appeal on a point by requesting the reservation of a question of law.... This legislative history of section 319 makes it clear that it was intended to afford the State the right to appeal a question of law to the SCASection 319(2) indeed strongly suggests that the Legislature intended to permit an appeal against any order upholding or dismissing an objection by way of a reservation of a question of law'

Section 322 of the CPA reads:

- (1) *In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may-*
- (a) *allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or*
 - (b) *give such judgment as ought to have been given at the trial or*
 - (c) *make such order as justice may require...*

Ms Nkosi-Thomas submitted that an appropriate order would be for this court to set aside the order of the court below, substitute it with an order dismissing the applicant's application for the removal of the two prosecutors and remit matter to the high court to proceed with the criminal trial. That is the order that I propose making."

The fundamental question still is: do the questions of law, if they may be so-called, arise "*on the trial*" of the First, Second, Sixth and Ninth Respondents? Section 319 of the CPA requires any question of law to arise "*on the trial*" of any person for any offence in a superior court. The words 'arise on the trial' have been interpreted to denote the proceedings after arraignment when the charges are put and upon the tendering of the plea to the charge: see R v Tucker at page 159h supra; R v Solomon supra; S v Mene supra. The paragraph quoted above by the Applicant does not support the interpretation contended for by the Applicant that the Constitutional and Supreme Court of Appeal have interpreted s 319(1) of the CPA to mean that the State may request a reservation of a question of law even before the finalization of a matter.

The Porrit matter can be distinguished from the current matter. In that matter the question of law was based on an order of the High Court. At the inception of the accused's trial, the High Court ordered the removal of the prosecutors from the trial following the accused's plea in terms of section 106(1)(h) of the CPA. The accused had successfully challenged the title of the prosecutors to prosecute them. The prosecutors were removed from their case or their trial which order had a final effect, and the accused then demanded an acquittal. A question of law, in circumstances where the accused demanded an acquittal, quite clearly arose 'on the trial' of accused.

S v Boekhoud 2011(2) SACR 124 (SCA), paragraph [33] is one of the judgments on which the Applicant relies for the contention that section 319(1) of the CPA is applicable to interlocutory applications which are not final or definitive or with a final effect, particularly the separation of trial orders in terms of section 157 of the CPA.

[26] It is Mr. Abrahams' view that none of the authorities on which the Applicant has placed reliance that the Constitutional Court and the Supreme Court of Appeal interpreted s 319(1) in the light of the Constitution to also be available to the State in circumstances where the matter has not been finalised, find application in this case.

None of those paragraphs cited in those judgments is any authority for the view contended by the Applicant. I agree with Mr Abrahams. Moreover, it was so argued further by Mr. Abrahams that the Applicant is unable to refer this court to a single judgment in the history of our law in which section 319(1) of the CPA was held to be applicable in circumstances where an order, interlocutory or otherwise, was not

final or definitive or of final-effect or where, in the light of the Constitution, s 319 was available to the state in circumstances where a matter has not been finalized.

[27] **Director of Public Prosecutions v Magidela and Another 2000(1) SACR 458 (SCA)** is no authority for the proposition that the SCA's interpretation of s 319 is also available to the state in circumstances where a matter has not been finalized nor is an authority on the expression "*on the trial*" of the offence. It only deals, in paragraph [9] with the requirements for a reservation of a question or questions of law.

[28] In Magidela, the trial court reserved the following question of law:

"1. Whether the respondent had the right to remain silent after they had pleaded guilty during the proceedings conducted in terms of section 119 of Act 51 of 1977; and whether there was a duty to inform the respondent of such right after that they had pleaded guilty; and, whether the Magistrate's failure to do so will necessarily rendered the record with its contents of the said proceedings inadmissible at the subsequent trial of the respondent."

These questions of law were reserved at the conclusion of the trials of the respondents. The first respondent had been acquitted after he had closed his case without tendering any evidence and the second respondent was acquitted at the close of the state case. Quite clearly, the questions of law had arisen on the trial of the respondents in a superior Court. The SCA found that the questions of law can only be reserved provided they arose '*on the trial*' of the accused before the superior court. To give a quintessential of a trial, it has normally without any exception that a case is postponed several times before court before it is finally postponed to a specific day for "trial". This is the day on which the State puts the

charge or indictment to an accused person, who will then plead guilty or not guilty. This is the day on which the trial starts. Therefore, trial only starts the day the charge is put to the accused, and he pleads to it.

