REPORTABLE

CASE NO. P 4/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE
PETITIONER

and

CALVIN LISELI MALUMO **FIRST RESPONDENT**

CHIKA ADOUR MUTALIFE **SECOND RESPONDENT**

JOSEF KAMWI SIMAWHEWHE **THIRD RESPONDENT**

SYLVESTER LUSIKU NGALAULE **FOURTH RESPONDENT**

KINGSLEY MWIYA MUSHEBAFI **FIFTH RESPONDENT**

JOHN TEBISO MASAKE **SIXTH RESPONDENT**

CHRIS SITALI MUSHE **SEVENTH RESPONDENT**

GEORGE MASIALETI LISEHO **EIGHTH RESPONDENT**

DAVIS CHIOMA MAZYU **NINETH RESPONDENT**

FRANCIS BUITIKO PANGALA RESPONDENT	**TENTH**
ROSTER MUSHE LUKATO RESPONDENT	**ELEVENTH**
KISKO TWAIMANGO SAKUSHEKA RESPONDENT	**TWELFTH**
TOBIAS MUSHWABE KANANGA	**THIRTEENTH RESPONDENT**
FREDERICK KABODONTWA LUTHEHEZI RESPONDENT	**FOURTEENTH**
POSTRICK MARIO MWIYA RESPONDENT	**FIFTEENTH**
NDALA SAVIOUR TUTALIFE RESPONDENT	**SIXTEENTH**
ANDREA PUO MULUPA RESPONDENT	**SEVENTEENTH**
MICHAEL MUNDIA MUBYANA	**EIGHTEENTH RESPONDENT**
O'BRIEN SINKOLELA MWANANYAMBE	**NINETEENTH RESPONDENT**
JOSEF OMO MUFUHI RESPONDENT	**TWENTIETH**
RODWELL MWANABWE SIHELA RESPONDENT	**TWENTY FIRST**
ALBERT SIKENI MANGALAZI RESPONDENT	**TWENTY SECOND**
VICTOR TUMONI LUNYANDILE RESPONDENT	**TWENTY THIRD**

CHARLES MUKENA SAMBOMA **TWENTY FOURTH RESPONDENT**

ZIEZO AUSTIN LEMUHA **TWENTY FIFTH RESPONDENT**

CORAM: MARITZ, JA, STRYDOM, AJA AND MTAMBANENGWE, AJA.

Heard on: 08/06/2010

Delivered on: 14/09/2010

APPEAL JUDGMENT

STRYDOM AJA: [1] After hearing argument the Court issued the following order:

> "Having read the petition and other documents filed of record and having informed the petitioner that the Supreme Court declines the invitation to exercise its review jurisdiction in terms of section 16 of the Supreme Court Act, 1990 it is ordered:
>
> 1. That the petitioner's petition for leave to appeal against the order of the Court *a quo* made on 1 March 2010 declaring that all the statements made by the respondents which had been handed in as exhibits during the trial within a trial were inadmissible as evidence (on grounds other than the one in respect of which leave to appeal has already been granted by the Court *a quo* on 1 April 2010) is refused."

[2] At the time the Court indicated that it would provide its reasons at a later stage. What follows are the reasons of the Court.

[3] The petitioner in this matter (the State) filed a petition in this Court for leave to appeal against decisions in the Court *a quo* whereby it was ruled that certain confessions and/or admissions made by the various respondents, and which the State tendered in evidence, were inadmissible. An application for leave to appeal in terms of sec. 316A(1), read with sec. 316(1), of the Criminal Procedure Act, Act No. 51 of 1977, (the Act) against this ruling, was dismissed by the Court. The State thereupon petitioned the Chief Justice, in terms of the provisions of the Act, for leave to appeal.

[4] The parties were then given notice by letter dated 10 May 2010 that the Judges considering the petition have directed that the petition be argued before them on 8 June 2010. The letter gave directions as to the procedure to be followed and requested counsel to specifically address certain issues in argument as set out in the letter. These were the following:

> "3.3 In addition to any argument to be advanced by or on behalf of any of the litigants, the following questions also be addressed in argument:
>
> a. Are the rulings of the Court *a quo* on the inadmissibility of the confessions/statements which are the subject matter of the petition final in effect or are they interlocutory in nature?
>
> Are the rulings of the Court *a quo* which are the subject matter of the petition appealable by the State in terms of section 316A of the Criminal Procedure Act, 1977 prior to the conclusion of the trial-proceedings against the respective accused persons to whom those rulings relate and if so, under which circumstances (if any) should such an appeal be entertained? Are those circumstances present in this case?"

