



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

Not reportable

Case no: 45/2021

In the trial-within-a-trial between:

NOMALANGA MOROADI SELINA CHOLOTA

APPLICANT

and

THE STATE

In re:

Case no: 45/2021

THE STATE

and

NTHIMOTSE MOKHESI AND 17 CO-ACCUSED

Neutral citation: *Cholota v The State In re: S v Mokhesi and Others* (45/2021) [2026]
ZAFSHC 116 (26 March 2026)

Coram: Loubser J

Heard: 16 March 2026

Delivered: 26 March 2026

Summary: Application for the reservation of questions of law made by the applicant after judgment was delivered against her in a trial-within-a-trial – whether the questions posed constitute questions of law

ORDER

- 1 None of the questions that are sought to be reserved, are questions of law.
 - 2 The application for the reservation of question of law for consideration by the Supreme Court of Appeal, is dismissed.
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JUDGMENT

Loubser J

Introduction

[1] This is an application for the reservation of questions of law for consideration by the Supreme Court of Appeal in terms of s 319(1) of the Criminal Procedure Act no 51 of 1977 (the Act). The application concerns a judgment delivered by this court in a trial-within-a-trial in the criminal matter of the *State v Nthimotse Mokhesi and 17 Others*,¹ in which matter the applicant features as accused no. 17. All the accused have pleaded not guilty to multiple counts of fraud, corruption, money laundering and alternative counts thereto at the commencement of the trial. The charges against the accused relate to what has become known as the Free State Asbestos Scandal. Mr. Ace Magashule, erstwhile Premier of the Free State Province, is one of the accused in the trial. It is common cause that the present applicant was the personal assistant of Mr. Magashule at the time.

Background

[2] When the applicant pleaded not guilty to the charges levelled against her, a special plea in terms of s 106(1)(f) of the Act was handed in on her behalf. In the special plea, she pleaded that this Court has no jurisdiction to try the offences she is charged with, because her extradition from the United States of America to the Republic of South Africa to stand trial, was unlawful. It was unlawful because of the improper conduct of the

¹ *State v Nthimotse Mokhesi and 17 Others* (45/2021) [2025] ZAFSHC 164 (3 June 2025).

South African officials in that they presented false and incorrect information to United States authorities during the extradition process, it was pleaded. It was contended that the unlawfulness of the extradition rendered the jurisdiction of the South African criminal court void.

[3] The applicant then raised four pertinent grounds in her special plea in support of her allegations of an unlawful extradition. They are the following:

(a) The State lied to/misrepresented to US authorities that there was reasonable and probable cause for the charges brought against her. She was only charged because she would not implicate Mr. Magashule during a witness interview with the State's investigators in Washington on 21 and 22 September 2021.

(b) The State lied/misrepresented to US authorities that she was a fugitive from justice. The basis for the request for extradition by the State was mainly the allegation that she had refused to or was not returning back to South Africa to face trial, which allegation was false.

(c) The State lied to/ misrepresented to US authorities that the applicant was a flight risk with connections in Kenya, which later proved to be false.

(d) The State lied to US authorities that she was part of a syndicate with Mr. Mpambani and facilitated kickbacks for this syndicate. On even the most cursory reading of the charges against her, it is patently clear that she was never part of any syndicate.

[4] After this special plea was presented by the applicant, a trial-within-a-trial was held to decide whether there was merit in the plea and whether this Court has jurisdiction to try the charges against her. During the hearing, the State called two witnesses to testify, while no witnesses were called to testify for the applicant. In addition, many documents were handed in as exhibits by the parties.

[5] On 3 June 2025 this court delivered judgment in the trial-within-a-trial, and found that the extradition was indeed unlawful, but on a different ground than any of those pleaded by the applicant. The court found that the extradition was unlawful in that it was not requested by the South African powers of State but by members of the National Prosecuting Authority. The court consequently found that it did not have jurisdiction over the applicant. As a result, the court found that it was no longer necessary to determine the grounds for unlawfulness of the extradition as set out in the special plea of the applicant.

