

SOUTH AFRICA / JUDGMENT

S v Mokhesi and 17 Others (45/2021)

[2025] ZAFSHC 164 (3 June 2025)

[2025] ZAFSHC 164**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

Reportable/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 17 Others (45/2021)

[2025] ZAFSHC 164 (3 June 2025)

Coram: Loubser J

Heard: 5, 6, 7, 8, 14, 15, 21, 22 & 26 May 2025

Delivered: 3 June 2025

Summary: Trial within a trial - extradition - special plea - jurisdiction - court has no jurisdiction to try her on the offences she is charged with, due to her unlawful extradition from the United States of America

ORDER

1 The extradition of Ms Cholota from the United States of America to the Republic of South Africa is declared to have been done unlawfully for want of a valid and lawful request for her extradition by the South African executive power.

2 Consequently, this Court does not have jurisdiction to try Ms Cholota on the offences she is charged with.

3 Ms Cholota is free to go.

JUDGMENT IN THE TRIAL WITHIN TRIAL

LoubserJ

[1] The Court will now proceed to deliver judgment in the trial within a trial held pursuant to the Special Plea raised by Accused no 17, Ms Nomalanga Cholota, to the effect that this Court does not have the necessary jurisdiction to try her on the charges levelled against her. The principal matter before the Court is the long awaited trial of 18 accused in relation to what has become known in the public eye and the media as the Free State Asbestos Scandal, which was perpetrated some 10 years ago. The public interest in the matter on a wide scale was no doubt fuelled by the fact that the erstwhile Premier of the Free State, Mr. Ace Magashule,

features as one of the accused in the matter. Miss Cholota was his personal assistant at the time. All the accused are charged with multiple counts of fraud, corruption, money laundering and alternative counts thereto. All the accused have pleaded not guilty to all those charges, and they are fiercely contesting the accusations against them.

[2] The presence of Ms Cholota in the Court to face the charges against her, is the result of an extradition order handed down by the Court in the United States of America and the Deputy Secretary of State at the end of July 2024. At the time, she was resident in the USA where she was furthering her studies at a university. In this Court, Miss Cholota pleaded not guilty on all the charges on 16 April 2025 on the basis that her extradition to South Africa was unlawful. As a result, this Court is precluded from trying the offences with which she is charged, as the unlawfulness of the extradition renders the jurisdiction of the South African criminal court void, she pleaded. This plea of no jurisdiction was presented in terms of s 106(1)(f) of the Criminal Procedure Act 51 of 1977 (CPA), which provides that an accused may plead to a charge that the Court has no jurisdiction to try the offence with which she is charged. This special plea was reduced to writing and handed in as exhibit 5. I will return to exhibit 5 at a later stage when the specifics contained therein are dealt with.

- [3] Now it is established law in our country that if there were unlawful or improper conduct on the part of the organs or the functionaries of the South African State in foreign territory aimed at securing the presence of an accused in South Africa, the South African Courts are precluded from trying anyone for crimes committed within its borders. See in this respect *S v Ebrahim*[1] and *S v December*. [2] For this reason, this Court directed that a trial within a trial be held first to establish whether there is any merit in the special plea of Ms Cholota.
- [4] In a trial within a trial, the onus of proving beyond reasonable doubt that the court has jurisdiction, rests on the State. This has been the position since *R v Radebe*. [3] Consequently, the prosecution opened the proceedings in the trial within a trial by handing in a bulky file containing mainly documents relating to the extradition in the USA and events related to it. This file was handed in without any objection and was accepted by the Court as exhibit 9. Of particular interest in exhibit 9 is the Memorandum Order and Certification by the United States District Court for the district of Maryland, presided over by a Magistrate Judge filed under tab E, and accompanied by the formal extradition order issued by the Deputy Secretary of State of the United States in Washington on 31st July 2024. In terms of the order Ms Cholota is extradited to South Africa to stand trial for the offences of fraud as charged in counts 3, 4, 5 and 6 only, and corruption, as well as the specified alternatives to the corruption charges, for which she is so charged. And then: 'Extradition is not granted for the offences of fraud as charged in counts 1, 2, 7 and 8, nor for the specified alternatives to any of the fraud charges, nor for the offences of money laundering.'
- [5] In addition, the State called two witnesses to testify in the trial within a trial, namely Capt. Calitz and General Gerber, both attached to the Serious Corruption Investigation Unit of the Directorate for Priority Crime Investigation, more commonly known as the Hawks. After they had testified, the State closed its case. To the surprise of many, the case for Ms Cholota was then also closed without her presenting any evidence under oath or the calling of any witnesses to testify on her behalf.
- [6] Before the trial within a trial, the accused all pleaded to the charges against them. The following charges were put to Ms Cholota, namely Counts 1 to 8 (fraud) and the alternatives thereto of theft and attempted theft, Count 15 (corruption) and two alternatives of also corruption, Count 16 (corruption) and the first alternative thereto of corruption, Count 17 (corruption) and the alternative thereto of corruption, Count 18 (corruption) and the first alternative thereto of corruption, and Count 19 (corruption) and the first alternative thereto of corruption. At the hearing of final submissions in the trial within a trial, the prosecution conceded that Ms Cholota should not have been required to plead to Counts 1, 2, 7 and 8 as well as the alternative counts to Counts 3, 4, 5 and 6. It undertook to stop the prosecution as far as these counts are concerned. Although it remains a mystery to this Court why the counts in question were put to accused 17 at all in view of the terms of the extradition order, it will not be necessary for the prosecution to stop the prosecution in relation to those charges. This is so because it speaks for itself that this court does not have the necessary jurisdiction to try Ms Cholota on counts 1, 2, 7 and 8, nor for the specified alternatives to

