REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 32/2001

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & OTHERS

IN RE: NOTICE OF A POINT IN LAW TO BE RAISED

THADDEUS SIYOKA NDALA (Accused No. 70)	**1ST APPLICANT**
MARTIN SIANO TABAUNDULE (Accused No. 71)	**2ND APPLICANT**
ANDREAS PUO MULUPA (Accused No. 26)	**3RD APPLICANT**
JOSEPH KAMWI KAMWI (Accused No. 3)	**4TH APPLICANT**
HERBERT MBOOZI MUTAHANE (Accused No. 5)	**5TH APPLICANT**
CHRIS PUISANO NTABA (Accused No. 7	**6TH APPLICANT**
MUSHE ROSTER LUKATO (Accused No. 18)	**7TH APPLICANT**
POSTRICK MOWA MWINGA (Accused No. 23)	**8TH APPLICANT**
NDALA SAVIOUR TUTALIFE (Accused No. 24)	**9TH APPLICANT**
BRITAN SIMISHO LIELEZO (Accused No. 31)	**10TH APPLICNAT**
JOHN M PANSE LUBILO (Accused No. 50)	**11TH APPLICANT**
REX LUMPONJANI KAPANGA (Accused No. 63)	**12TH APPLICANT**
BRENDAN LUYANDA LUYANDA (Accused No. 120)	**13TH APPLICANT**
DAVIS CHIOMA MAZYIU (Accused No. 16)	**14TH APPLICANT**
FRANS MUHUPULO (Accused No. 122)	**15TH APPLICANT**

and

THE STATE, represented by

THE PROSECUTOR -GENERAL **RESPONDENT**

Neutral citation: *Ndala v The State* (CC 32/2001) [2013] NAHCMD 262 (19 September 2013)

Coram: HOFF J
Heard: **18 September 2013**
Delivered: **19 September 2013**

Summary: Where a question of law is raised in a superior court in terms of the provisions of s 319 of Act 51 of 1977 such question of law is reserved for consideration by the Appellate Division.

It is not the task of the trial court to decide on the merits or demerits of the point of law raised and to make a finding either in favour of the point so raised or against the point so raised – To do so would constitute an irregularity and the court would be acting *ultra vires* the provisions of s 319.

Any application for the reservation of a question of law must be brought as soon as possible and within a reasonable time after the conclusion of the trial ie after the conviction and sentence of an accused or after his or her acquittal and may not, in contradistinction to a special entry in terms of s 317, be brought during trial proceedings.

ORDER

The prayer to be allowed to raise two points of law at this stage before proceeding with this trial, is refused.

JUDGMENT

HOFF J:

[1] This court was provided with a document yesterday morning which reads *verbatim* as follows:

> 'NOTICE OF POINT IN LAW TO BE RAISED.
>
> TAKE NOTICE THAT the above applicants hereby give notice to raise following two issues as crisp legal issues:
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> (a) Whether the High Court Act, Act 15 of 1990 has application in the territory known and described as the Eastern Caprivi Zipfel, because it is contended by the applicants that it is not.
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> (b) Whether the Arm and Ammunition Act 7 of 1996, section 95 of the Defence Act 1957 (Act 44 of 1957) as amended by section 29 of the Defence Amended Act, 1990, (Act 20 of 1990) as amended by Act 1 of 2002, the Police Act, Act 19 of 1990, the Union Regulation Amendment Act, Act 34 of 1955 as amended by section 2 of the Departure from Namibia Regulation Act, Act 4 of 1993, is applicable in the territory known and described as the Eastern Caprivi Zipfel, because the applicants contend that it is not.'

The correct reference to the High Court Act is Act 16 of 1990.

[2] The background to this application (if I may grace it with such an appellation) is that this court on 16 July 2013 postponed the continuation of this trial to 16 September 2013 (ie the first day of the present term). Ms Agenbach, who appears on behalf of 15 accused persons on the instructions of the Directorate of Legal Aid, confirmed when the case was postponed that on 16 September 2013 she would either approach this court for a further postponement of the case, if not, then there

was the possibility of an application being brought to recall certain State witnesses, further alternative was to inform this court whether or not she would call her clients to testify.

[3] On 16 September 2013 to the surprise of counsel appearing on behalf of the State as well as the counsel appearing on behalf of the remainder of the accused persons Ms Agenbach brought an application on notice of motion and served it on counsel that very same morning in which the following relief was claimed inter alia:

1. Declaring that the High Court of Namibia has no jurisdiction in respect of the territory known and described as the Eastern Caprivi Zipfel.

