



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

Not reportable

Case number: 10/2021

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE

APPLICANT

and

MALIKOMO MOHAPI

FIRST RESPONDENT

SUPERIOR QUALITY TRADING

SECOND RESPONDENT

SEIPATI DHLAMINI

THIRD RESPONDENT

LERATO MNGOMEZULU

FOURTH RESPONDENT

DISEBO MASITENG

FIFTH RESPONDENT

MOKEMANE NDUMO

SIXTH RESPONDENT

MAHLOMOLA MOFOKENG

SEVENTH RESPONDENT

MBANA PETER THABETHE

EIGHTH RESPONDENT

Neutral citation: *Director of Public Prosecutions v Mohapi and Others* (10/2021) [2025]

ZAFSHC 368 (21 November 2025)

Coram: Loubser J

Heard: 14 November 2025

Delivered: 21 November 2025

Summary: Application for reservation of questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977.

ORDER

The application for reservation of questions of law is dismissed.

JUDGMENT

Loubser J

[1] This is an application by the applicant for the reservation of questions of law in terms of the provisions of s 319 of the Criminal Procedure Act 51 of 1977. The application follows upon the judgment of Mgudlwa AJ finding the respondents not guilty and acquitting them in respect of all the charges in a criminal trial over which he presided.

[2] The respondents stood trial on 61 counts in terms of the Prevention of Organised Crime Act 121 of 1998, Prevention and Combating of Corrupt Activities Act 12 of 2004, Broad Based Economic Empowerment Act 46 of 2013, Public Finance Management Act 1 of 1999, and forgery, uttering and fraud read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997, read with s 332 of the Criminal Procedure Act 51 of 1977 (CPA).

[3] The respondents were not all charged on the same counts. Counts 1 to 8 of forging and tendering of forged documents and the award of the contract in question relate to only the first and second respondents. Counts 9 and 10 are similar to Counts 1 to 8, but they relate to the third up to the eighth respondents only. Counts 11 and 12 pertain to the failure to disclose financial interests and providing of false information, but Count 11 relates to the first and second respondents only, while Count 12 relates to only the third respondent. Counts 13 to 61 pertain to the offences of corruption, money laundering and the contravention of the Public Finance Management Act 1 of 1999, but Counts 13 to 28 relate to the third respondent only, while Counts 29 to 44 relate to the first and second respondents. Counts 45 to 60 relate to the first, second and third respondents only, while Count 61 relates only to the eighth respondent.

[4] The third to eighth respondents were all employees of the Department of Agriculture and Rural Development in the Free State Province.

[5] Since Mgudlwa AJ is no longer acting as a judge of this Division, he was not

available to hear the application in terms of s 319. The application was consequently allocated to this Court for hearing. At the hearing, the application was furiously opposed by counsel appearing for the respective respondents.

[6] Section 319 provides for the reservation of a question of law for consideration by the Supreme Court of Appeal. Such a question of law must arise at the trial, and the trial court may of its own motion or at the request of either the prosecutor or the accused reserve the question. The main use of the procedure under this section is to give the State the opportunity to appeal from a high court to the Supreme Court of Appeal on a point of law. The State cannot appeal against findings of fact which the trial judge made. The pivotal question in applications of the present kind is therefore whether the questions involve points of law or not. If the questions appear to be factual and do not involve points of law, the application stands to be dismissed.

[7] In *DPP Western Cape v Bongo*¹ the Supreme Court of Appeal set out the requirements that must be met before a question of law may be reserved. They are the following: the question must be framed accurately so that there is no doubt as to what the legal point is, the facts upon which the point is based must be clearly set out in the record and questions of law should not be reserved where they will have no practical effect on the acquittal of the accused.² Elsewhere, the Court stated that the question as to whether proven facts in a particular case constitute the commission of a crime, is a question of law, but a question of law is not raised by asking whether the evidence established one or more of the factual ingredients of a particular crime where there is no doubt or dispute as to what those ingredients are.³

[8] In *Director of Public Prosecutions: Limpopo v Molohe and Another*⁴ the Supreme Court of Appeal reaffirmed that the provisions of s 319 are peremptory and require strict compliance as its purpose is to limit appeals by the State.⁵ In *S v Basson*⁶ the Supreme Court of Appeal held that the State has no right of appeal in terms of the CPA in respect of erroneous findings of fact by the trial Judge. Whether the trial court's finding of fact is right or wrong is therefore totally irrelevant in order to determine whether he erred in law. A legal

¹ *DPP Western Cape v Bongo* [2024] ZASCA 70; 2024 (2) SACR 183 (SCA).

