

SE NO.: CC 32/2001

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**CALVIN LISELI MALUMO + 118 OTHERS**

**CORAM:** HOFF, J

**Heard on:** 2006.02.22, 2006.02.27

**Delivered on:**  
2006.02.28

the State is permitted to lead evidence outside the parameters of the further particulars supplied to Accused No. 90;

**JUDGMENT:**

**HOFF, J:**  
This is an application in terms of Section 317 of Act 51 of 1977 for a special entry in terms of the following irregularities:

1. that this Court made, a ruling that

2. that this Court erred in that contrary to the concession made by the State that they particularize four meetings against Accused No. 90, in holding that the further particulars supplied in essence form part of the summary of substantial facts in terms of section 144 of Act 51 of 1977;

3. that this Court erred in putting form over substance;
4. that this Court erred in law by reading the phrase "*various meetings*" disjunctively as opposed to conjunctively rendering the words "*planned attacks*" of paragraph 1 (a) of the further particulars supplied meaningless; and
5. that this Court erred in law by effectively abrogating the further particulars supplied by the State prejudicing the defence of Accused No. 90 which has the effect of infringing the right of Accused No. 90 to a fair trial as envisaged in the Namibian Constitution.
- This application was opposed by the State.
- In considering this application it is thus necessary to look at the ruling itself and the reasons for such a ruling.
- The basic objection by Mr Kauta was that since the State provided further particulars the State is bound by those further particulars provided and should not be allowed to lead evidence of incidents relating to events outside those incidents referred to in their further particulars. This is also the first irregularity referred to in this application and it is from this alleged irregularity

that the other alleged irregularities flow from.

In my previous ruling which I shall refer to as "*the further particulars ruling*" I have given reasons why I have found that the further particulars requested and the further particulars provided are confusing and embarrassing and do not wish to repeat those reasons. It is thus on this basis that I have in the *further particulars ruling* considered two options.

Firstly that it appears to me that what was provided by the State is a conflagration of a summary of substantial facts (section 144 of Act 51 of 1977) and further particulars (section 87 of Act 51 of 1977).

I have then indicated that if one considers the information provided by the State as summary of the substantial facts on which the State relies upon then the State is not precluded from leading evidence outside what is contained in the summary since the State is not bound by the facts referred to in the summary.

I have secondly indicated that if all the information provided by the State in response to the request for further particulars should be regarded as further particulars then the further particulars refer to as least five separate and distinct meetings allegedly attended by Accused No. 90 and that in addition he attended "*various other meetings.*"

It is on the basis that the further particulars refer to "*various other meetings*" that this Court ruled that the State is not precluded from leading evidence which is perceived as evidence

outside the further particulars and this Court remarked that it would have expected an request for further and better particulars since the phrase "various other meetings", is vague.

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specific.  
Paragrap  
hs 1.7  
and 1.8  
read as  
follows:

*"1.7 Was accused at a meetings (s) were the violent take-over was planned or did he plan the violent take-over himself ? Precise and full particulars are requested.*

*1.8 If accused planned the violent take-over at a meeting (s), the State is requested to furnish particulars with respect to the place and date of such meetings."*

In section A of the reply by the State under the heading "Summary of Evidence" the State tabulated four

different meetings  
 i.e. one at the  
 DTA office in  
 Katima Mulilo,  
 one at Linyanti  
 village during  
 1998, one at the  
 house of Richwell  
 Matengu  
 Mukungu during  
 1998, and one  
 during 1999 at the  
 house of Gabriel  
 Mwilima. In  
 section B under  
 the heading:  
*"More  
 specifically the  
 allegations  
 against the  
 accused are the  
 following":*  
 appears at par. 1  
 (a)

*"the  
 accused  
 attended  
 various*

*other meetings and particularly  
 a meeting on 01 August 1999 at  
 Linyanti Khuta where the  
 planned attacks were discussed."*

In my view this reply far from being specific is vague and embarrassing and I must repeat what I have said in *"the further particulars ruling"* i.e.that one would have expected a request for further and better particulars. This was not done.

My understanding of the submissions on behalf of Accused No. 90 is that the *"various other meetings"* referred to in section B must be understood and limited with reference to the four meetings referred to in section A. I disagree since there is no indication from the further particular provided to which meetings are referred to by the phrase *"various other meetings"* hence it cannot now be suggested that this Court erred in reading that phrase disjunctively.

The alleged irregularity that form is being put above substance is in my view a bald assertion and without substance.

It should in addition be clear from what was said *supra* that there is no foundation that this Court in "*the further particulars ruling*" abrogated the further particulars supplied by the State.

I am of the view that this application for special entry in terms of section 317 of Act 51 of 1977 is frivolous and this Court accordingly refuse to record the alleged irregularities stipulated by counsel in this application.

**ON BEHALF OF THE STATE:**

JANUARY

ADV.

**Instructed by:**

OFFICE OF THE  
PROSECUTOR-GENERAL

**OF  
ACCD  
NO. 90:**

**ON  
BEHALF**

MR

KAUTA

Instructed  
by:  
DIRECTOR  
OF  
LEGAL  
LEGAL  
AID