



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 092/2025

In the matter between:

**DIRECTOR OF PUBLIC PROSECUTIONS,
GAUTENG DIVISION**

APPLICANT

and

**KABELO JOHN MATSEPE
MAMPHE DANIËL MSIZA**

**FIRST RESPONDENT
SECOND RESPONDENT**

Neutral citation: *Director of Public Prosecutions, Gauteng Division v Matsepe & Another* (092/2025) [2026] ZASCA 135 (05 October 2026)

Coram: KEIGHTLEY JA and SERITI, DIPPENAAR, MOLITSOANE and ZILWA AJJA

Judgments: Seriti AJA (first judgment): [1] to [38]
Keightley JA and Dippenaar and Molitsoane AJJA (second judgment): [39] to [94]

Heard: 4 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 05 October 2026.

Summary: Criminal Procedure – Criminal Procedure Act 51 of 1977 (CPA) – separation of trials in terms of s 157 – application for leave to appeal dismissal of

application for reservation of questions of law under s 319 – mootness – appealability – jurisdictional requirement under s 319 - prosecutorial discretion under s 179(2) of the Constitution – whether the high court improperly interfered with the state's decision to prosecute accused jointly in a Prevention of Organised Crime Act 121 of 1998 (POCA) prosecution.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mabuse J sitting as court of first instance):

1. The application for leave to appeal is dismissed.

JUDGMENT

Seriti AJA:

[1] This matter emanates from the Gauteng Division of the High Court, Pretoria (the high court), where Mabuse J granted certain orders which we will deal with shortly. The application stems from the criminal trial in *State v Andile Malusi Attwell Ramavhunga and 12 Others*¹ relating to the demise of the VBS Mutual Bank (VBS). In the high court, the respondents appeared as accused numbers nine and ten, together with 11 co-accused, facing various counts of (i) racketeering offences in contravention of the Prevention of Organised Crime Act 121 of 1998 (POCA); (ii) theft; (iii) fraud; (iv) corruption in contravention of the Prevention and Combating of Corrupt Activities Act 12 of 2004; and (v) money laundering in contravention of s 4, alternatively s 5 and/or s 6 of POCA. The respondents and their co-accused were indicted on 179 charges, with the first respondent on 39 counts and the second respondent on eight counts.

[2] After various case management meetings, the matter was set down for plea and trial on 22 July 2024. On that date, the respondents served an application on all the parties, seeking a temporary stay of their prosecution (prayer 1) and separation of trials in terms of s 157 of the Criminal Procedure Act 51 of 1977 (CPA) (prayer 2).

¹ *Director of Public Prosecutions, Gauteng Division v Matsepe and Others* 2025 (2) SACR 86 (GP); (CC11/2021) [2025] ZAGPPHC 20; 2025 (2) SACR 86 (GP) (6 January 2025).

[3] The application was argued on 14 August 2024 in the high court before Mabuse J. On 16 August 2024, the court dismissed the first prayer and granted the relief sought in prayer 2, namely, the separation of trials of the respondents from those of their co-accused.

[4] On 4 October 2024, the applicant, Director Public Prosecutions, Gauteng Division (DPP), filed an application for the reservation of questions of law in terms of s 319(1) of the CPA. On 11 November 2024, the application for the reservation of questions of law in terms of s 319(1) of the CPA was argued before the high court. On 6 January 2025, judgment was handed down and the high court dismissed the application for reservation of questions of law in terms of s 319(1) of the CPA.

[5] On 6 February 2025, the DPP applied for leave to appeal to this Court in terms of s 317(5) of the CPA in respect of the granting of prayer 2 mentioned above and against the dismissal of the application in terms of s 319(1) of the CPA to reserve five questions of law for the consideration of the Supreme Court of Appeal (SCA). The DPP seeks from this Court the following:

(a) that leave to appeal against the refusal of the high court to reserve questions of law be granted;

(b) that the questions of law, which will be detailed later, be reserved and referred to this Court for consideration.

(c) in the event that the merits are considered by this Court, that the court order that the appeal succeeds and the order of the high court, granting the separation of trials in respect of the respondents in terms of s 157 of the CPA, be set aside.