² *Ibid* para 36.

³ *Ibid* para 35.

⁴ *Director of Public Prosecutions: Limpopo v Molohe and Another* [2020] ZASCA 69; 2020 (2) SACR 343 (SCA).

⁵ *Ibid* para 39.

⁶ *S v Basson* 2003 (2) SACR 373 (SCA).

question arises only when the facts on which the trial court bases its ruling may have a different legal consequence than the consequence that the court found, it was held.

[9] It is with these legal principles in mind that I now turn to the questions of law raised by the applicant, in order to establish whether it has met the stated requirements and whether they indeed involve questions of law. The applicant raised altogether seven questions of law, which it framed as questions A to G.

[10] Question of Law A: 'Whether in light of the *prima facie* evidence that was placed before the trial Court, the decision to find the respondents not guilty was such an error of such a nature that it constituted a gross irregularity in the trial?'

a) In relation to this question the applicant submits that the Court did not properly consider, ignored or misapplied the principles related to the evaluation of evidence in its judgment. It did so by brushing aside all the exhibits handed in by the State as copies and inadmissible evidence 'in terms of the best evidence rule'.

b) The applicant further submits that the Court erred and misdirected itself by failing to consider uncontested evidence and to apply the relevant principles of the law to the respective exhibits by brushing them aside as copies and 'in terms of the best evidence rule'.

[11] Now, we have seen from the discussion above that questions of law should not be reserved where they will have no practical effect on the acquittal of the accused. The present case is complicated by the fact that all the respondents were not charged with all the counts on the charge sheet. This question of law is too widely stated to be applicable to all the respondents without specifying what effect a successful appeal will have on each of the respondents individually. For instance, in respect of the fifth, sixth and seventh respondents, they were charged with a failure to prevent irregularities in the procurement and award process of a tender. However, it appears that no direct evidence was placed before the court that any of them had engaged in or had actual knowledge of any false representations or misstatements forming the basis for the charges against them. It follows that a successful appeal on this question of law will probably have no practical effect on the acquittal of these accused, if it ever can be classified as a question of law. The question simply lacks the necessary particularity as to which of the respondents will be affected by the question of law. The question under A, therefore, cannot be reserved.

[12] Furthermore, the applicant relies in this question on the allegation that the trial Judge 'brushed aside' all the exhibits as copies and inadmissible evidence. In terms of the best evidence rule, they should have been considered, so the argument goes. However, it appears as if all the conditions for applying the best evidence rule have not been met, for instance that a diligent search was conducted to find the originals.

[13] In the premises, I do not regard this question as a valid question of law.

[14] Question of Law B: 'Whether the trial Court applied the correct test, or legal principles to evaluation of evidence when it draws an adverse inference against the State for electing not to call witnesses where the evidence relevant to the applicant's case was common cause and the witnesses were made available to the defence?'

a) This question relates to witnesses Masiteng and Mlambo, who were State witnesses whom the State failed to call, but had been made available to the defence, who also declined to call them.

b) The applicant submitted that the trial Judge was wrong when he drew an adverse inference against the applicant for not calling the witnesses by finding that this failure meant that the witnesses would have given unfavorable evidence to the applicant's case.

[15] I am of the view that this question of law will have no practical effect on the acquittal of the respondents. This is so because the trial judge knew that the witnesses were made available to the defence, who did not call them. Therefore, even if he was wrong to make the inference against the applicant, the correct decision would have been to find that the witnesses could not take the matter any further and that their evidence was therefore irrelevant to the adjudication of the case. In any event, having regard to all the circumstances of the case, a successful appeal on this question of law will have no practical effect on the acquittal of the respondents.

[16] I consequently find that this question does not raise a valid question of law that could have any positive effect for the respondents.

[17] Question of Law C: 'Was there not a duty on the trial Court in terms of Section 186 of the Criminal Procedure Act, Act 51 of 1977 to call dr. Masiteng and mr. Mlambo? [sic]'

[18] This question has already been answered under Question of Law B. The two witnesses would not have taken the matter any further. A successful appeal on this point will have no practical effect on the acquittal of the accused.