[5] Simultaneously a letter was addressed to the Judge *a quo* in which he was

requested, in terms of the provisions of sec. 316(8)(a) of the Act, to provide this Court with the information as set out in the letter. I will refer to some of this information later, if necessary.

[6] In its petition the State points out that the trial is of an exceptional nature involving charges such as High Treason after an attempted *coup d'état* in the Caprivi region. There are 278 charges against each of the 122 accused and, from the information given by the Judge *a quo,* the docket of the case comprises some 859 witnesses of which 346 have, so far, given testimony in the trial - now in its 9th year since the accused first appeared in the Court below. From this information it seems that the events which gave rise to the prosecution happened during the second half of 1999 and the majority of the accused persons were arrested during August 1999 with first appearances in the magistrate's court on 23 August 1999. Since the trial started in the High Court various applications, necessitating the hearing of evidence, have been brought in that Court. Some of the accused successfully challenged the jurisdiction of the High Court in terms of s. 106(1)(f) of the Act and the order became the subject matter of an appeal to this Court. I have referred to these facts to show the enormity of the task that faced those involved with it.

[7] The petition continues to state that the reasons why the confessions and statements by the respondents have been excluded by the Court are because the Court was not satisfied that those statements had been made voluntarily. In most of the instances some coercive actions, such as, *inter alia,* assaults by members of the

police or military, were complained of. (The involvement of the military came about when a state of emergency was declared in the Caprivi at the time of, and after, the attempted *coup.*) In these instances leave to appeal was refused mainly because the learned Judge *a quo* was of the opinion that his ruling on the admissibility of the statements was not final but was interlocutory in nature. In addition, the Court concluded that leave to appeal should also be refused because there was no reasonable prospect that another Court would, on the evidence, come to a different conclusion than that reached by the Court *a quo.*

[8] However, in regard to some of the disallowed statements the Court *a quo* granted leave to appeal. Those are instances where the only ground for rejecting the statements was the failure of the magistrate who recorded the statement, to properly explain the rights of the accused in question to apply for legal aid in instances where they could not afford to appoint legal practitioners of their choice. In this regard the Trial Judge was of the opinion that the finding made by him was sufficiently final and unalterable that leave to appeal could be granted. The Court held that once the magistrates, who had taken the statements of the respondents, testified that they had not explained to a respondent his right to apply for legal aid, that that was the end of the matter. Consequently the learned Judge granted leave to appeal in those instances.

[9] An aspect of this case which is out of the ordinary is that a number of the respondents staged a boycott of the court proceedings and refused to attend Court.

This came about when counsel appointed to defend them refused their instructions to object to the jurisdiction of the Court *a quo* on the peculiar grounds which those respondents sought to advance. As a result they terminated the services of their counsel and their attempts, so far, to obtain other counsel were not successful. According to a statement, read to us by the twenty fifth respondent, Mr. Ziezo Austin Lemuha, this happened on 8 March 2007. According to the statement they will only return to Court after the close of the State's case. Statements by these unrepresented and absent respondents were tendered in evidence by the State and in the case of those respondents, cited in this petition, were ruled out by the learned Judge *a quo* on the grounds as previously set out herein. None of these respondents either attended or gave evidence in the trial within a trial proceedings.

[10] We have had the benefit of full and thorough argument by counsel on both sides and I would be failing in my duty if I did not express the Court's appreciation to counsel, more so where this matter was heard as one of urgency which inevitably shortened the periods within which heads of argument were required to be filed. The State was represented by Mr. Gauntlett, assisted by Mr. Pelser, Mr. Small, Mr. January and Mr. Julies. Mr. Botes, assisted by Mr. Kruger, Mr. Neves, Mr. Samukange and Mr. McNally appeared for the 1st, 2nd, 5th, 6th, 7th, 13th, 18th, 19th and 20th respondents. Mr. Kachaka appeared for the 21st and 22nd respondents. The following respondents appeared in person, namely 3rd, 4th, 8th, 9th, 10th, 11th, 12th, 14th, 15th, 16th, 17th, 23rd and 24th.

[11] At the outset the Court informed counsel that it would first of all want to hear argument on the Prosecution's asserted right to appeal the rulings made by the Court *a quo.* Mr. Gauntlett started off by stressing that the case was an exceptional one. Counsel pointed out that there was going to be an intermediate appeal due to the fact that the Court *a quo had* granted leave to appeal in those instances where the respondent's entitlement to apply for legal aid (the constitutional point) had not been explained to them when they made their statements. He submitted that it would be logical also to hear the appeals in regard to the other, nonconstitutional grounds, where the Court excluded the statements made by respondents. Because there was going to be an appeal on the constitutional issues in any event, issues such as convenience and the principle against piecemeal appeals, should not be allowed to affect the right to appeal in this instance. The trial in the Court *a quo* was already interrupted as a result of the pending appeals and to grant leave in these cases would therefore not cause further prejudice.