2. Declaring the High Court Act, Act 16 of 1990. There is no Application in the territory known and described as the Caprivi, Eastern Caprivi Zipfel.

3. Declaring that the High of Namibia has no jurisdiction over the first 15 Applicants and or to adjudicate any of the offences contained in the indictments preferred against the applicants allegedly having been committed in the territory known and described as the Eastern Caprivi Zipfel.

4. Declaring that the Arms and Ammunition Act, Act 7 of 1999, the Defence Act, Act 1 of 2002, the Police Act, Act 19 of 1990, the Union Regulation Amendment Act, Act 34 of 1995 as amended by section 2 of the departure from Namibia Regulation Act, Act 4 of 1993 are not applicable in the territory known and described as the Eastern Caprivi Zipfel.

5. Declaring that the Applicants have not properly and lawfully being arrested in terms of the Defence Act, Act 44 of 1957 as amended by section 29 of the Defence Amended Act, Act 20 of 1990 as amended by Act 1 of 2002 and the Police Act, Act 19 of 1990.

[4] State counsel and defence counsel were united in their opposition to the relief being sought at that stage. After having heard submissions, that application was struck from the roll in a judgment delivered the next day ie 17 February 2013 on the basis that the application was a plea in terms of the provisions of s 106(1)*(f)* of the Criminal Procedure Act 51 of 1977 disguised as an application brought on notice of motion. In that judgment this court referred to the fact a plea that a court of law lacks jurisdiction to adjudicate upon certain offences must be brought at the inception of a criminal trial or not at all with reference to the relevant case law. I further held that since the accused persons had pleaded as far back as 15 March 2004 the plea (disguised in the form of an application) should have been brought 9 years earlier and could not be considered at this stage.

[5] Ms Agenbach then informed this court that she intended to approach the High Court civil division in order to bring the same application and to ask for the staying of these criminal proceedings pending the finalisation of the civil application.

[6] This intended form of action was also opposed. During the course of hearing submissions in this regard the proceedings were postponed in order to hear the submissions by Mr P Kauta the next day ie on 18 September 2013.

[7] At the commencement of the proceedings on the morning of 18 September 2013 before this court could afford Mr Kauta the opportunity to address the court, Ms Agenbach handed up the notice of the two points of law to be raised referred to (supra) a the beginning of this judgment. I requested Mr Kauta then to address the court on the issue which stood over from the previous day as well as on the notice to raise points of law at this stage.

[8] I do not intent to repeat every submission by Mr Kauta save to mention that it was submitted that the raising of points of law at this stage of the trial is an abuse of process; that the conduct of counsel, Ms Agenbach is tantamount to contempt of court in her refusal to abide by the ruling of this court; that what is called points of

law is in effect a repetition of the jurisdiction application brought the previous day and which was struck from the roll; that counsel is holding her co-defence counsel, the State as well as this court ransom by her conduct; that 41 accused persons had already testified and that they are prejudiced the longer it takes to finalise this trial and that the accused persons who had closed their respective cases have a right to know the outcome of this trial ie whether they would be convicted or found not guilty.

[9] This court was also referred in his address to the provisions of s 319 of the Criminal Procedure Act 51 of 1977 which regulate the reservation of a question of law in criminal proceedings. Mr Kauta further submitted that in order to stop the abuse of process, this court has an inherent power to regulate the proceedings before it and should put counsel, Ms Agenbach on terms by giving directions in respect of the future conduct of proceedings. The other counsel appearing on behalf of the remainder of the accused persons namely Messrs McNally, Neves, Kachaka, Nyoni, Kavendjii and Muluti supported these submissions.

[10] It is apparent, and this is also not denied by Ms Agenbach that the two points of law raised are coached virtually in the same language as prayers 2, 4 and 5 in the notice of motion which had been struck from the roll. Prayers 2, 4 and 5 in the notice of motion had overnight been transformed into ‘crisp’ points of law.

[11] Ms Agenbach submitted that the points of law raised may expedite the proceedings, stating that should those points not allowed to be argued it may ‘perpetuate malicious proceedings’. Counsel was however unable to clarify in which way the present proceedings could be classified as malicious. It was further submitted that she has a duty towards her clients and would forsake this duty should she fail to raise the points of law referred to and that she was unable to proceed to the next step in these proceedings unless she has certainty on the points so raised. I need on this point remind counsel that though she certainly has a duty towards her clients to act in their best interests, she, as an officer of this court, equally has a duty amongst others to assist this court to finalise this inordinately prolonged trial as soon as circumstances may allow it. Counsel further submitted that her clients have an

absolute right to a fair trial in the sense that there can be no derogation from such a right. On the issues of abuse of process and contempt of court it was submitted that she was only trying to expedite the proceedings in this court. Counsel requested to be allowed to raise the points of law before this court proceeds with the trial. Ms Agenbach at the stage when the document, containing the two points of law, was handed up informed the court that she was ready to argue the matter.