[19] Question of Law D: 'Whether the trial Court, in respect of its ruling on 4 December 2024 that all documents tendered in evidence by the applicant were copies, unauthenticated and inadmissible, erred in applying the wrong test and legal principles relating to admissibility of documentary evidence?'

a) In relation to this question, the applicant submits that the total rejection of all the exhibits under the circumstances amounted to a miscarriage of justice, as the requirements for the admissibility of each type of document varies.

b) It further contended, in amplification, that the trial court misdirected itself in finding that affidavits or certificates by bank officials in terms of s 236 of the CPA were copies and therefore inadmissible.

[20] This question appears to be a repetition of Question of Law A, which was already dealt with herein before. The same considerations, therefore, apply to the present Question. In addition, it is not clear whether the Question is framed accurately. The fact on which this Question is based, do not refer to the trial court's judgment at all and it is not clear which portions of the judgment, with reference to the paragraphs thereof, the applicant seeks to attack. For instance, no specific reference is made to the contents of para 28 to 31 of the judgment and the case law referred to by the trial court. It is not alleged that the case referred to was incorrectly applied.

[21] With reference to my findings on Question of Law A, I have to conclude that the present Question also lacks the particularity to qualify as a valid Question of Law.

[22] Question of Law E: 'Whether the common cause facts actually constitute the crimes of fraud, forgery, uttering, corruption money laundering and contravention of the PFMA?'

a) As the basis for this Question, the applicant refers to one or two instances where the evidence of a State witness was not challenged by the defense. It further contends that the trial Court misdirected itself by failing to consider all evidence tendered but compartmentalized and disregarded some of the evidence tendered by the State, thereby committing an error in law.

b) The applicant further submits that the trial court failed to apply the elements of the crimes charged to the proven facts and thereby committed an error of law.

[23] It appears to this Court, that the factual basis upon which the applicant wishes to ask this Question of law does not address the question itself. While the Question refers to common cause facts, such common cause facts are not listed in the Question. In addition, this Question appears to be nothing more than a question whether the trial Judge had considered the facts, particularly the common cause facts, correctly. This is a question of fact which may not be reserved by the State for consideration.

[24] This question of fact is now disguised as a question of law, and therefore cannot be reserved.

[25] Question of Law F: 'Should the Court *a quo* not have considered the entire body of evidence?'

a) In relation to this Question the applicant points out that all the undisputed evidence became common facts, and that it is clear from the record that the Court *a quo* did not consider the entire body of evidence.

[26] In formulating this Question, the applicant does not refer to the trial court's judgment. It does not challenge the trial court's observations in para 55 of the judgment, where the following is said:

'The case of the State in this matter is pivoted on the disputed secondary evidence which has been proven to have been mishandled. I have assessed the credibility of the evidence of all state witnesses and, in my view, even though the accused exercised their right to remain silent, the State has not succeeded in surmounting the threshold of proving the guilt of all 8 accused beyond any reasonable doubt in respect of all counts respectively.'

[27] Therefore, it cannot be said that the trial court had not considered the entire body of evidence in the trial. The Question of Law may therefore be considered to be inelegantly drawn or inaccurately drawn. As is mentioned in the discussion above, questions of law will not be reserved if they are not drawn accurately.

[28] Consequently, this question cannot be reserved.

[29] Question of Law G: 'Whether the Court's failure to make findings of fact as enjoined in terms of S146(A) of the Criminal Procedure Act 51 of 1977 read with S34 of the Constitution of South Africa amounted to a failure of justice or rendered the trial unfair?'

a) In this Question the applicant relies on the fact that the trial judge gave an *ex tempore* judgment on the matter on 4 December 2024, and promised to provide a full written judgment later. The applicant then made numerous requests for the full written judgment. It was only submitted on 17 February 2025 and turned out to be the same judgment as the *ex tempore* judgment. On 17 June 2025 the applicant requested a 'stated case' from the trial judge, and on 5 August 2025 he responded by stating that his reasons for judgment are in his written judgment.

b) The applicant submits that the trial court had a statutory duty of proper consideration and a duty to give adequate reasons for its acquittal of the respondents. Its failure to provide the same amounted to a failure of justice and a breach of the right to a fair trial in terms of s 34 of the Constitution, it is alleged.

[30] What the applicant appears to seek by way of this Question is a ruling that the trial judge erred in his findings on the facts, since he did in fact give reasons as envisaged by s 146. It is therefore a question of fact, and not a question in law. This Question can also not be reserved.

[31] The following order is made:

The application for reservation of questions of law is dismissed.



P. J. LOUBSER
JUDGE OF THE HIGH COURT

Appearances

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