According to Mr Stroh, the judgment of Basson does not support Mr Van Der Merwe's argument that both the Constitutional Court and Supreme Court of Appeal have interpreted s 319(1) of the CPA to mean that the state may apply for the reservation of a question of law before the finalization of criminal matter. He relies in this regard on paragraph [263] of the judgment in which the court stated as follows:

"The accused did not plead to these charges and the trial proceedings did not directly involve them...."

Accordingly, I find that the questions formulated by the Applicant as the questions of law did not arise "*on the trial*" of the First, Second, Sixth and Ninth Respondents.

[29] The Applicant has not fully complied with the peremptory requirements of section 319(1) of the CPA.

[29.1] For a Request to be successful, there are certain requirements that must be satisfied. These requirements are set out in some judgments. There is a long list of authorities which hold the view that it is imperative first to determine whether an applicant for a section 319(1) request for a reservation of questions of law has complied with the peremptory requirements of that section of the CPA. For instance, in **Director of Public Prosecutions, Limpopo v Molohe and Another 2020(2) SACR 343 (SCA)**, the Court held as follows in paragraph [39] to [41]:

“[39] The provisions of s 319 of the CPA are peremptory and require strict compliance, as its purpose is to limit appeals by the State. It should be mentioned that s 319 has been subjected to a detailed analysis in a number of judgments, both by this Court and the Constitutional court. Its principles have accordingly been firmly established in our law.

[40] Two decades ago, in Director of Public Prosecutions, Natal v Magidela and Others this Court eloquently and commendably set out the position of the relevant law stating that:

‘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 Andere 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 emphasized in this Court and are firmly established (see, for example, S v Khoza en ‘n 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 the person (S v Mulayo 1962 (2) SA 522 (A) at 526 - 527). Non constat that the problem 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 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 the issue at the trial.’

[41] Furthermore the authors Du Toit et al in the Commentary on the Criminal Procedure Act state:

‘The trial court must refer to those facts in its judgments as part of the reserved questions of law (*S v Nkwenja en ‘n Andere* 1985 (2) SA 560 (A) 567B). Furthermore, whenever the State has a question of law reserved which rests on particular facts, the State must have those facts fully placed on the record and in particular as part of the out of the question of law.”

[30] In paragraph [18] the court emphasized the fact that the provisions of s 319(1) of the CPA are compulsory and furthermore that they must be strictly followed. The purpose of the provisions of s 319 were also set out in paragraph [18]. Their purpose was to limit the appeals by the state. Any question of law raised by the state must be supported by the facts of the matter. The guidelines set out in the Magidela judgment must therefore be followed.

See also **S v Pooe 2021(2) SACR 115 (SCA), paras [18] to [21]**. In paragraph [20] thereof, the Court stated that:

“[20] In my view, the s 319 application that the state brought before the trial court, the first mentioned court motion’, was of the utmost importance, as it would serve to indicate the grounds upon which the state had sought to reserve the points of law.

[21] An examination of the s 319 application.... revealed that the grounds upon which the questions of law were sought to be reserved by the State were set out in a summary form of the evidence of the trial court, but the factual basis upon which they supposedly pivot were not. The State did not set out the factual findings on which the reserve questions of law ought to have been considered. Thus, the facts upon which the point hinged were not clear, nor were they fully set out by the state. It is also not certain from the trial court's judgment on the merits which facts it accepted to be the facts proved in the case. In these circumstances the state ought to have requested the trial court to clarify its findings of fact. This the state regrettably failed to do... There are thus serious shortcomings in the s 319 application brought by the state."

[31] The First and Second Respondents complain that the Applicant has not complied with the peremptory requirements of s 319(1) of the CPA. In this regard they placed reliance on *S v Pooe supra* and **Director of Public, Western Cape v Schoeman and Another 2020(1) SACR 449 (SCA) at [46] and [49], also paras [39] to [42]**. According to Mr. Abrahams, s 319 of the CPA requires strict compliance. Questions of law must be properly or intelligently and accurately framed by the Applicant. Such should leave no doubt as to precisely what the legal questions are. The Applicant must delineate proper factual foundation in respect of each question formulated. The facts upon which the point of law hinges must be clear, and these facts must be fully set out in the record together with the questions of law. I find that the Applicant has not complied with this requirement. It has failed to delineate proper factual foundation in respect of each question of law formulated.