Counts 3, 4, 5 and 6 in any event. At the end of this judgment, the court will make the appropriate order in this respect. By virtue of the provisions of s 106(4) of the CPA, the accused will not be entitled to demand that she be acquitted or convicted on those charges because she had pleaded to them.

- [7] The result is that the special plea of no jurisdiction pleaded by Ms Cholota is now confined and limited to only the question whether this court has the jurisdiction to try her on counts 3, 4, 5 and 6 as well as all the counts of corruption and the alternative counts to the corruption counts. The first step in determining this question, is to take a close look at the special plea filed on behalf of Ms Cholota in the form of exhibit 5.
- [8] In exhibit 5, Ms Cholota raises the following grounds to demonstrate that her extradition to South Africa was unlawful:
- a) The State lied to or misrepresented to US authorities that there was reasonable and probable cause for the charges brought against her. She was charged after she would not implicate Mr Magashule (accused no
 - 13) during a witness interview with the State's investigators in Washington on 21 and 22 September 2021. The State itself informed the Constitutional Court, in a sworn affidavit deposed to by one of the investigators, Captain Calitz, that 'the fact that Ms Cholota did not attribute certain instructions to her former boss has the result that she was then treated as a suspect in relation to some of the same charges that her former boss, Mr. Magashule, was facing.' The charges against Ms Cholota were simply a follow through of the threat the investigators had made against her that she would be charged if she did not cooperate with them. The State does not deny the threats, nor that they were made, the State simply alleged that the threats made were fair warning, as appears from the State's answering affidavit in bail proceedings in August 2024. Further, the evidence will show that there was never any reasonable or probable cause for the charges against accused 17 and the intimation to US authorities by the State was unlawful and false.
 - b) The State lied or misrepresented to US authorities that accused 17 was a fugitive from justice. The basis for the request for extradition made to the United States by the State was mainly the fact the accused refused to or was not returning back to the country to face trial. This information was proven to be false during the opposed bail proceedings on 14 August 2024. The Magistrate found that there was no evidence to prove that the accused had ever been contacted by the State and informed of a hearing date and requested to return to the country to attend court on the hearing date. In this respect the Magistrate had the following to say:

'She was a resident and a student in the United States at all times. There is no evidence that it was difficult to get hold of her when she was needed. It appears that there was regular communication between her and the State and her previous legal representative and the State to a point, and then the legal process with regard to her came to a standstill for quite a while. At one state her address was apparently not known to the authorities in the United States but she was

also located in order to start extradition proceedings. The applicant indicated that she was at all times still a student at the University attending classes. I do not have any evidence from the State that there was an instruction issued that she must inform the investigating officer of any change of residential address if she does that.'

Further, the accused no 17 had previously demonstrated that she obeyed court or legal summons when she had travelled back from the United States to South Africa to give testimony at the Zondo Commission in December 2019. The State lied to or misrepresented false information to US authorities that accused 17 was refusing to come back to the country and face the charges, and needed to be extradited.

- c) The State lied to or misrepresented to US authorities that Ms Cholota was a flight risk with connections in Kenya. The state prosecutor, Adv. De Nysschen, deposed to a sworn affidavit under oath, which was submitted to US authorities as a supplement to the report for extradition. Therein, he informed the US authorities that accused 17 was a flight risk, and that she had connections in Kenya:

'She will, in all probability apply for bail which may be opposed by the prosecution, due to the possibility of her being a flight risk, her connection in Kenya and the outcome of the extradition. Ordinarily in extradition proceedings in the US, fugitives or accused persons are released on bail pending the extradition hearing. Ms Cholota was forced to abandon her pursuit of bail, as US authorities presented to the US District Court that she was a flight risk with connections in Kenya. The Magistrate in South Africa noted the following in her judgment in the bail proceedings: 'The defence offered an explanation why they abandoned her bail application in the United States indicating that there were false allegations made against her about her connections in other countries. This was not disputed by the State although the State was given the opportunity to do so.'