[12] When this court struck the application from the roll on 17 September 2013, it struck, in addition to the other relief prayed for, also the relief prayed for in paragraphs 2, 4 and 5 of the notice of motion. This court by doing so, in essence, and for the reasons mentioned, refused to consider the merits of the declaratory relief prayed for in paragraphs 2, 4 and 5 of the notice of motion.

[13] If the intention, by raising the two points of law, is in a roundabout way to move or to coerce this court in hearing in effect the merits of paragraphs 2, 4 and 5 of the notice of motion then I agree that this would be an abuse of process, something which this court strongly disapproves of. If the submission by Ms Agenbach that to allow her to raise the points in law, since it would expedite the proceedings, is in fact a request to argue the two points raised on the merits and then thereafter expect this court to come to a finding either in favour of the points so raised or against the points raised, would similarly not only be an abuse of process and tantamount to contempt of court but it would also be an irregularity and *ultra vires* the provisions of s 319 of the Criminal Procedure Act. This much will become clear later during this judgment.

[14] Section 319 provides as follows:

> ‘Reservation of question of law –
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> (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 Appellate Division 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 Appellate Division.

(2) The grounds upon which any objection to an indictment is taken shall, for the purpose of this section, be deemed to be questions of law.

(3) The provisions of ss 317(2), (3), (4) and (5) and 318(2) shall apply mutatis mutandis with reference to all proceedings under this section.'

[15] In a judgment delivered on 11 February 2013 this court considered the provisions of s 317 dealing with special entries of which some provisions are mutatis mutandis applicable to s 319 where this court referred with approval to *S v Kroon* 1997 (1) SACR 525 (SCA) at 530b-c where it was held that a special entry had to be formulated in the form of a factual finding accompanied by the *allegation of the accused person* that it resulted in an irregularity that prevented justice from being done.

[16] In that judgment (of 11 February 2013) this court also referred to S v Botha 2006 (1) SACR 105 at 110 and where it was held that it was not the task of the trial court to make a finding that there had been an irregularity. It was held (in *Botha*) that it was the task of the Supreme Court of Appeal to determine whether or not there had been an irregularity and thereafter to decide on the merits and consequences thereof. If it was found by the Court of Appeal that an irregularity had occurred, the next step was to determine, in accordance with the proviso to s 332 of the Act whether the irregularity had caused a failure of justice. The provisions of s 317 thus only introduce the alleged irregularity.

[17] Similarly the provisions of s 319 are clear and unambiguous which requires of this court to *state* the question reserved, direct that it be specially entered in the record and thereafter be transmitted to the Registrar of the Appellate Division ie the Supreme Court.

[18] In *Director of Public Prosecutions, Natal v Magidela and Another* 2000 (1) SACR 458 SCA the Supreme Court of Appeal in South Africa at 462g-h and 463a-b

referred to requirements which must be met when a question of law is sought to be reserved in terms s 319(1) of Act 51 of 1977, as follows:

'The provisions of s 319 and its predecessors have been the subject of judicial interpretation over the years and in order to see whether the requirements of the section were complied with in this case it is important to consider how the section has been construed. The first requirement is not complied with simply by stating a question of law. At least two other requirements must be met. The first is that the question must be framed by the Judge "so as accurately to express the legal point which he had in mind" (*R v Kewelram* 1922 AD 1 at 3). Secondly, there must be certainty concerning the facts on which the legal point is intended to hinge. This requires the court to record the factual findings on which the point of law is dependent (*S v Nkwenja en 'n Ander* 1985 (2) SA 560 (A) at 567B-G). What is more, the relevant facts should be set out fully in the record as part of the question of law (*S v Goliath* 1972 (3) SA 1 (A) at 9H-10A). These requirements have been repeatedly emphasised in this court and are firmly established (see, for example, *S v Khoza en Andere* 1991 (1) SA 793 (A) at 796E-I). The point of law, moreover, should be readily apparent from the record for if it is not, the question cannot be said to arise "on the trial" of a person (*S v Mulayo* 1962 (2) SA 522 (A) at 526-7). *Non constat* that the point should be formally raised at the trial: it is sufficient if it "comes into existence" during the hearing (*R v Loubscher* 1926 AD 276 at 280; *R v Tucker* 1953 (3) SA 150 (A) at 158H-159H). It follows from these requirements that there should be certainty not only on the factual issues on which the point of law is based but also regarding the law point that was in issue at the trial.'