1. The Court's power of review in terms of sec 16 of the Supreme Court Act, Act 15 of 1990

[12] Counsel's argument further addressed the various questions as they appear in the letters of 10 May 2010 and 28 April 2010, and whereby counsel were requested to address certain specific issues. Mr. Gauntlett has conveniently set out these questions as follows:

> "(a) whether section 20 of the Supreme Court Act, 1990

(i) confers authority to this Court to review the proceedings of the High Court *mero motu*, and

(ii) provides a basis for this Court to exercise its discretion, if any, in favour of the State;

(b) whether the rulings of the Court *a quo* on the inadmissibility of the statements forming the subject-matter of the petition are final in effect or interlocutory in nature; and

(c) whether these rulings are

(i) appealable in terms of section 316A of the Criminal procedure Act,1977 prior to the conclusion of the trial proceedings, and

(ii) if so, under what circumstances; and further,

(iii) whether such circumstances are present in this case."

[13] Mr. Gauntlett pointed out that the State in its petition invoked the provisions of sec. 20 of Act 15 of 1990 as an alternative to its main argument based on the interpretation of sec 316A of the Act. Counsel further stressed the fact that sec. 20 must be read with sec. 16 of the Supreme Court Act. This is correct for sec. 20 only defines the powers of the Court "in cases where it is sitting as court of first instance or on review." It follows therefore that the powers provided for in sec. 20 only become available once the Court sits as a Court of first instance in terms of sec. 15 of the Act, which concerns constitutional matters brought before it by the Attorney-General in terms of Art. 79(2) read with Art. 87(c) of the Namibian Constitution, or where it exercises its review jurisdiction in terms of sec. 16 of the Supreme Court Act. Sec.

16 is therefore the relevant provision and it reads as follows:

> "(1) In addition to any jurisdiction conferred upon it by this Act, the Supreme Court shall, subject to the provisions of this section and section 20 have the jurisdiction to review the proceedings of the High Court or any lower court, or any administrative tribunal or authority established or instituted by or under any law.
>
> (2) The jurisdiction referred to in subsection (1) may be exercised by the Supreme Court *mero motu* whenever it comes to the notice of the Supreme Court or any judge of that court that an irregularity has occurred in any proceedings referred to in that subsection, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court: Provided that nothing in this section contained shall be construed as conferring upon any person any right to institute any such review proceedings in the Supreme Court as a court of first instance.
>
> (3) The Chief Justice or any other judge of the Supreme Court designated for that purpose by the Chief Justice, may give directions as may appear to him or her to be just and expedient in any particular case where the Supreme Court exercises its jurisdiction in terms of this section, and provision may, subject to any such direction, be made in the rules of court for any procedures to be followed in such cases.
>
> (4) The provisions of this section shall not be construed as in any way limiting the powers of the High Court as existing at the commencement of this Act or as depriving that court of any review jurisdiction which could lawfully be exercised by it at such commencement."

[14] Mr. Gauntlett submitted that on a proper construction of the section the power vested in the Supreme Court would include the present proceedings and that the matter was indeed one capable of being dealt with by this Court under sec. 16. The powers granted to the Court in terms of sec 20 are wide enough to deal with the petition and to grant to the State the orders set out in its petition.

[15] Section 16 is an extra-ordinary provision which allows this Court, as a Court of first instance, to correct irregularities in proceedings before the High Court and any other tribunal or authority established by law. This power can only be exercised by this Court once it takes cognizance of such irregularity and assumes jurisdiction. Sub-sec. (2) specifically prohibits any party to bring review proceedings in the Supreme Court as a Court of first instance. The existence of an irregularity in proceedings may come to the notice of the Court or any of its Judges, in which case it may *mero motu* assume jurisdiction and give directions in terms of its Rules to deal with the matter. Perhaps the most likely manner in which an irregularity of that nature would be brought to the attention of the Court or any of its Judges, is by means of a complaint by an aggrieved party involved in the proceedings or through a third party with an interest therein. In the case of *Schroeder and Another v Solomon and 48 Others,* 2009 (1) NR 1 (SC) this Court gave detailed directions of what was required of a party who wanted to bring an irregularity in proceedings to the notice of the Supreme Court or to one of its Judges.