As a result, Ms Cholota abandoned the bail application in the US as she could not defend herself against the false claim that she had connections in Kenya. The State later claimed that it was mistaken that she had Kenyan connections, and had only assumed this due to the fact that she had three layovers in Kenya while flying to other destinations. The US was never apprised of this mistake nor the layovers. In another affidavit under sworn oath, the State claimed that it had made the above mistake because the accused has a child in Nigeria and that they had mistook Nigeria for Kenya.

- d) The State lied to US authorities that accused 17 was part of a syndicate with Mr. Mpambani and facilitated kickbacks for this syndicate. On even the worst cursory reading of the charges against accused 17, it is patently clear that accused 17 was not part of any syndicate. No such allegations appear in the amended charge sheet filed by the State with the Free State High Court, nor evidence levelled against accused 17. It is clear that such information was only given to US authorities to bolster their unlawful quest for extradition by any means: legal or otherwise. The judgment by Heter AJ in the Free State High Court is thus instructive and warrants presentation before this Honourable Court.

[164] It can be taken as a fact that the information provided by the State had been incorrect. More importantly, upon the most cursory reading of the judgment of the Magistrate, Judge E Asian presiding over the extradition hearing, it is clear that the entire basis of the extradition proceedings was information that the State had provided on the applicant. The US did not conduct its own separate investigation or confirmation of the facts. It relied solely on the accuracy and veracity of information given to it by the State.

[165] It is patently clear that the State is therefore to be blamed for putting this incorrect information before court during the extradition proceedings. The State should have made certain of its

facts.

[166] I agree with the submissions by Mr Makapela to the effect that the State would provide false incorrect information to authorities of another country concerning a South African citizen presents a serious public interest concern and has serious implications on the interest of justice. I also agree with his submission that the above conduct by the State grossly infringes on international law and constitutional law.'[4]

What appears pertinently clear is that it is undeniable that the State presented false and incorrect information to US authorities. Two South African courts have already made this finding. The US authorities relied on this information in good faith and actioned the extradition on an unknowingly unlawful basis.

- e) The extradition of accused 17, Nomalanga Moroadi Cholota is unlawful. As such, this Court is precluded from trying the offences she is charged with as the unlawfulness of the extradition renders the jurisdiction of the South African Criminal Court void.

Wherefore Accused 17 prays for an order that:

1. The extradition of Nomalanga Moroadi Cholota from the United States to the Republic of South Africa is unlawful.
2. The South African Criminal Court does not have jurisdiction to try her on the offences she is charged with.

[9] This then, represents the entirety of the special plea of no jurisdiction pleaded by accused no 17, Ms. Cholota. Ordinarily, this Court should now decide each and every of the grounds advanced as the basis for the special plea. However, it needs mentioning that, at the hearing of the closing arguments in the trial within a trial, Ms. Makapela, appearing for the accused, submitted that the case for the State is stillborn since it was never showed by the State that the extradition was requested by the South African executive powers of State. The extradition was requested by members of the National Prosecuting Authority, which was not allowed, she submitted. Here she referred to the decision of the South African Supreme Court of Appeal (SCA) in *Schultz v Minister of Justice and Correctional Services and Others*[5] (*Schultz*), a decision that was handed down about two months before the

extradition order was made in the USA. In that appeal the crisp issue was whether the power to request the extradition of a person from the USA to stand trial in the RSA vests in the executive authority of the Minister of Justice and Constitutional Development, or whether it vests in the National Prosecuting Authority. As a point of departure, the Court pointed out that on 16 September 1999, the Government of South Africa entered into an Extradition Treaty with the Government of the USA. The treaty was signed by the Minister of Justice and Constitutional Development on behalf of the Government of South Africa. In terms of Article 1 of the Treaty, the parties agreed to extradite to each other, pursuant to the provisions of the Treaty, persons whom the authorities in the requesting State have charged or convicted of an extraditable offence.

[10] The Court then stated that the doctrine of legality, an incident of the rule of law, which entails that no power may be exercised beyond that which is conferred by law, forms the basis for the consideration of the issue. Power should therefore be sourced in law, the Court said. The Court then went on to refer to other case law and to discuss the South African Extradition Act 67 of 1962, and the customary and international law with reference to our own Constitution. It came to the conclusion that the National Prosecuting Authority has the important function of determining who is to be prosecuted and what the charges are to be. The Minister has no role or power in the exercise of this prosecutorial function. However, if an identified accused is in a foreign State, this triggers the engagement of executive authority, as the National Prosecuting Authority must seek assistance from the executive to make the extradition request to the foreign state, the Court found. The Court further stated that the Minister is the executive authority who represented the government of the Republic in concluding the Treaty. Accordingly, he has the power to represent the State in requests made under it, the Court said. The Court then made the following order, and I quote:

'The order of the High Court is set aside and replaced with the following: It is declared that only the First Respondent, (that is 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.'