[19] In the present instance there is no certainty in respect of the facts, if any, on which the points in law intended to be raised, are based.

[20] It is further certainly not the task of this court to decide on the merits of the two points raised ie whether or not the statutes referred to in the two points are applicable in the region formerly known as the Eastern Caprivi Zipfel, since to do to this court would commit an irregularity and would act *ultra vires* the provisions of s 319 of Act 51 of 1977. It is for this reason that there is no substance in the submission by counsel that, should this court be amendable to hear argument on the points raised, it would expedite the proceedings. It simply would not.

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[21] However counsel and those accused persons represented by her are faced at this stage with another insurmountable hurdle, that being, that the points of law intended to be raised would be raised prematurely.

[22] In *R v Ngema, R v Cele* 1960 (1) SA 137 AD at 140F-G the following appears:

'The history of s 366 was examined by this Court in *R v Solomons,* 1959 (2) SA 352 (A.D.) at p. 359, and in *R v Adams, supra,* and no good purpose would be served by now repeating that examination or by reproducing the reasoning reflected in the judgment of the later of those two cases. It suffices to say that sec. 366, in its present form, was authoritatively interpreted in *R v Adams, supra*, and that, in accordance with that interpretation, a conviction is a condition precedent to this Court's entertaining questions of law reserved, at the instance of the accused, for its consideration pursuant to the provisions of that section. It thus becomes necessary to determine whether or not the present appellants can rightly be said to be convicted in the court a quo.'

[23] The provisions of s 319 of Act 51 of 1977 are to a large extend coached in language similar to the provisions of s 366 of Act 56 of 1955.

[24] A point of law in terms of s 319(1) may therefore be raised only at the end or at the conclusion of a trial and not, in contradistinction to a special entry in terms of s 317, during the trial or within a period of fourteen days after his conviction or within such extended period as may upon application and on good cause shown, be allowed.

[25] The dictum in *R v Ngema* was followed in *S v Khoza en Andere* 1991 (1) SA 793 AD at 795J-796A-B.

[26] In *S v Legote en 'n Andere* 1999 (1) SACR 256 WLD it was held that an application for the reservation of a question of law must be brought as soon as possible and within are reasonable time *after* the trial. It was further held that the question whether the application has been brought within a reasonable time is being

determined from the time after the finalisation of the case and the filing of the application and not the time when the application is heard.
(See also *S v Legote* 2001 (2) SACR 179 SCA; *R v Adams* 1959 (3) SA 753 (A); *S v Pineiro and Others* 1992 (1) SACR 287 (Nm).

[27] In *Pineiro,* (a decision of the High Court of Namibia) Strydom JP stated the following at p 290f-g:

> 'What is clear is that the question of law must arise on the trial of any person for any offence in a Superior Court. In my opinion the trial referred to in the section, in the case of a conviction, is the prosecution of the accused for an offence allegedly committed by that accused, the defence set up by such accused in order to avoid such conviction and any sentence imposed following upon a successful prosecution.'

[28] In *Pineiro* it was held that the forfeiture of fishing vessels made in terms of s 17 of the Sea Fisheries Act 58 of 1973 did not arise "on the trial . . . .of any person" as intended by s 319 of the Criminal Procedure Act 51 of 1977 and the State was accordingly not entitled to preserve a question of law in respect thereof.

[28] It should by now be crystal clear to everyone that the prayer by counsel to be allowed to raise those points of law before proceedings with this trial can by no means be entertained by this court and should accordingly be refused.
[29] Mr Kauta during his address has urged this court to put Ms Agenbach on terms, which terms he submitted would move the proceedings forward and out of this present quagmire. This court may still do as suggested, depending on the next course of action taken by counsel, Ms Agenbach. It may, for example, not be necessary to do so where, on the instructions of her clients, counsel closes their respective cases, or decides to put them on their defence.

[30] In the circumstances I deem it necessary to make the following order:

> The prayer to be allowed to raise two points of law at this stage before proceeding with this trial, is refused.

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E P B HOFF

Judge

APPEARANCES

APPLICANTS: I Agenbach

of Agenbach Legal Practitioners, Windhoek

FOR THE STATE:	H January of Office of the Prosecutor-General, Windhoek
FOR THE REMAINDER OF ACCUSED PERSONS:	P Kauta, P McNally, J Neves, V Kachaka, G Nyoni, C Kavendjii & P Muluti Instructed by Directorate of Legal Aid, Windhoek