[16] A reading of sec. 16 further shows that the Court's jurisdiction to deal with irregularities by way of review is limited to irregularities in the proceedings and that only in such instances may the Court exercise the powers granted to it by the section read with sec. 20 of Act 15 of 1990. What constitutes an irregularity in the proceedings was considered by this Court in the matter of *S v Bushebi,* 1998 NR 239 (SC) where the following was stated by Leon, AJA, at p. 241F, namely:

> "The phrase 'irregularity in the proceedings' as a ground for review relates to the conduct of the proceedings and not the result thereof. In *Ellis v Morgan, Ellis v Dessai* 1909 TS 576 Mason J said this at 581:
>
> > 'But an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party, from having his case fully and fairly determined.'"

Further at p. 241I the Court pointed out:

> "However, where the error is fundamental in the sense that the lower court has declined to exercise the function entrusted to it by the statute the result of which is to deny a party the right to a fair hearing, the matter is reviewable."

[17] As previously stated the various statements by the respondents were confessions or admissions made by them and which the State tendered in evidence. Because of objections raised by the respondents, evidence was presented in a trial within a trial to determine the admissibility of the statements. This is the usual method by which statements, amounting to confessions or admissions, are dealt with where objections are raised concerning their admissibility. (See *S v W,* 1963 (3) SA 516(AD) at 521). Consequently there is no objection raised against the method of the proceedings adopted by the learned Judge *a quo* in coming to the conclusion that the statements should be excluded. There is also no complaint about some high-handed or mistaken action by the learned Judge whereby the State was prevented from a full and fair hearing of its case and nor is there complaint about a fundamental error committed by the learned Judge which prevented the State from having a fair hearing. It is clear from the judgment that the learned Judge considered the evidence and

excluded the statements on grounds relevant in deciding the issue of admissibility of such statements. Whether he was right or wrong in doing so is not relevant for purposes of deciding whether sec 16 should apply. In fact, as was pointed out in the *Bushebi* case, a review on the bases of an irregularity in the proceedings does not concern itself with an incorrect judgment. That, so it seems to me, is what the State wants this Court to do, namely to find that the learned Judge *a quo* wrongly decided to exclude the various statements. The petition, in each instance, starts by alleging that the Court 'wrongly' ruled that a particular statement was inadmissible or that the Court 'misdirected' itself. These are generally grounds for an appeal and although, in deciding whether an irregularity was committed in the proceedings, a Court would not slavishly bind itself to the allegations made by a party in deciding whether sec 16 applies, it is nevertheless relevant in the present proceedings given the total lack of grounds for a review and the fact that the litigant, in these proceedings, being the Prosecutor-General, is well acquainted with what the law requires in such an instance.

[18] In the case of*. Schroeder, supra,* where this Court gave directions as to how an irregularity in proceedings should be brought to the attention of the Supreme Court by a third party, it was stated that the fact that the irregularity complained of was alterable by the Court, or tribunal committing it, was a factor to be considered in deciding whether the Supreme Court should accept jurisdiction or not. It is trite law that as far as the admissibility of evidence is concerned the trial Court can at any stage during the proceedings, and as evidence may become available, change its

previous ruling and admit evidence previously excluded or exclude evidence previously admitted. (See *S v Steyn,* 1981 (3) SA 1050 (CPD) and *S v Mkwanazi,* 1966 (1) SA 736(AD) at 743.)

[19] In regard to its application for leave to appeal, which was rejected by the Court *a quo*, the State submits in its petition that the only issue which the Court should have decided was whether there were reasonable grounds on which another Court might come to a different finding. Instead, it submits, the Court dealt with the State's right to appeal in regard to the issues raised - which it should not have done - and did not consider the prospects of the appeal – which it should have done. In so far as this allegation may be seen as a ground for review, I am of the opinion that it is without any merit. The right of a party to appeal is always an issue, more so in this instance given the time the application was made and the nature of the intended appeal. It was the duty of the Court to consider this issue and once it came to the conclusion that the matter was not appealable in law at that stage the prospects of the appeal on the merits became irrelevant.

[20] For the reasons set out above I have come to the conclusion that this is not a matter where this Court can or should accept jurisdiction in terms of the provisions of sec. 16 of Act No. 15 of 1990.

