REPORTABLE

CASE NO.: SA 13(a)/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE	**APPELLANT**
and	
JOHN TIBISO MASAKE	**6TH RESPONDENT**
GEORGE MASIYALETI LISEHO	**8TH RESPONDENT**
DAVIS CHIOMA MAZIU	**9TH RESPONDENT**
FRANCIS BUITIKO PANGALA	**10TH RESPONDENT**
ROSTER MUSHE LUKATO	**11TH RESPONDENT**
KISCO TWAIMANGO SAKUSHEKA	**12TH RESPONDENT**
TOBIAS MUSHWABE KANANGA	**13TH RESPONDENT**
FREDERICK KABODONTWA LUTHEHEZI	**14TH RESPONDENT**
ANDREAS PUO MULUPU	**17TH RESPONDENT**
O'BRIEN SINKOLELA MWANANYAMBE	**19TH RESPONDENT**
ALBERT SEKENI MANGALAZI	**22ND RESPONDENT**
CHARLES MUKENA SAMBOMA	**24TH RESPONDENT**

Coram:	Strydom AJA, Mtambanengwe AJA *et* Langa AJA
Heard on:	25/10/2010
Delivered on:	22/08/2011

APPEAL JUDGMENT (REASONS)

LANGA AJA:

[1] On 25 October 2010 after hearing argument, the Court issued the following order:

> "Matter struck off the roll. The reasons will follow."

What follows are the reasons of the Court.

[2] The State is the appellant; the respondents, and other accused, are standing trial in a special High Court in Windhoek in case number CC 32/2001. The charges range from high treason, sedition, public violence, murder and/or attempted murder. On 1 March 2010 and after the conclusion of a combined trial-within-a-trial in which the State tendered statements made by some of the accused, the Court *a quo* made a ruling rejecting the admissibility of the statements. The State applied for leave to appeal and this was refused in respect of some statements (the first lot) and granted with regard to others (the second lot, made by the 12 respondents in this matter). In respect of the first lot of statements, the State approached the Chief Justice on petition, a process which culminated in this Court in the matter of *Calvin Liseli Malumo and Others* (Case No. P.4/2010) which was argued in this Court on 08 June 2010. The full judgment (per Strydom AJA with Maritz JA and Mtambanengwe AJA concurring) dismissing the petition, was delivered by this Court on 14/09/2010.

[3] The second lot of statements were made by the 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 17th, 19th, 22nd and 24th respondents and form the subject matter of this appeal. The 12 respondents are, respectively, accused 10, 15, 16, 17, 18, 19, 20, 22, 26, 28,

55 and 119. As stated earlier, leave to appeal was granted to the State by the Court *a quo*. The appeal concerns the exclusion of these statements by the Court *a quo*. The reason for inadmissibility, as given by the Court *a quo*, is that in each case, the magistrate who recorded each statement failed to inform the accused concerned of his or her entitlement to apply for legal aid before making the statement.

[4] In granting leave to appeal to the State in respect of this latter group, the learned Judge *a quo* stated as follows:

> "I am of the view that only in respect of those statements excluded exclusively on the constitutional issue (i.e. failure to inform accused persons of their entitlement to legal aid) is there a reasonable prospect that another Court may come to a different conclusion...".

Leave to appeal was accordingly granted in respect of those accused whose statements fell into this category, and granted only in respect of the constitutional issue referred to.

[5] When the matter was called before us, Mr. D.F. Small assisted by Mr. H.C. January (instructed by the Prosecutor-General) represented the State, i.e., the Appellant. Appearances for the Respondents were as follows: the 6th Respondent was represented by Mr. Samukange; 13th Respondent by Mr. Kruger; 19th Respondent by Mr. Neves and 22nd Respondent by Mr. Machaka. The following Respondents appeared in person, namely, numbers 8, 9, 10, 11, 12, 14, 17 and 24.

[6] As in the *Malumo* case, the Court informed counsel that it would first of all want to hear argument on the Appellant's right to appeal the ruling of the Court *a quo* at this stage. The circumstances in *Malumo* were as follows: Following a ruling by the Court *a quo* that statements made by the accused that the State had tendered in evidence were not admissible, the State applied for leave to appeal to the Supreme Court of Namibia in terms of section 316(1) of the Criminal Procedure Act, Act No. 51 of 1977, (the Act), against the ruling. The application for leave to appeal was refused by the Court *a quo* and the State thereupon petitioned the Chief Justice, in terms of the provisions of the Act for leave to appeal. When the petition came up for hearing in this Court, counsel were requested to address, *inter alia*, the following questions in their argument:

> "(a) Are the rulings of the Court *a quo* on the admissibility of the confessions/statements which are the subject matter of the petition, final in effect or are they interlocutory in nature?
>
> (b) 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 what circumstances (if any) should such an appeal be entertained? Are those circumstances present in this case?"