According to Du Toit:

“...whenever the State has a question of law reserved which rests on particular facts, the State must have those facts fully placed on record and in particular as part of the setting out of the question of law.”

Quite clearly, the authorities do not require the reasons for the request for the reservation of law. Instead, they require the facts which underpin the request for the reservation of the question of law.

[32] According to the judgment of DPP, *Western Cape v Schoeman and Another supra* the requirements of s 319(1) of the CPA are as follows:

[32.1] Firstly, the question of the law reserved must be framed accurately leaving no doubt what the legal point is.

[32.2] Secondly, the facts upon which the point hinges must be clear.

[32.3] Thirdly, these facts should be set out fully in the record together with the questions of law.

[33] The Applicant must request a court hearing the s 319(1) request to return a special finding on the facts upon which the ostensible questions of law, as formulated by the Applicant, are founded. See in this regard, *S v Pooe supra* paragraph [21]; *Director of Public Prosecutions, Western Cape v Schoeman supra* paragraph [46]; *Director of Public Prosecutions, Limpopo v Molohe and Another supra* paragraph [11].

[34] I now turn to the Applicant's Request to establish whether it has complied with the requirements of section 319(1) of the CPA in accordance with the guidelines set out in *Magidela or Molohe and Another*. The Applicant's Request, dated 4 October 2024, states as follows:

"Now therefore please take further notice that the applicant respectfully requests the court to resolve the following questions of law and stipulate the trial Court's factual findings and the basis of each question:

[34.1] Whether the Honourable Court exercised this discretion judicially or had been influenced by a wrong principle of law or a misdirection on the facts or whether its decision had been unreasonable in granting the separation of trials.

The Finding of the Court on this point

The issue of separation of trial is discretionary. The discretion had to be exercised judicially by a court having regard to the interests of justice. Section 157 makes no distinction between cases.

[34.2] Whether the Honourable Court duly considered the prosecutorial prerogative as to how the accused should be charged as provided for in terms of section 179(2) of the Constitution.

The court's findings on this point

The provisions of section 35(3)(d) of the Constitution do not prevent the State from exercising its authority in terms of s 179(2) of the Constitution. The exercise of the State powers in terms of s 179(2) of the Constitution is subject to the Bill of Rights.

[34.3] Whether the Honourable Court erred in not considering the provisions of POCA and the authorities in relation thereto when it interfered in the directive by the National Director of Public Prosecutions in terms of section 2 (4) of the POCA that the respondents must be prosecuted together.

The Findings of the Court on this Point

It is utterly incorrect for the State to regard a Judge's exercise of his discretionary powers as an *'interference'*. In my view, such unsavory language should be avoided.

I find that the provisions of POCA are read and applied subject to the Bill of Rights. I also find that the provisions of POCA do not prevent the Court from invoking the provisions of s 157 of the CPA where it comes to the interests of justice.

[34.4] Whether the Honourable Court erred in mero motu applying its inherent powers in terms of section 173 of the Constitution instead of correctly conducting an inquiry in terms of section 342(A) of the CPA.

The Court's Findings on This Point.

Nothing in this section states that the court may not exercise its powers unless it is so asked by someone.

The court was never asked to exercise its powers in terms of s 342(A) of the CPA. I also found that section 342(A) is trumped by the Bill of Rights.

[34.5] Whether the Honourable Court erred in relying on section 342(A) of the CPA where it did not properly apply the provisions of the section and failed to hold an inquiry providing all the parties with the opportunity to respond and provide due recognition to the impact on all the parties including the victim interest.

Findings on this Point.

This point is not clear. But as I pointed out somewhere above, no one raised the provisions of s 342(A) of the CPA.

[35] It will be recalled that the Applicant informed the court that, in addition, he relies on the grounds set out in the application for leave to appeal for its Request. The question is, do those grounds set out the facts upon which the questions of law are based? The answer is, NO. The facts upon which the points in law were said to hinge were not set out in the Applicant's application in terms of s 319(1) of the CPA. In *Molope and Another*, the Court's ratio decidendi appears in paragraph [45]. The said paragraph states as follows:

"An examination of the s 319 application by the State pertinently illustrates that the facts upon which the point of law were said to hinge on were not set out in its application. The State merely summarized the evidence of the witnesses without

analyzing the facts. It failed to set out the trial court's findings on which the reserved question ought to have been considered."