[6] The Director of Public Prosecutions, Bloemfontein, then took this judgment of the court on appeal to the Constitutional Court. On 23 January 2026 the Constitutional Court delivered judgment.² The appeal was partially upheld and the order of this Court was set aside. It was held that the extradition was indeed unlawful since only the National Executive has the power to make extradition requests to foreign states, and not the officials of the National Prosecuting Authority. However, it was further held that the fact that the extradition was unlawful as aforesaid, does not of itself deprive this Court of criminal jurisdiction over Ms. Cholota. The Constitutional Court then made an order remitting the matter to this court to determine the remaining grounds of Ms. Cholota's special plea. Those grounds are the four grounds of the special plea referred to in para 3 above.

[7] This court then proceeded to comply with the orders of the Constitutional Court by considering the remaining grounds contained in the special plea of the applicant. It did so by having regard to the evidence presented and the documents handed in during the trial-within-a-trial. In addition, the court had also taken into account the further submissions made by counsel representing the respective parties. On 18 February 2026 the court delivered judgment³ and dismissed the remaining grounds of the applicant's special plea. It was consequently found that the court has jurisdiction to try the applicant on the charges she is facing.

[8] It is against this judgment and findings that the applicant now seeks to have questions of law reserved for determination by the Supreme Court of Appeal.

Section 319(1)

[9] Section 319(1) of the Act provides as follows: '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 Supreme Court of Appeal, 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 Supreme Court of Appeal.'

² *Director of Public Prosecutions, Johannesburg and Another v Schultz and Others; Director of Public Prosecutions, Bloemfontein v Cholota* [2026] ZACC 3; 2026 (3) BCLR 175 (CC).

³ *Cholota v The State* [2026] ZAFSHC 63

[10] In *Director of Public Prosecutions, Natal v Magidela and Another*⁴ the criteria for proper compliance with the requirements of s 319 were set out as follows: only a question of law may be reserved, such questions must arise at the trial, and the trial court must formulate the question either of its own accord or on application of the state or the accused. It appears from this that the only discretion the judge has, is to decide whether the questions involve points of law or not. Such a decision is not always without difficulty, because some questions may be composite in nature and then the judge has to decide whether the question is actually a pure question of law or fact, or whether it is a combined question. Such delimitation is not always apparent, as is illustrated in *Magmoed v Janse van Rensburg and Others*.⁵

The current questions of the Applicant:

[11] With these principles in mind, I now turn to the questions raised and to a determination whether those questions are actually questions of law.

[12] The first question:

Whether the court erred in evaluating and determining the conduct of the State as directed by the judgment of the Constitutional Court. Specifically, whether the conduct of the State brought the administration of justice into disrepute and whether there has been an abuse of process which amounts to an affront of the public conscience.

[13] Having regard to what the Supreme Court of Appeal has stated in relation to a question of this kind, the question is not a question of law but one of fact. In *Director of Public Prosecutions, Limpopo v Molohe and Another*⁶ that the court held: 'If the alleged question of law is nothing more than a question whether the judge had correctly considered the facts, this remains a question of fact which may not be reserved at the request of the Estate.' In *Director of Public Prosecutions, Free State v Mokati*⁷ the following was said: 'The mere fact that the judicial process has become flawed by the way

⁴ *Director of Public Prosecutions, Natal v Magidela and Another* 2000 (1) SACR 458 (SCA).

⁵ *Magmoed v Janse van Rensburg and Others* 1990 (2) SACR 476 (C) and on appeal 1993 (1) SACR 67 (A).

⁶ *Director of Public Prosecutions, Limpopo v Molohe and Another* [2020] ZASCA 69; 2020 (2) SACR 343 (SCA) para 41.

⁷ *Director of Public Prosecutions, Free State v Mokati* [2022] ZASCA 31; 2022 (2) SACR 1 (SCA) para 17.

a trial court goes about assessing the evidence before it does not justify permitting s 319 to be used by the prosecution to reserve a point of law for what is in truth a misdirection of fact.'

[14] In *S v Pooe*⁸ the court rejected the question 'whether the trial court failed to evaluate the evidence in accordance with the accepted legal principles, i.e. in totality and taking into account the probabilities and improbabilities of the respective versions as a question of law, holding that it is a question of fact.

