

SOUTH AFRICA / JUDGMENT

S v Mokhesi and Others (45/2021) [2025] ZAFSHC 183; 2025 (2) SACR 182 (FB) (13 June 2025) [2025] ZAFSHC 183

COURT

Free State High Court, Bloemfontein

BEFORE

Loubser

CASE / FILE NUMBER

45/2021

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case number: 45/2021

In the matter between:

THE STATE

and

NTHIMOTSE MOKHESI

1st Accused

MAHLOMOLA JOHN MATLAKALA

2nd Accused

PHEAGANE EDWIN SODI

3rd Accused

BLACKHEAD CONSULTING (PTY) LTD

4th Accused

(Registration number 2011/011664/07)

As represented by accused 3

DIAMOND HILL TRADING 71 (PTY) LTD

5th Accused

(Registration number 2012/100469/07)

As represented by Lindikhaya Mpambani

605 CONSULTING SOLUTIONS (PTY) LTD

6th Accused

(Registration number 2014/123768/07)

As represented by Michele Anita Mpambani

SELLO JOSEPH RADEBE

7th Accused

MASTERTRADE 232 (PTY)LTD

8th Accused

(Registration number 1999/013675/07)

As represented by accused no 7

ABEL KGOTSO MANYEKI

9th Accused

ORI GROUP (PTY) LTD

10th Accused

(Registration number 2012/067835/07)

As represented by accused 9

THABANE WISEMAN ZULU

11th Accused

SARAH MATAWANA MLAMLELI

12th Accused

ELIAS SEKGOBELA MAGASHULE

13th Accused

NOZIPHO BELINA MOLIKOE

14th Accused

THABISO MAKEPE

15th Accused

ALBERTUS VENTER

16th Accused

NOMALANGA MOROADI SELINA CHOLOTA

17th Accused

MARGARET-ANN DIEDRICKS

18th Accused

Neutral Citation: S v Mokhesi and Others (45/2021) [2025] ZAFSHC 183 (13 June 2026)

Coram: Loubser J

Heard: 13 June 2025

Delivered: Ex temporae 13 June 2025

Summary: Application by the State to reserve questions of law for consideration by the Supreme Court of Appeal in terms of s 319 of the Criminal Procedure Act 51 of 1977.

ORDER

The application to reserve questions of law for consideration by the Supreme Court of Appeal, is dismissed.

JUDGMENT IN APPLICATION IN TERMS OF SECTION 319

Loubser J

[1] The State makes application for the reservation of questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977. The application comes in the wake of this Court's judgment in the trial within a trial held to determine whether the Court has jurisdiction to try accused no 17, Ms Cholota, on the charges levelled against her. She is one of the 18 accused in the matter of The State v Mokhesi and 17 Others that serves before this Court under case no. 45/2021. In its judgment in the trial within a trial, the Court found that it has no jurisdiction to try Ms Cholota, because the extradition of Ms Cholota from the United States of America to the Republic of South Africa had been done unlawfully for want of a valid and lawful request for her extradition by the South African Executive power.

[2] Section 319 of the Criminal Procedure Act provides as follows:

'319(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 Supreme Court of Appeal, and thereupon the first mentioned court shall state the question issued 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. Section 319(2) provides that the grounds upon which any objection to an indictment is taken shall, for purposes of this section, be deemed to be questions of law. Section 319 (3) provides that the provisions of s 317(2), (4) and (5) and 318(2) shall apply mutatis mutandis with reference to all proceedings under this section.’

[3] This section leaves no doubt that it only allows the reservation of a question of law. For that reason, the state is not permitted to have a disguised question of fact reserved for consideration by the Supreme Court of Appeal. In addition, it was decided by the Supreme Court of Appeal in *Magmoed v Janse van Rensburg*[1] that it is not competent for the prosecution to raise as a question of law the enquiry as to whether on evidence placed before the trial Court a reasonable court could not have acquitted the accused.

[4] I now turn to the six questions of law that the State has advanced in its application.

Question no 1: Whether the court misdirected itself/erred in the application of the decision of *Schultz v Minister of Justice and Correctional Services and Others*[2] (*Schultz*). In that decision, the Supreme Court of Appeal declared that only the Minister of Justice and Correctional Services in his capacity as a member of the national executive of the Republic of South Africa, has the power to make an extradition request for the extradition of the applicant from the United States of America. In the present case, the extradition request was made by the Director of Public Prosecutions in the Free State. *Schultz* was handed down on 24 May 2024, some two months before the extradition was granted in the USA. This Court is bound by the decisions of the Supreme Court of Appeal, and it was in no position to regard the request for extradition as a valid and lawful request. Because of this position, the question cannot be regarded as a valid question of law. Therefore, the question is not reserved.