2. The interpretation of section 316A of Act No. 51 of 1977.

[21] Prior to the enactment of sec. 316A the State, as represented by firstly the

Attorney-General, and after Independence by the Prosecutor-General, could only appeal on a question or point of law. (See sec 311 of Act 51 of 1977 prior to its amendment by sec. 2 of Act 26 of 1993.). There was no general right of appeal as provided for an accused who is convicted and sentenced. (see sec. 316 of the Act.) This situation was completely changed with the advent of sec. 316A and this section, which is of wide application, now affords the State in criminal proceedings a general right of appeal in regard to any decision by the Court in favour of an accused. As the provisions of sec 316 were applied *mutatis mutandis* to the provisions of sec 316A, it is necessary to look at both these enactments where the Court is called upon to interpret sec. 316A in regard to the right of the State to appeal in interlocutory proceedings where the prosecution of the respondents has still not been completed. The relevant part of sec. 316 provides as follows:

> "**316. Applications for condonation, for leave to appeal and for leave to lead further evidence-**
>
> (1) An accused convicted of any offence before the High Court of Namibia may, within a period of fourteen days of the passing of any sentence as a result of such conviction or within such extended period as may on application (in this section referred to as an application for condonation) on good cause be allowed, apply to the judge at the trial or, if that judge is not available, to any other judge of that court for leave to appeal against his or her conviction or against any sentence or order following thereon (in this section referred to as an application for leave to appeal), and an accused convicted of any offence before such court on a plea of guilty may, within the same period, apply for leave to appeal against any sentence or any order following thereon."

The relevant part of sec 316A reads as follows:

> **"316A. Appeal from High Court by Prosecutor-General or other prosecutor.**
>
> (1) The Prosecutor-General or, if a body or person other than the Prosecutor-General or his or her representative, was the prosecutor in the proceedings, then such other prosecutor, may appeal against any decision given in favour of an accused in a criminal case in the High Court, including –
>
> (a) any resultant sentence imposed or order made by such court;
> (b) any such order made under section 85(2) by such court, to the Supreme Court.

(2) The provisions of section 316 in respect of an application or appeal by an accused referred to in that section, shall apply *mutatis mutandis* with reference to an appeal in terms of subsection (1)"

[22] It was common cause between the parties that the ruling of a Court on the admissibility of evidence was interlocutory. There can be no doubt that that is so. (See, *inter alia, S v Melozani,* 1952 (3) SA 639 (AD) at 644D-G; *R v Musekiwa and Others,* 1965 (3) SA 529(SR) at 530H -531A and *Priday t/a Pride Paving v Rubin* 1992 (3) SA 542 (C) at 544H-545B, 547H-I.) From this it follows that the answer to question (b) of the letter dated 10 May 2010 is that the issue before the Court concerning the confessions and admission statements by the respondents is interlocutory and not of final effect.

[23] With reference to cases such as *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administrator,* 1987 (4) SA 569 (AD), *Marsey v Dilley,* 1992 (3) SA 944 (AD) and *Moch v Nedtravel (Pty) Ltd. t/a American Express Travel Service,* 1996 (3) SA 1 (AD), Mr. Gauntlett submitted that the important distinction which formerly existed between simple interlocutory orders, and orders with a final effect, was now of lesser importance in the context of appeals from the High Court and that, under the currently operative statutory provisions, an increasingly flexible approach to a right of appeal has been adopted. Counsel submitted therefore that the classification of the trial Court's rulings as "interlocutory" was of limited assistance when determining whether or not to grant the petition.

[24] I must however point out that, as was stated in the *Van Streepen*-case, *supra,* at p. 584A-D, that the distinction between simple interlocutory orders and orders having a final and definitive effect was of less importance, was brought about by amendments to the relevant sections of Act 59 of 1959 by the Appeals Amendment Act 105 of 1982, which now requires that in all appeals in civil proceedings from Provincial Divisions or Local Divisions to the Appeal Court, leave to appeal is necessary. The amendment brought about by Act 105 of 1982 is not part of our law and in terms of the provisions of Act 16 of 1990 the distinction between simple interlocutory orders and orders with a final and definitive effect remains important, not only to determine which orders are appealable, but also in which instances leave to appeal is necessary or not necessary.

[25] However, I agree with counsel that the answer to the question, as posed in para. (c) of the question set out by counsel, will determine whether the rulings of the Court *a quo* are appealable in terms of sec. 316A of the Act prior to the conclusion of the trial proceedings, and if so, under what circumstances. In this regard the fact that the statements are interlocutory may be relevant to their admissibility.