[6] On 23 April 2025, this Court, as per the order of Honourable Justices Makgoka JA and Dlodlo AJA, referred the DPP's application for oral argument pursuant to the provision of s 17(2)(d) of the Superior Courts Act 10 of 2013. The DPP was also directed to file the record within 3 months of the date of the court order, as provided in rule 8 of the Rules of this Court, which expired on 23 July 2025. The DPP failed to comply with the last-mentioned requirement and the appeal of the DPP lapsed. About 19 days after the lapse of the DPP's application for leave to appeal, on 11 August 2025, the DPP dispatched an

email to the Chief Registrar of this Court, requesting an extension for the lodging of the record for a further period of two months.

[7] Having been advised by the Registrar that its appeal lapsed on 23 July 2025, the DPP subsequently filed the record on or about 14 October 2025, together with its application for reinstatement and condonation. In their heads of argument, the respondents stated that the DPP is required to fairly furnish all such information as may be necessary to enable the court to assess the merits or lack thereof of the DPP's application. This necessitates the DPP to detail a full explanation for the non-compliance with the rules of this Court. The degree of non-compliance, the explanation proffered for non-compliance, the respondents and their co-accused's interest in finality of the judgment of the high court, the convenience of this Court and the avoidance of unnecessary delay in the administration of justice are all factors that the court will take into account.²

[8] The standard or test for determining condonation is whether it is in the interests of justice for condonation to be granted. The court must, inter alia, 'consider the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success'.³ The respondents in their heads of argument submitted that the DPP's application for condonation must be dismissed.

[9] In the high court, the DPP requested the court to reserve certain questions of law, which the DPP formulated as follows:

'Question 1: Whether the honourable court a quo had exercised its discretion judicially, or had been influenced by wrong principles of law or a misdirection on the facts, or whether its decision had been unreasonable in granting the separation of trials.

² See *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA) para 12 and *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) para 23.

³ *Director of Public Prosecutions, Johannesburg and Another v Schultz and Others; Director of Public Prosecutions, Bloemfontein v Choluta* [2026] ZACC 3; 2026 (3) BCLR 175 (CC) para 105.

Question 2: Whether the honourable court a quo duly considered the prosecutorial prerogative as to how the accused should be charged as provided for in section 179(2) of the Constitution.

Question 3: Whether the honourable court a quo erred in not considering the provisions of POCA and the authorities in relation thereto when it interfered in the directive by the National Director of Public Prosecutions in terms of section 2 (4) of POCA that the Respondents must be prosecuted together.

Question 4: Whether the honourable court a quo erred in *mero motu* applying its inherent powers in terms of section 173 of the Constitution instead of correctly conducting an enquiry in terms of section 342(A) of the CPA.

Question 5: Whether the honourable court a quo erred in relying on section 342(A) of the CPA where it did not properly apply the provisions of the section and failed to hold an enquiry providing all parties the opportunity to respond and provide due recognition to the impact on all the parties including the victim's interest.'

[10] Prior to examining how the high court dealt with the application for reservation of the questions of law mentioned above, I need to examine the applicable legal principles in a case of this nature and thereafter analyse the high court's order and the reasons advanced.

[11] In *Director of Public Prosecutions, Western Cape v Bongo*,⁴ this Court said the following:

'The application for the reservation of the questions of law must be considered in the light of the following legal principles. Section 319 of the CPA provides that a High Court may, either of its own accord or on the application of the prosecution or the accused, reserve a question of law for consideration by the Supreme Court of Appeal. It is trite that the section does not allow reservation of an issue which is a question of fact. The question as to "whether the proven facts in a particular case constitute the commission of a crime" is a question of law. But "a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to what those ingredients are."

The following requirements must be met before a question of law may be reserved: (a) the question must be framed accurately so that there is no doubt as to what the legal point is; (b) the facts upon which the point is based must be clearly set out; and (c) all of this must be clearly set

⁴ *Director of Public Prosecutions, Western Cape v Bongo* [2024] ZASCA 70; 2024 (2) SACR 183 (SCA).

out in the record. In addition, questions of law should not be reserved where they will have no practical effect on the acquittal of the accused.’⁵

[12] Section 319(1) of the CPA requires any question of law to arise on the trial of any person for any offence in a superior court. This is a fundamental, strict and peremptory jurisdictional requirement. Prior to dealing with the reserved questions of law, it is important to first determine if the questions of law referred to in this matter arose on the trial of the respondents.