I repeat that this order was handed down on 23 May 2024. The national Prosecuting Authority was a party to the litigation in Schultz, and must have known of the decision of the SCA. They had two months to engage the Minister to request the extradition of Ms. Cholota. But they never did.

[11] Now it is patently clear that the issues around an extradition from the USA to the RSA that served before the SCA in Schultz, are the very same issues that this Court is presently seized with. As we have seen, the judgment of the SCA is instructive on these issues and is to the point on the issues now before this Court. Moreover, in our legal system, the High Court and other lower courts are bound to follow the decisions of the SCA. This Court, therefore, has to follow the decision of the SCA in Schultz.

[12] Mr. De Nysschen, appearing for the prosecution, has argued that the question whether only the Minister is empowered to request an extradition, is irrelevant in the instant matter, because it was not included in the grounds set out in the special plea. However, the fundamental doctrine of legality, the rule of law, the principles of customary international law and our Constitution, lie at the heart of the question before the Court, irrespective of whether the question was raised as a ground in the special plea or not. To put it differently, if something was done unlawfully in the extradition process, that wrong can never be cured by a failure to plead same in the special plea. After all, it was at least pleaded that the extradition was unlawful.

[13] Mr. De Nysschen further argued that the Executive was in fact involved in the request for the extradition, because emails show that

representations made by the prosecution to the USA were channeled through the South African Department of International Relations and Co-ordination. Incidentally, this same argument was apparently raised in Schultz, and the SCA had the following to say in relation thereto and I quote: 'The involvement of the Department of International Relations and Co-ordination in the process does not take the matter any further. It really talks to nothing more than the administrative process involved.'[6]

[14] The facts in the present matter now become relevant, because it is necessary to establish who actually requested the extradition of Ms Cholota from the USA to the RSA. The only two witnesses who testified for the State in the trial within a trial, confirmed in their testimony that they had no involvement in the extradition process and could therefore, provide no information in relation thereto. The Court, therefore, has to rely on the documentation presented by the prosecution in exhibit 9 to determine where the request for extradition actually came from. The very first document filed in exhibit 9, under tab A, is the request for extradition from the RSA to the central authority of the USA. The request is made and signed by Navilla Somaru, the Acting Director of Public Prosecution, for the Free State Division of the High Court on behalf of the National Prosecuting Authority of the Republic of South

Africa on 11 January 2022. In the certificate on behalf of the RSA, she declared that she was authorised to make requests for the

extradition of people sought for criminal prosecution.

[15] In an accompanying affidavit, Adv. Somaru stated that the request for the arrest and extradition of Ms Cholota is made in terms of the Extradition Treaty entered into in 1999 by the Governments of the RSA and USA.

[16] This Court does not need to go any further in trying to determine who made the request for extradition. It was not the relevant Minister in his capacity as a member of the executive of the Government of the RSA, but the National Prosecuting Authority. This is underscored by the various communications in the multiple exhibits before me between the US Department of Justice and the Prosecuting Authority. As we have seen, the involvement of the

Department of International Relations and Co-ordination in these communications, is to be regarded as of no consequence. Consequently, I have to find that the prosecution has not proven beyond reasonable doubt, or at all, that there was a valid and lawful request from the RSA for the extradition of Ms Cholota from the USA. It follows that

if there was not a valid and lawful request for extradition, then the extradition itself was without any basis, and therefore unlawful.

[17] In view of these findings, it is no longer necessary for this Court to determine the grounds for the special plea as set out in exhibit 5. I make the following order:

1 The extradition of Ms Cholota from the United States of America to the Republic of South Africa is declared to have been done unlawfully for want of a valid and lawful request for her extradition by the South African executive power.

2 Consequently, this Court does not have jurisdiction to try Ms Cholota on the offences she is charge with.

3 Ms. Cholota is free to go.

LOUBSER J

Appearances For the State: JM De Nysschen with him T McPherson Instructed by: Office of the OPP, Bloemfontein For Accused 17: L Makapela Instructed by: Morakile Tibane Attorneys Inc, Johannesburg

[1] S v Ebrahim 1991

(2) SA 553 (A).

[2] S v December 1995

(1) CLR 438 (AD)

[3] R v Radebe 1945 AD 589.

[4] Cholota v Director of Public Prosecutions Free State and Others [2025] ZAFSHC 21.

[5] Schultz v Minister of Justice and Correctional Services and Others [2024] ZASCA 77; 2024 (2) SACR 294 (SCA).

[6] Ibid para 43.

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