[25] Mr. Gauntlett referred to the wording of sub-sec (1) of sec. 316A and submitted that the section allows the Prosecutor-General to appeal against “any decision” given in favour of an accused person. Counsel submitted that the words used were of the widest import and included any decision in favour of an accused person. If I understood counsel correctly the meaning of the word “decision” in the sub-section

should be construed “to include judicial pronouncements in criminal proceedings that is not appealable on the *Zweni* test but one which the interests of justice require should nevertheless be subject to an appeal before termination of such proceedings.” (See *S v Western Areas Ltd.,* 2005 (5) SA 214 (SCA) at pa. 28) The Court in this instance held that it was in accordance with the South African Constitution to construe “decision” as used in sec. 21(1) of Act 59 of 1959 of South Africa, as set out above. Counsel commended this interpretation and submitted that, seen against the legislative background and statutory interpretation by the Courts it had to be presumed to have been the intention of the legislature to return to a position where interlocutory appeals were allowed in criminal proceedings at the instance of the Prosecutor-General, subject only to leave to appeal being granted in certain instances. That then was the true meaning of the words “any decision” where it appeared in sec. 316A (1) of the Act. The requirements to be appealable in terms of sec 316A(1) are therefore threefold, namely (1) a decision of any nature (whether final, dispositive and definitive or otherwise); (2) given in favour of an accused; and (3) given by a High Court.

[26] Mr. Botes referred the Court to sec. 14(1) of the Supreme Court Act, Act 15 of 1990, and submitted that only a ‘judgment or order” was appealable and that would exclude interlocutory orders which did not have a final and definitive effect. Counsel pointed out that a ruling by a Court concerning the admissibility of evidence was purely interlocutory and could be altered by the Court during the trial. Counsel further pointed out that during a lengthy trial a host of rulings and decisions were made by

the Judge. On the interpretation of the petitioner it has an unfettered right to appeal any decision at any time. This not only puts the State in a much more favourable position than the accused, who must patiently wait until there was a conviction and sentence, but can also lead to an abuse of the process of the Court. Such interpretation would also mean that the words “any decision” would carry a more extended meaning than the requirement laid down by sec. 14(1) which only allows appeals against a “judgment or order”. Counsel referred the Court to the Full Bench decision of the High Court in *S v Strowitzki,* 1995 (2) SA 535 (Nm) (1994 NR 265 (HC)) where the Court, at p 271, stated that sec. 316A did not place the Prosecutor-General in a more advantageous position than an accused person. This is so because of the application of the provisions of sec. 316 *mutatis mutandis* to that of sec. 316A. Counsel further referred to the rule against piece-meal appeals and submitted that the interpretation of the petitioner will not lead to a more speedy and cost effective completion of a trial.

[27] Mr. Kachaka, on behalf of the 21st and 22nd respondents, stressed the fact that the proceedings in the Court *a quo,* concerning the admissibility of the statements of the respondents, were incomplete and interlocutory and should therefore not be entertained on appeal unless there were special circumstances, which were not present in this instance. Counsel also submitted that the interpretation put on sec 316A by the petitioner would only cause further delays and costs.

[28] Because of the conclusion to which I have come I do not find it necessary, at this stage, to decide the meaning of the words “any decision” in sec. 316A of the Act. The contention that sec 316A (1) creates for the Prosecutor-General an unlimited right of appeal where a decision is given by the High Court in favour of an accused is, on the argument by Mr. Gauntlett, not subject to the application of the provisions of sec. 316 where that provision would put any constraint on the wide meaning of the words. Consequently Counsel argued that the provision, that an accused person could only appeal after sentence was pronounced by the Court, should not be read into the section by application of the words *mutatis mutandis.*

[29] Counsel submitted that because the words “any decision” appear in the section without any limitation the Legislator did not intend that the wide meaning of the words should be narrowed down. This must further be seen against the role played by the prosecutor in a criminal trial and the interest of the Prosecutor-General in criminal prosecutions in general. Counsel submitted that sec. 316A(3), which provided for a cost order against the State in appropriate circumstances, would put a curb on any notion to abuse the process of the Court. Counsel further found support for this interpretation in the case of *S v Delie (1)* 2001 NR 178 (HC).

[30] I do not agree with Counsel that the words “any decision” stand to be read without any qualification. In my opinion the Legislator has clearly laid down the procedure in terms of which also the Prosecutor-General must act in bringing an

appeal before this Court. This was done by applying the provisions of sec 316 *mutatis mutandis,* that is with the necessary changes, (in points of detail) to the provisions of sec 316A. (See *Touriel v Minister of Internal Affairs, Southern Rhodesia,* 1946 AD 535). So applied, the words "convicted" or "conviction" or "sentence", where they appear in sec. 316 (1), must be changed as far as sec 316A(1) is concerned, to reflect the position of the State *vis-à-vis* appeals. The State's interest in appeals will arise when there is an acquittal of an accused and for purposes of sec. 316A(1) the above words are to be replaced by the word "acquittal". This means that the State's right of appeal against any decision given in favour of an accused must be launched within fourteen days after the acquittal of an accused. In my opinion this change is not in conflict with any of the provisions of sec.316A. Nor is there anything repugnant or arbitrary in such change and the change brought about by the words *mutatis mutandis* find effectual application in the provisions of sec 316A.