[13] The respondents were served with an indictment on 26 March 2021, setting out the charges and allegations against them as required by s 144(1) of the CPA and appeared in the high court together with their co-accused for the first time on 2 August 2021. The matter was set down for trial on several occasions, namely 3 October 2022, 9 October 2023, 6 November 2023, 6 May 2024 and 22 July 2024. On each occasion, the respondents appeared in court as they were served with an indictment, they appeared in court with their co-accused. Their matter was then postponed, for one reason or another, to the next date. At all times, the respondents were required to appear in court.

[14] The DPP in his heads of argument submitted that the question of whether a matter is on trial should be determined by the factual position of each matter. The interpretation of the words ‘on the trial’ must be answered taking into account the facts of the matter. The respondents appeared in court several times and they were forced to appear in court as failure to do so might have attracted unpleasant consequences. It cannot be said that the several appearances of the accused in court had nothing to do with the trial.

[15] When the high court granted the separation order, the matter was on trial. If the matter was not on trial, the respondents could have decided not to go to court without any consequences. The respondents and their co-accused were served with an indictment on 12 March 2021 setting out the charges and allegations against them as required by s 144(1) of the CPA.

⁵ Ibid paras 35-36. See also *Director of Public Prosecutions, Western Cape v Schoeman and Another* [2019] ZASCA 158; 2020 (1) SACR 449 (SCA) para 39.

[16] In *S v Basson*,⁶ (*Basson*) the Constitutional Court, amongst others, held that s 319(2) of the CPA strongly suggests that the Legislature intended to permit an appeal against any order upholding or dismissing an objection by way of a reservation of a question of law.

[17] Section 76(1) of the CPA provides that proceedings in the high court commence by serving an indictment on an accused and the lodging of the indictment with the Registrar of the court concerned. As stated earlier, in this matter, the accused were served with the indictment, and they appeared in court on several occasions. This is a clear indication that when the accused appeared in court, the proceedings had already begun. The proceedings referred to above are the criminal prosecutions of the respondents and their co-accused.

Approach of the high court to the application to reserve questions of law

[18] The questions of law that the DPP sought to reserve were mentioned in full in the previous paragraphs. In dismissing the application for the reservation of the questions of law, in terms of s 319(1) of the CPA, the high court, among others, said the following: 'The issue of separation of trial is discretionary. The discretion had to be exercised judicially by a court having regard to the interests of justice . . .

The provisions of section 35(3)(d) of the Constitution do not prevent the State from exercising its authority in terms of s 179(2) of the Constitution. The exercise of the State powers in terms of s 179(2) of the Constitution is subject to the Bill of Rights.

It is utterly incorrect for the State to regard a Judge's exercise of his discretionary powers as an "interference".

I find that the provisions of POCA are read and applied subject to the Bill of Rights. I also find that the provisions of POCA do not prevent the Court from invoking the provisions of s 157 of the CPA where it comes to the interests of justice.

⁶ *S v Basson* [2005] ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC); 2007 (1) SACR 566 at 621C.

Nothing in this section states that the court may not exercise its powers unless it is so asked by someone. The court was never asked to exercise its powers in terms of s 342(A) of the CPA. I also found that section 342(A) is trumped by the Bill of Rights.

. . . I pointed out somewhere above, no one raised the provisions of s 342(A) of the CPA.'

[19] The view of the high court is incorrect. After the grant of the separation order, the DPP is denied the opportunity of deciding how the trial will be conducted.

[20] The high court's view is that the criminal case remains intact even after granting the separation order. I do not agree with that view. The effect of the separation of trial order in terms of s 157 of the CPA by the high court has a final and/or definitive effect in the criminal trial. After the high court granted the separation, the position would be that the matter can no longer continue in terms of the indictment in respect of which the respondents were arraigned by the DPP in the cause of the execution of their constitutional mandate in terms of s 179(2) of the Constitution and POCA. Under the order of separation, the indictment would need to be reviewed to exclude the respondents, as well as a number of charges that were only applicable to them. In my view, that might hamper the DPP in the execution of its functions. Some other witnesses might be required to testify on the same issues in two or more trials. This might also place a strain on the resources of the National Director of Public Prosecutions.

[21] Section 179 of the Constitution vests the prosecuting authority with the power to institute criminal proceedings on behalf of the state. Sections 179(1) and (2) reads as follows:

'(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of –

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority

. . .

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.'