[7] It was pointed out in the petition that the learned Judge *a quo* had refused leave to appeal because he was not satisfied that the excluded statements had been made freely and voluntarily; further, that the ruling on the inadmissibility of the statements was interlocutory in nature and the learned Judge was further of the view

that there was no reasonable prospect that another Court would come to a different conclusion. Among other things, the petition itself sought to justify the hearing of the appeal while the main trial in the High Court still had some way to go – the so-called piecemeal approach. That the circumstances were somewhat unusual cannot be doubted. The trial had been extremely lengthy, already in its 9th year, with some 278 charges against 122 accused persons. The docket indicates that there were 859 witnesses of which only 346 had thus far given evidence.

[8] After reviewing the law and the facts which were largely common cause, the Court came to the conclusion that the decision of the Court *a quo* in *Malumo* did not amount to an "irregularity in the proceedings," as envisaged in section 16 of the Supreme Court Act[1]. There was furthermore no complaint about highhanded or mistaken conduct by the learned Judge which may have prevented the State from enjoying a full and fair hearing, nor did the learned Judge commit any fundamental mistake. There was accordingly nothing meriting the exercise of the Court's review jurisdiction in terms of section 16 of Act No.15 of 1990. See *S v Bushebi*, 1998 NR 239 (SC) at p 241 F. Likewise in this case. No case has been made out for this Court to exercise its review jurisdiction. The only difference to the circumstances in *Malumo* is that in this case, the learned Judge has granted leave to appeal in respect of the statements in issue. If the conclusions arrived at by the learned Judge are wrong, either in ruling the statements inadmissible, or in granting leave to appeal, that is

[1]The section is described as an extra-ordinary provision which allows the 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. *Malumo* para 15.

neither here nor there. This does not constitute an irregularity in the proceedings. In any event, since the trial is still proceeding in the High Court, the opportunity still exists for the Judge *a quo* to reconsider. This is particularly so as, in terms of the provisions of section 14 of Act 15 of 1990, no appeal lies against rulings which are alterable by the Court a *quo* itself. It is not necessary in this case to explore whether this is equally applicable to review proceedings; the relevant principles on review have already been dealt with. I turn now to deal with the question whether, in this case, this Court should proceed to decide the appeal in respect of the statements that have been ruled inadmissible.

[9] The statements concerned in this group are those which, although they have been disallowed, leave to appeal to the Supreme Court has been granted by the Court *a quo.* These 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 representatives of their choice. The learned Judge *a quo* was of the opinion that the finding made by him was sufficiently final and unalterable that leave to appeal could be granted. The trial Court held that once the magistrates who had taken the statements testified that they had not explained to the accused the right to apply for legal aid, that was the end of the matter and leave to appeal was granted.

[10] When counsel, who had prepared full argument, were invited to argue appealability as a point *in limine*, it soon became clear that the only feature that

distinguishes the issues here from the *Malumo* case was the fact that leave to appeal had been granted, and the view of the trial Court that his finding was sufficiently final and unalterable that leave to appeal should be granted. Counsel for the respondents however argued that the matter was not appealable because of the principle against piece-meal appeals, that there were no exceptional circumstances present in this case to justify such an approach; that the appeal may prove to be unnecessary after all; and that there is no final order by the Court a *quo*. In a case of this length and complexity, it is perhaps not self evident that nothing will happen during the remainder of the trial that will change the mind of the Court *a quo* on one or other issue. This is particularly so where, as in this case, potentially scores of witnesses, including the accused may still give evidence.

[11] Taking everything into account, in particular the relationship between this case and the *Malumo* matter, and the factors taken into account in that case, I am of the view that the matter has been brought on appeal prematurely, before the completion of the trial. The matter was accordingly struck off the roll.

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LANGA AJA

I agree.

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STRYDOM AJA

I agree.

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MTAMBANENGWE AJA

Counsel on behalf of the Appellant:	Mr. D.F. Small
Assisted By:	Mr. H.C. January
Instructed By:	Prosecutor-General
Counsel on behalf of the 6th Respondent:	Mr. J. Samukange
Counsel on behalf of the 13th Respondent:	Mr. H. Kruger
Counsel on behalf of the 19th Respondent:	Mr. J. Neves
Counsel on behalf of the 22nd Respondent:	Mr. V.C. Kachaka
Instructed By:	Directorate of Legal Aid
On behalf of 8th, 9th, 10th, 11th, 12th, 14th, 17th and 24th Respondents:	in person