Similarly, in this case, the State has failed to set out the facts upon which it reserved the points of law. As shown above, in the *Molope and Another* case, the State application for leave to appeal or the State's application in terms of s 319(1) failed because the State had failed to state the facts upon which the points of law were said to hinge. In the circumstances, the Applicant's application on this point is doomed to failure.

Lastly, the last point of the law has been inelegantly framed. It must be recalled that it is a requirement of *Schoeman* that the question must be framed accurately leaving no doubt what the legal point is.

[36] Whether section 319(1) of the CPA is applicable to interlocutory applications which are not final, definitive or of final effect, more specifically to separation of trial orders in terms of section 157 of the CPA.

[36.1] Counsel for the First and Second Respondents submitted that an order separating an accused's trial from his co-accused is interlocutory, not of final effect and not appealable. In this regard counsel for the First and Second Respondents relied on the remarks of Hofmeyer J. in **S v Libaya en 'n Andere 1965(4) SA 249 (O) 252 at 252C-D**, which has been copiously cited in paragraph [40] of the judgment which the Applicant seeks to appeal against. In addition, counsel for the First and Second Respondents relies on the submissions made by counsel for the Applicant in an earlier application for separation of trials. In a subsequent application for leave to the court's refusal to order a separation of trial, counsel for

the Applicant submitted, in that application and as one of the reasons why the then Applicant's application for leave to appeal should not be granted, an order for the refusal of an order of separation of trials is interlocutory and not appealable. A quote from the said judgment:

"3. At the commencement of the proceedings, I invited the parties' submissions as to whether the order refusing the separation of trials sought by the applicant from the trial of the rest of the accused in the main trial is in fact appealable.

4. Advocates Celliers SC, on behalf of the applicant, contended that the order is appealable, as it is final in effect and disposes of the issue of separation of trials the applicant intended. Further, that the current application is brought in terms of sections 16 and 17 of the Superior Court Act of 2023 (the SC Act)

5. Advocate van der Merwe, on behalf of the respondent, contended that the order is not appealable as it is an interlocutory order in a criminal trial without a final effect. Further, that the application is brought under the provisions of section 157(2) of the CPA and as such, leave to appeal ought to be brought in terms of the provisions of section 316 of the CPA, which remedy is available to the applicant only after his conviction and sentence".

Based on the foregoing, it is Mr Abraham's view that the order that this court made in terms of section 157 of the CPA is interlocutory; it does not have a final effect and is therefore not appealable. According to **S v Boekhoud 2011(2) SACR 124 (SCA) paras [33] and [66]**, the fact remains that the charges against the First and Second Respondents remain *extant* and thus fall outside the scope of s 319(1) of the CPA.

[36.2] According to Mr Abrahams, separation orders in terms of section 157 do not have a final or definite effect; are not definitive of the rights of the parties; do not have

the effect of disposing of a substantial portion of the criminal case of the First and Second Respondents; do not terminate the charges preferred against the First and Second Respondents as outlined in the indictment; do not bring the criminal trial of the First and Second Respondents to an end; and do not bring finality to the *lis* between the State, on one hand and First and Second Respondents, on the other hand, as the charges preferred against the First and Second Respondents remain extant and will amount to impermissible piecemeal appeals. See in this regard **S v Boekhoud 2011(2) SACR 124(SCA) ,33, and 66; S v Basson 2007(1) SACR 566 (CC) ,149 to 152; R v Adams and Others 1953(3) SA 753,762H-763**

It will be recalled that in **Daniel Mamphe Msiza v The State Case No. CC11/2021** Mosopa J refused the application for leave to appeal because:

"The interlocutory order I made does not dispose of the criminal trial of the applicant".
See paragraph 13, lines 4 to 5 of the said judgment.