[15] In the premises, the question presently under discussion is no doubt a question of fact. This view of the court also finds support in what the Constitutional Court had stated when it remitted this matter back to this court for adjudication of the remaining grounds of the special plea. It stated in para 104 that the expressly pleaded grounds of the special plea had not been adjudicated upon, 'and are dependent on factual findings which this High Court is ill-placed to make.' This court was therefore tasked to make factual findings and not findings in law.

[16] The second question:

Whether the court correctly applied the standard of proof beyond reasonable doubt and the legal principles associated, when it found that the State had shown beyond a reasonable doubt that there is no merit in the remaining grounds of the applicant's special plea.

[17] When this question is considered, the court does not need to go any further than what was stated in the matters of *Molopo*, of *Mokati* and of *Pooe*, *supra*, by the Supreme Court of Appeal, and to which reference was already made herein. Especially in *Pooe*, the question was much the same as the present question, namely whether the trial court failed to evaluate the evidence in accordance with the accepted legal principles. The Supreme Court of Appeal found that this was a question of fact.

⁸ *S v Pooe* [2021] ZASCA 55; 2021 (2) SACR 115 (SCA) paras 15 and 55.

[18] Consequently, the question cannot be reserved.

[19] The third question:

Whether the court had applied the correct test and/or legal principles when assessing the favourability / credibility of the witnesses, and the reliability and accuracy of their evidence.

[20] Once again, the findings of the Supreme Court of Appeal in the matter of Mokati, referred to hereinbefore, are directly applicable to this question. In Mokati it was pointed out by the court that the way in which a trial court goes about assessing the evidence before it, does not justify permitting s 319 to be used by the prosecution to reserve a point of law for what in truth is a misdirection of fact. The principles expressed in the matter of Poee, are also directly applicable to this question. There it was held that the questions whether the trial court failed to evaluate the evidence in accordance with the accepted legal principles, is a question of fact and not a question of law.

[21] For this reason, the third question is a question of fact and can therefore not be reserved.

[22] The fourth question:

Whether the court properly relied on findings in the judgment of the US District Court of Maryland and the FTI Report in determining whether there was reasonable and probable cause to sustain the charges against the applicant when the aforesaid judgment and report were handed down or procured after the charges had been levelled against the applicant.

[23] With regards to this question, it needs mentioning that this court did not only rely on the US judgment and the FTI Report (a forensic audit report) to find that there was reasonable and probable cause to sustain the charges against the applicant. It also relied on the testimony of Captain Calitz to the effect that the investigation in the matter stretches back to 2020. The US judgment and the FTI Report merely corroborated the pre-existing evidential matrix.

[24] Be it as it may, it is the view of this court that this question concerns factual sufficiency, and not a legal misdirection that warrants reservation as a point of law. The question can therefore also not be reserved.

[25] The fifth question:

Whether the court itself engaged in preliminary litigation and thus materially misdirected itself in its finding that ‘although this court has not yet heard evidence in the main trial yet, it is clear from the quoted passages in the forensic audit that Ms. Cholota had requested payments from Mr. Mpambani after his company had received payments for the asbestos project while no work in the project had been done.’

[26] It is clear from a proper reading of this passage that the court did not make any findings concerning the existence of a syndicate involving the applicant and others. The court merely responded to the fourth ground of the special plea claiming that the State had lied to US authorities that the applicant was part of a syndicate, thereby pointing out that such information came from an independent forensic audit before the extradition court, and not from the State per se. Accordingly, there was no misdirection by the court, and the question pertains to a matter of fact, not of the law.

[27] This question can therefore also not be reserved.

[28] In the premises, the application for the reservation of questions of law stands to be dismissed. The following order is made:

- 1 None of the questions that are sought to be reserved, are questions of law.
- 2 The application for the reservation of question of law for consideration by the Supreme Court of Appeal, is dismissed.



P J LOUBSER
JUDGE OF THE HIGH COURT

Appearances

For the applicant:

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Johannesburg

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Bloemfontein

For the State:

W Nicholson SC

Instructed by:

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