[31] I am, for the following reasons, also satisfied that it is necessary to bring about this change. It must firstly be accepted that the Legislator was aware of the principle against piece-meal appeals and wanted to give effect thereto. If that was not the intention one would have expected the Legislator to say so in clear language and not to leave it to some extended interpretation of the words "any decision". This principle is of longstanding and is a salutary one and was expressed by Innes, CJ, more than a hundred years ago in the matter of *Smith v James,* 1907 TS 447 as follows on p. 448:

> "It appears to me that the magistrate's decision is not a 'final order' from which an appeal will lie to this court. It only disposed of the first exception, and the magistrate ought to have gone

> on and decided the matter on the merits. Otherwise, there might be two or three appeals from a magistrate's decision in the same matter. The defendant might file several special pleas and might appeal seriatim from the decision of each of them leaving the merits still open. But such decisions are really not final orders. A 'final order' is one settling the dispute between the parties. "

[32] Mr. Gauntlett is confident that allowing an appeal before the proceedings are terminated will not cause undue delay and will be cost effective. This argument is at best speculative. If the State must apply for leave to appeal within fourteen days after a decision was given in favour of an accused it will, especially in long protracted cases, inevitably lead to delays, as has happened in the present case, to allow the State to bring its application, and, if unsuccessful, to petition the Chief Justice. Furthermore, where the State is of the opinion that a matter will detrimentally affect its case it may ask for a postponement of the case until a decision is obtained from this Court.

[33] A second reason why the words *mutatis mutandis* must apply to the provisions of sec 316A in the way as set out above, is because to allow an appeal in unterminated proceedings might have been unnecessary and in the end only of academic interest. This is so where the accused is in any event convicted notwithstanding any decision in his or her favour by the Court and against which an appeal is pending or was decided in favour of an accused. It is trite law that a Court of law will not involve itself in issues which are moot or only of academic interest. (See, *inter alia, Attorney-General, Transvaal v Flats Milling Co (Pty) Ltd,* 1958 (3) SA

360(AD) p.370B-374 and *Attorney-General, Transvaal v Raphaely,* 1958 (1) SA 309 (AD). It seems to me that the only occasion on which the State will be able to appeal where it has secured a conviction is when the accused has been acquitted on a main charge but convicted of a lesser charge. (See *S v Zoko,* 1983 (1) SA 871(NPD)). However, I need not decide this issue in this matter.

[34] The third reason concerns the issue that there is not a final order by the Court a quo and that the rulings by the Court in connection with the admissibility of the confessions and admissions by the respondents are alterable by the Court itself. Any cogent evidence now placed before the Court *a quo* may have a result different from that when the learned Judge decided to exclude the evidence in the statements. With the majority of the respondents not having testified before the Court, this is not merely a vague possibility but is a very real one. The question then arises, if this Court should decide to hear the appeals, whether any decision that this Court may come to, in regard to the admissibility of the statements on appeal, is or is not final, and may be altered by the Court a quo as evidence emerges which causes the learned Judge to change his mind. The answer to such a problem may not be so clear cut and may give rise to issues concerning jurisdiction and competency of the various Courts. I agree with Mr. Botes that in view of the provisions of sec. 14 of Act 15 of 1990 no appeal lies against rulings which are alterable by the Court *a quo* itself. In my opinion this was also not sanctioned by the provisions of sec. 316A.

[35] However, the general rule that an accused may not launch an appeal before sentence, as set out in sec. 316(1), is not immutable. In *S v Majola,* 1982 (1) SA 125 (AD) at 132F, G and 133A the following is stated, namely:

> "That provision reflects, of course, the general rule that a convicted accused cannot appeal against his conviction until he has also been sentenced. That rule is enforced to avoid piecemeal appeals and to induce expeditious finality in criminal litigation."

Page 132G:

> "But, that notwithstanding, it will be immediately observed that the provision merely regulates the time limits within the application for leave to appeal is to be made. It does not expressly and absolutely prohibit the convicted accused from applying for leave to appeal, or the trial Court from granting it, before he is sentenced."

Page 133A:

> "Of course, the general rule that no appeal should lie to this Court, whether by means of a special entry, reserved law question or in the ordinary way unless the accused is first sentenced, should only be departed from in exceptional circumstances for the reasons already given."