[22] Decisions concerning whether and how to prosecute fall within the constitutionally protected prosecutorial sphere. This includes decisions relating to the formulation of

charges, the joinder of accused persons, and the manner in which charge sheets or indictments are formulated. Decisions concerning whether the accused person(s) should be indicted jointly or not and how criminal proceedings ought strategically to be conducted fall primarily within the constitutionally assigned terrain of the prosecuting authority.

[23] The separation of powers doctrine requires that courts exercise restraint where intervention would effectively substitute judicial preference for prosecutorial judgment in matters constitutionally entrusted to the prosecuting authority. Sections 156 and 157 of the CPA recognise that the decision as to whether accused persons should be charged and tried jointly resides with the prosecution. These sections permit the joint trial of accused persons where the prosecutor is of the view that the evidence against them arises from substantially the same set of facts or that overlapping evidence will be admissible against multiple accused.

[24] Section 157(2) of the CPA, on the other hand, confers upon a court a discretion to order a separation of trials where the interests of justice so requires. In *S v Maringa and Another*,⁷ this Court observed that the purpose of the joinder provisions is to avoid a multiplicity of trials where there are a number of accused and to avoid prejudice to both the accused and the prosecution. The court further recognised that joint prosecutions serve important systemic and forensic objectives, including the avoidance of duplication of evidence, the conservation of judicial and public resources and the coherent adjudication of disputes arising from a common factual matrix.

[25] In *S v Sehoole*,⁸ this Court reaffirmed the principle of prosecutorial autonomy in relation to charging decisions and said ‘ordinarily, courts are not at liberty to interfere with the prosecutor’s discretion unless there are truly exceptional circumstances for doing so’.

[26] It is trite that the choices concerning the formulation of charges and the path that the prosecution will take fall within the constitutionally assigned domain of the prosecuting authority. Absent demonstrable prejudice, unlawfulness or a material threat to trial

⁷ *S v Maringa and Another* [2015] ZASCA 28; 2015 (2) SACR 629 para 14.

⁸ *S v Sehoole* 2015 (2) SACR 196 (SCA) para 12.

fairness, courts should exercise considerable restraint before directing the fragmentation of a prosecution which the state has deliberately elected to pursue in the consolidated form. Excessive judicial intrusion into matters of prosecutorial decisions risks undermining prosecutorial discretion.

[27] From the above, it is clear that the high court misdirected itself when it held that the separation would have no practical effect on the matter. This view of the high court is incorrect. The DPP submitted that this matter is of significant public importance since it relates to the alleged unlawful activities that led to the demise of VBS, which continues to be in the public domain. The DPP continued with his submission and said that, as set out in the preamble of POCA, organised crime creates a danger to public order and safety and economic stability, and have the potential to inflict social damage, and that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of and related conduct in connection with enterprises which are involved in a pattern of racketeering activity. The effect of the court order is that it interferes with prosecutorial prerogative as to how the accused should be charged, and to fulfil our constitutional obligation and will negatively impact how the community perceives justice to be done.

[28] The DPP's counsel further submitted that the order in respect of the second prayer has the same effect as where an objection to the indictment was upheld, in that the indictment needs to be amended from the original on which the respondents were arraigned. The DPP's counsel further submitted that the high court did not refer to or analyse the issues raised by the DPP regarding implications of POCA in its judgment dated 6 September 2024. The DPP's counsel further submitted that in a matter such as this, where this issue formed a substantial part of the argument to oppose the application by the respondents, the high court misdirected itself by failing to properly consider when the court was evaluating its judgment.

[29] The high court, in its judgment on 6 January 2025, made the following finding in respect of question 4:

‘Nothing in this section states that the court may not exercise its powers unless it is so asked by someone. The court was never asked to exercise its powers in terms of s 342(A) of the CPA. I also found that section 342(A) is trumped by the Bill of Rights.’

[30] The DPP’s counsel submitted that the issue in respect of s 342(A) of CPA arose in the judgment dated 6 September 2024. The issue of s 342(A) was not raised by the parties during the application and the parties were not requested by the high court to address it thereon. The high court in its judgment considered s 342(A) of the CPA to determine unreasonable delay and the prejudicial effect thereof on the co-accused of the respondents.

[31] It is a misdirection for the high court, in its judgment to consider s 342(A) without the parties having been given an opportunity to address the court about s 342(A).