[36.3] In this notice of opposition to the reservation of questions of law Mr. Stroh, for the Sixth and Ninth Respondents, states that the Sixth and Ninth Respondents deny that the interlocutory order in terms of s 157 of the CPA is final. He argued furthermore that the order is not final in nature as it is subject to reconsideration at the request of the parties in this matter. He concedes though that once the matter proceeds based on the separation order the accused 9 and 10, in other words the First and Second Respondents, cannot be charged together with the rest of the Respondents again as directed by the National Director of Public Prosecutions. The reason the order is not final, according to Mr Stroh, is that there has been no conviction and no sentencing. So, according to Mr Stroh, the procedure set out in s 319(1) of the CPA can only be resorted to at the conclusion of a criminal trial and not before it or not even where a

criminal trial has not taken place. Mr Stroh does not refer the court to any authority in which the s 157 interlocutory order was reconsidered at the instance of the parties in the matter while he accepts that if the matter proceeds according to the separation order, some of the Respondents will not be prosecuted with the others.

[36.4] On the other hand counsel for the Applicant argued that the effect of the separation of trials order that the court granted in terms of s 157 of the CPA has a final or definitive effect on the criminal trial. According to him, this order needs to be distinguished from other interlocutory orders that the court can revisit or reconsider during the trial. Once the trials are separated in terms of s 157 of the CPA, it would mean that the trial can no longer continue in terms of the indictment of which all the Respondents were arraigned by the Applicant during the execution of their powers. In terms of the court order, the indictment would need to be reviewed to exclude the First and Second Respondents.

[36.6] It is of paramount importance at this stage to point out that the question is not whether a separation order in terms of s 157 of the CAP is justified but whether separation order made in terms of s 157 of the CPA is appealable. The authorities quoted by counsel for the Applicant in this regard are of little help. Whether or not such an order is appealable depends on whether it is permanent or a definite or final judgment. And interlocutory order is an order granted by a court at an intermediate stage during litigation, settling or giving directions relating to some preliminary or procedural question which has arisen in the dispute between the parties. Such an order may be either purely interlocutory or it may be an interlocutory order having a final or definite effect. The principle to be applied in determining whether a procedural order is purely interlocutory is the leading case of **Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948(1) SA 839 (A.D.), 870**. Such an order is

purely interlocutory unless it disposes of any issue or any portion of the issue in the main trial or unless it irreparably anticipates or precludes some of the relief which would or might have been given at a hearing. Though an interlocutory order may cause great, indeed irreparable, prejudice to the Respondent, it clearly does not dispose of any issue or any portion of an issue in the main trial.

[36.8] It is of paramount importance to point out that when counsel for the Applicant argues that the order in terms of s 157 of the CPA has a final or definitive effect it means that, if the matter proceeds as ordered by the court, the First and Second Respondents cannot be charged together again as directed by the National Director of Public Prosecutions. Although this order may cause great, indeed irreparable, prejudice to the Applicant, it clearly does not dispose of any issue or any portion of an issue in the main criminal trial. But this argument by Mr Van der Merwe does not mean that the order in terms s 157 brings any finality to the *lis* between the State, on the one hand, and the First and Second Respondents, on the other hand. Here I agree with the argument raised by Mr Abrahams that, despite the court's order in terms of s 157 of the CPA, the charges against the First and Second Respondents remain extant. See *S v Boekhoud* paragraph [33] where the court had the following to say:

'[33] Whilst appreciating that there was a well-established legislative and judicial policy which precluded piecemeal appeals to the SCA, the Constitutional Court noted there was no such problem where the only charge against an accused is squashed. That effectively brings the proceedings to an end. The same would apply in the event that all the charges in an indictment were to fall away because of the ruling on jurisdiction. It went to hold that there is no bar to a question being reserved in this regard.'

In the current matter, no indictment has been quashed. There has not been any objection to the jurisdiction of the Court, as it was in the Magidela matter. There is no order dismissing or upholding an exception to the charges. It is for that reason that Mr Abrahams has argued that the charges against the First and Second Respondents, and by implication against the Sixth and Ninth Respondents remain extant.

[36.9] The order in terms of section 157 of the CPA does not bring the criminal trial of the First, Second, Sixth and Ninth Respondents to an end. See *S v Boekhoud* 2011(2) SACR 124 (SCA) paras [33], [34], and [66]; *S v Basson* 2007(1) SACR 566 (CC) from paras [149] to [152]; *R v Adams and Others* 1959(3) [A.D] 753 at 763.