(See further *Wahlhaus and Others v Judicial Magistrate Johannesburg and Another,* 1959 (3) SA 113 (AD) and *S v. Harman,* 1978 (3) SA 767 (AD)).

[36] A reading of the cases shows that in exceptional circumstances leave to appeal can be given before sentence is passed on an accused. If that is true of sec 316(1) then I can see no reason why that should not also be true of section 316A(1).

After all sec. 316A(1) is a reflection of 316(1) and what 316(1), in relation to an appeal, is for an accused person, sec. 316A(1) is such for the State, in matters where the State wishes to appeal.

[37] The question is then whether there are exceptional circumstances present in this matter which will enable this Court to grant leave to appeal at this stage of the proceedings. I agree that this is not the ordinary run of the mill case which more frequently takes up the time of Judges. Its sheer magnitude in the number of accused persons, the number of witnesses and charges, puts it on a different level from cases normally prosecuted. I do, however, not think that that factor is sufficient to warrant a departure by this Court from the general rule set out herein before. The complaint by the State is basically that the learned Judge *a quo* excluded evidence which, according to the opinion of the State, should have been allowed. This is no exceptional matter. It is one which Judges and magistrates face almost daily in dispensing justice in our criminal courts. I therefore agree with Mr. Botes and Mr. Kachaka that there are no exceptional circumstances which would warrant a departure from the provisions of sec.316A(1).

[38] Mr. Gauntlett also referred to sec 316A(1)(b) which provides for an appeal to the Supreme Court in regard to any orders made under sec. 85(2) of the Act. This section deals with objections by an accused person to the charge. Sub-sec. (2)(a) provides that where an objection is well-founded the court may order the prosecution to amend the charge accordingly or to provide further particulars. Sub-sec. (2)(b)

contains a sanction, namely, if the prosecution fails to comply with the court order it may quash the charge. It seems to me that the operative part of the section is sub-sec. (2)(b) because if the prosecution is not able to amend the charge or to provide the further particulars ordered it would lead to a quashing of the charge which in my opinion is a final order and therefore appealable at that stage.

[39] The reliance placed by counsel on *S v Delie, supra,* is in my opinion not supportive of counsel's submissions in relation to the interpretation of sec. 316(1)A. The accused in that matter pleaded guilty to a charge of failing to pay maintenance. When the matter came on review two Judges of the High Court were of the opinion that the questioning by the magistrate in terms of sec 112 of the Act revealed a valid defence to the charge. Instead of referring the matter back to the magistrate for further questioning, as they were required to do in terms of sec. 312 of the Act, they set aside the conviction and sentence and ordered the release of the accused from prison. That, in my opinion, was the end to that particular proceedings, and even if the State could have recharged the accused, they would have had to do so afresh. The appeal by the State was therefore at the completion of the proceedings and in accordance with the interpretation of sec. 316A(1) as set out herein before.

[40] These then are the reasons for the orders made by the Court.

[41] As is evident from the reasons for the orders made, the issues raised in this appeal are both novel and complex. By making its order soon after the conclusion of argument, the Court intended no disrespect to the cogent and well reasoned submissions advanced by both counsel but, rather, to facilitate continuance of the trial

in the Court *a quo.* It is difficult to understand why the trial has been postponed pending the outcome of this petition and the appeal. If the issues raised in the petition and the appeal were the only ones relevant to the remainder of the trial, the postponement – apparently granted at the instance of counsel for the defence – might have been justified. However, the Court has been assured that many of the few hundred remaining witnesses which the Prosecution intends to call will testify on matters wholly unrelated to those issues.

The Court is not presently in a position to comment on the Prosecutor-General's decision to saddle the trial Court with - what must have been anticipated, would be – an unwieldy and colossal trial by indicting so many accused persons in the same proceedings, each facing more than a hundred charges and the evidence of close to a thousand witnesses. It is also understandable that a case, with the dimensions here involved, will inevitably lead to stoppages resulting in delays during the trial due to number of people involved and the issues raised during the trial. The Court has considered the reasons for many of the postponements noted in the Trial Judge's report and, without commenting on each of them or apportioning any blame at this stage, I must note the concern of all the Judges that this trial is not being driven forward with the urgency it deserves to bring it to finality. It is in the interest of everybody, also in regard to the principle on which our State is constituted, namely the rule of law, and the right of the accused persons to a speedy trial, that this case be brought to finality as soon as possible.

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STRYDOM, AJA.

I agree.

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MARITZ, JA.

I agree.

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MTAMBANENGWE, AJA.

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On behalf of 3rd, 4th, 8th, 9th, 10th, 11th, 12th, 14th, 15th, 16th, 17th, 23rd and 24th Respondents:	In Person