[32] The DPP’s counsel further argued that it was not in the interests of justice for the high court to *mero motu* invoke its inherent powers in terms of s 173 of the Constitution, where there were still other remedies available to the court to resolve issues pertaining to undue delay in the matter. The better option for the high court was to utilise the provision of s 342(A) and allow the parties’ representatives to address the court on the implications of s 342(A).

[33] Section 342(A) of the CPA would have allowed the high court to look at various options to resolve the issue which the court was faced with. The DPP’s counsel further submitted, correctly so that s 342(A)(3) of the CPA deals with the powers that a court has when it finds that there was an unreasonable delay. It is to be noted that a separation of trials does not fall within the remedies listed in s 342(A)(3) of the CPA and that there were a number of remedies available to the court other than the order granted. I agree with the submission made by the DPP’s counsel as mentioned in the previous paragraphs.

[34] In paragraph 47.17, the high court said the following:

‘We know why the State has not been able to commence trial. This is all because of the unending applications brought by the Applicants with which the Respondents have nothing to do with.’

In paragraph 47.24, the court said the following:

‘While the Court respects the desire of the First Respondent to hear the case of all 13 accused, in other words, the Applicants and Respondents, in order to avoid multiplicity of trials, that should not be done at the expense of the Respondents who are ready to proceed with their trials . . . who have repeatedly told the Court that they were ready; and in circumstances where the First Respondent has, on times without number, told the DJP that it was ready to proceed with the trial’

From the above quoted two paragraphs of the high court’s judgment, it is clear that the high court attributed to the respondents the delay of commencement of the trial. It is important to note that the separation of trials does not fall within the remedies listed in s 342(A)(3) of the CPA and that there were a number of remedies available to the court other than granting an order for separation of trials. The high court had a duty to manage the case properly.

[35] The DPP’s counsel further submitted correctly so that the separation of trials was not one of the remedies available in terms of s 342(A)(3) of the CPA, and the high court erred when it thought that it was utilising the provisions of s 342(A). If the various mistakes of law had not been made, the high court would not have granted an order of separation of trials.

[36] I am therefore of the view that the high court committed various errors of law as mentioned earlier. The questions of law mentioned earlier fall within the ambit of s 319. The formulation of the questions of law, in my view, is correct and cannot legitimately be criticised.

[37] I am satisfied that if the high court did not commit the errors of law as mentioned above, the court would not have granted the separation order.

[38] In the result, had I commanded a majority, I would have made the following order:

- 1 The applicant is granted leave to appeal.
- 2 The questions of law mentioned earlier are determined in favour of the DPP.

- 3 The order of the court a quo granting separation of trials is set aside and replaced by an order dismissing an application for separation of trials.

L W SERITI
ACTING JUDGE OF APPEAL

Keightley JA and Dippenaar and Molitsoane AJJA (Zilwa AJA concurring):

Introduction

[39] We have read the judgment of our brother Seriti AJ (the first judgment). The first judgment sets out the relevant facts and issues, and it is not necessary to repeat them, save where relevant to the context of this judgment. Regrettably, we are unable to agree with the outcome of the first judgment or the reasoning in support thereof.

[40] The DPP seeks leave to appeal against the dismissal by the high court (per Mabuse J) of its application under s 319 of the CPA for the reservation of five questions of law for the consideration of this Court. The averred questions of law relate to an earlier order by the high court under s 157 of the CPA separating the trial of the respondents from those of their co-accused (the separation order).

[41] Two justices of this Court referred the application for leave to appeal for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. At the hearing, the parties made submissions on the application for leave, and on the merits of the appeal. An application for condonation and re-instatement of the application was granted at the hearing. The primary question to be considered is whether leave to appeal should be granted. It is only if the DPP persuades this Court that there is merit in the application for leave to appeal that this Court will be required to determine whether the averred questions of law should be decided in favour of the applicant, and that the separation order be set aside.

[42] As in many applications for leave to appeal, there is a necessary overlap with the merits of the applicant's case on appeal. Unless the applicant demonstrates reasonable prospects of success in the appeal, and absent any overriding interests of justice, leave to appeal is likely to be refused.

[43] The first judgment concludes that leave to appeal should be granted. It holds that the questions of law arose 'on the trial' of the respondents, as envisaged by s 319 of the CPA. In respect of the questions of law, the first judgment concludes that in ordering the separation of trials, the high court committed various errors of law which fall within the ambit of s 319. Accordingly, it finds that the questions of law should be determined in favour of the applicant, and the separation order set aside.