[36.10] Based on the above authorities, including the **Porrit** and **Magidela** judgments, I am satisfied that the position has now been firmly established by the Constitutional Court and the Supreme Court. that section 319(1) of the CPA is not applicable in this matter. Both Mr. Abrahams and Mr. Stroh have submitted that the Applicant's application in terms of s 319(1) of the CPA be dismissed. According to Mr Stroh, the Applicant did not set out the requirements in this application for questions of law to be reserved by this court.

[37] The questions of law framed by the Applicant do not have any practical effect on the outcome of the trial of the First and Second Respondents.

[37.1] Relying on the judgment of **Director of Public Prosecutions, Western Cape, v Bongo** 2024(2) SACR 180 (SCA) at paragraph [36], at paragraph [36], Mr. Abrahams argued that the questions of law framed by the Applicant have no practical effect on the outcome of the trial of the First and Second Respondents. In the said paragraph the court stated that:

[36] The following requirements must be met before a question of law may be reserved: (a) the question must be framed accurately so that there is no doubt as to what the legal point is; (b) the facts upon which the point is based must be clearly set out; (c) all of this must be clearly set out in the record. In addition, questions of law should not be reserved while they will have no practical effect on the acquittal of the accused. (My own underlining)

[37.2] There must be at least a reasonable prospect that if a mistake of law had not been made, the First and Second Respondents would have been charged with the rest of the Respondents and that there are reasonable prospects that they would be convicted. I am of the view that some of these questions of law, although not framed in conformity with the requirements of *S v Molohe and Another* and *S v Pooe*, raise questions of law.

[37.3] Nothing in the proceedings suggests that, if the First and Second Respondents are charged separately in terms of this court's order made in terms of s 157 of the CPA, they will not be convicted? Again, to put it otherwise, there is no suggestion that the First and Second Respondents will only be convicted if they appear or are charged with the rest of the Respondents.

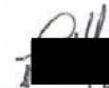
[37.4] Accordingly, questions of law should not be reserved while they will not have any practical effect. The charges against the First and Second Respondents remain extant. The order by the court in terms of section 157 of the CPA does not terminate the charges preferred against the First and Second Respondents, whether they are charged separately or with the rest of the Respondents.

[38] I have not been persuaded that the Applicant enjoys any prospect of success if the Applicant's application in terms of s 319(1) of the CPA is granted nor have, I been

persuaded that there are any compelling reasons why the appeal should be heard. Both Mr Abrahams and Mr Stroh are of the strong view that the factual foundation in respect of the questions formulated by the Applicant does not enjoy any prospects of success.

Accordingly, I make the following order:

1. **The application in terms of section 319(1) of the Criminal Procedure Act NO. 51 of 1977 to reserve five (5) questions of law for the consideration of the Supreme Court of Appeal is hereby dismissed.**




PM MABUSE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Applicant

Adv JH Van Der Merwe

Assisted by S Veenemens

Instructed by

Director of Public Prosecutions.

Counsel for the First & Second Respondents: Adv Shaun Abrahams;

Assisted by Connie Mokhare

Instructed by:

Maluleke Incorporated t/a Maluks Attorneys

Counsel for the Second Respondent:

Adv. Werner Smit

Instructed by:

Legal-Aid South Africa

Counsel for the Third & Sixth Respondents: Adv. Mike Netshiavha

Instructed by: Nwandzule Attorneys

Counsel for the Fourth Respondent: Adv. David Ramagalela

Instructed by: Shemeya Vengesa Attorneys

Counsel for the Sixth & Ninth Respondents: Mr. Johan Stroh/Ms Ross.

Instructed by: Legal-Aid South Africa

Counsel for the Seventh Respondent: Mr. Ledile Mphela

Instructed by: Mphela Mngadi & Associates

Counsel for the Tenth Respondent: Adv. Marianna Mampuru

Instructed by: Legal-Aid South Africa

Counsel for the Eleventh Respondents: Mr. Lwazi Guzana

Instructed by: Lwazi Guzana Attorneys

Counsel for the Eleventh & Twelfth Respondents: Mr. Jaco Hills/Adv W Jungbluth

Instructed by: Hills Incorporated

Date heard: 11 November 2024

Date of Judgment: 6 January 2025