Question no 2: Whether this Court erred in upholding the special plea by failing to distinguish the facts pertaining to the respondent’s

extradition from those applicable in *Schultz*. This question pertinently raise the facts on which this court decided the matter, as well as the facts that appeared in *Schultz*. In my view, this question therefore does not raise a question of law and cannot be reserved.

Question no 3: Whether this Court erred when it overlooked the dicta of the SCA in the unreported decision in *Spagni v Acting Director of Public Prosecutions, Western Cape and Others*[3] (*Spagni*). Now obviously, the dicta in *Spagni* pertained to the facts of that matter, and more importantly, *Schultz* came at least a year after the judgment in *Spagni*. It appears that this is a disguised question of fact, and not a valid question of law that can be reserved.

Question no 4: Whether the court’s finding that the prosecution had not proved beyond reasonable doubt that there was a valid and lawful request for extradition, was correct in law in the circumstances. The only evidence placed before the Court in this regard was the request for extradition by the Free State DPP. The Court therefore found on the facts, and this question cannot be regarded as a question of law.

Question no 5: Whether the Court was correct in law by allowing counsel for the accused to raise the authority of Schultz for the first time in closing arguments, depriving the State of audi alteram partem, having a fundamental aspect of the rule of law. On this aspect the record of the proceedings will show that a copy of Schultz was already handed in as an exhibit during the trial within a trial, albeit not by the counsel appearing for the accused. The prosecution therefore knew of that judgment beforehand. Furthermore, in closing argument the Court requested the prosecutor to respond to the accused's argument on the Schultz-matter, and he contended it is irrelevant because it did not form part of the grounds for the special plea. This is in other words a factual issue that does not fall under a question of law. It cannot become reserved.

Question no 6: Whether the Court erred in overlooking and failing to consider the provisions of s 172 of the Constitution. This is the first time that this issue is raised. It was never part of the State's case in the trial within a trial. This question assumingly pertains to the fact that this Court failed to consider the retrospective effect of Schultz. This cannot be regarded as a question of law, because it is mostly irrelevant. The State knew two months before the extradition took place that there was no valid and lawful request for extradition, and as it appears from this Court's judgment in the matter, the State did nothing about it and chose to stand by the request made by the DPP. Whether Schultz has retrospective effect or not, has no bearing on the position that prevailed. This is not a valid question of law that can become reserved.

[5] Lastly, and apart from the views of the Court expressed so far, I am not satisfied that it is competent for the State to request reservations of law in the circumstances of this case. In *R v Solomons*[4] the Appellate Division has stated that the State can only have a question of law reserved when there is an acquittal. Also, in *S v Mene*[5] the Appellate Division decided that where a trial court has quashed a charge, it cannot reserve a question of law on application by the prosecutor, because there was no acquittal. The circumstances of the present matter are on the same level. The accused concerned was not acquitted by this court. It was only found that the court does not have the jurisdiction to try her on the offences she is charged with. It was specifically mentioned in this Court's judgment that she cannot be found guilty or not guilty after she had pleaded not guilty to the charges, because of the provisions of s 106(4) of the Criminal Procedure Act. That subsection provides that an accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, is entitled to demand that he be acquitted or convicted. For this reason the court only informed the accused that she was free to go, without acquitting her on the charges.

[6] In the premises the application to reserve questions of law for consideration by the Supreme Court of Appeal, is dismissed.

Appearances

For the State: JM De Nysschen with him T McPherson

Instructed by: Office of the DPP, Bloemfontein

For Accused 17: L Makapela

Instructed by: Morakile Tibane Attorneys Inc, Johannesburg

[1] Magmoed v Janse van Rensburg 1993

(1) SACR 67 (A).

[2] Schultz v Minister of Justice and Correctional Services and Others

[2024] ZASCA 77; 2024 (2) SACR 294 (SCA).

[3] Spagni v Acting Director of Public Prosecutions, Western Cape and Others

[2023] ZASCA 24.

[4] R v Solomons 1959 (2) SA 352 (A).

[5] S v Mene 1978 (1) SA 832 (A).

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Prepared on 13 October 2026 · Esheria