[44] The first judgment cites this Court's judgment in *S v Bongo*⁹ and the principles and requirements applicable to applications under s 319 stated therein. However, the first judgment does not address these requirements directly, save for the jurisdictional prerequisite that the questions of law must 'arise on the trial'. Nor does the first judgment deal with the requirements for leave to appeal. Further, it gives no consideration to, and assessment of, each of the averred questions of law independently. Instead, the first judgment adopts a globular approach to the issues at hand, focusing primarily on what it finds to be the strongly protected constitutional authority of the state to determine prosecutorial matters. It holds that the separation order in terms of s 157 of the CPA would have a final or definitive effect on the criminal trial in that the indictment would have to be reviewed, and some witnesses might be required to testify on the same issues in two or more trials. According to the first judgment, this would hamper the applicant in the execution of its functions and place strain on the resources of the National Director of Public Prosecutions. The conclusion reached in the first judgment is that the separation order constituted an untenable interference with the prosecutorial prerogative. It holds that instead of granting the separation order, the high court should have invoked s 342(A) of the CPA and allowed the parties to make submissions on what powers a court could

⁹ See fn 4-5 above.

exercise if faced with an unreasonable delay and that separation was not listed in the remedies available under s 342(A)(3).

[45] We differ in both the approach adopted in the first judgment and in its conclusions. The reasons for our disagreement follow below.

The questions of mootness and appealability

[46] Two antecedent questions arise in this application: mootness and appealability.

[47] Mootness is a consideration because it is common cause that the underlying reason for the high court granting the separation order has fallen away. The respondents' trial was separated from that of the remainder of their co-accused because the respondents were, at that stage, pursuing an appeal against the dismissal by the high court of their application to compel further particulars. The high court granted the separation order primarily because the delay emanating from the respondents' pending appeal would prejudice the remaining accused's right to a fair and speedy trial. This impediment has now fallen away. This is because by the time the matter was heard by this Court, the respondents had unsuccessfully pursued all attempts at appealing the judgment refusing their application to compel further and better particulars. The parties were agreed at the hearing of the matter that there is nothing to prevent the DPP from applying to consolidate the respondents' prosecution with that of their co-accused once more.

[48] The application for leave to appeal is not directly against the separation order. As stated earlier, the DPP seeks leave to appeal against the refusal by the high court to reserve five questions of law. The separation order is implicated in that, if leave to appeal is granted, and the questions of law upheld, this will have the effect that the separation order will be set aside. It follows from this that if the basis of the separation order has, for all practical reasons, become moot, then the same fate must befall the s 319 application.

[49] Section 16 (2)(a)(i) of the Superior Courts Act deals with mootness. It gives a court sitting on appeal a discretion to dismiss an appeal where 'the issues are of such a nature

that the decision sought will have no practical effect or result'. While the question of mootness may be a relevant factor in the overall consideration as to whether the DPP has made out a case for the granting of leave to appeal, in our view it would not be appropriate to dismiss the application for this reason alone.

[50] The second antecedent issue is whether the s 319 application by the DPP to reserve questions of law gives rise to an appealable issue in the circumstances of this case. This question stems from the nature of the order in respect of which the DPP seeks to reserve questions of law for consideration by this Court on appeal. The separation order is an interlocutory order and the questions of law thus relate to an interlocutory order.

[51] An interlocutory order may be appealable. As explained in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,¹⁰ there is a distinction between simple interlocutory orders, that are generally not appealable, and other interlocutory orders that generally are, or may be, appealable. This distinction was described as follows by Schreiner JA in the majority judgment in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*¹¹ with reference to the judgment of the Appeal Court in *Globe and Phoenix GM Company v Rhodesian Corporation*¹².

'From the judgments of Wessels and Curlewis JJA, the principle emerges that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit; or, which amounts, I think to the same things, unless it "irreparably anticipates or precludes some of the relief which would or might be given at the hearing". The earlier judgments were interpreted in that case and a clear indication was given that regard should be had, not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon an in that way affects the decision in the main suit.'¹³

¹⁰ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A). See also *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 53.

¹¹ *Pretoria Garrison Institutes v Danish Variety Products (Pty), Limited* 1948 (1) SA 839 (A).

¹² *Globe and Phoenix Gold Mining CO Ltd Company v Rhodesian Corporation Ltd* 1932 AD 146. See also *Mathale v Linda and Another* 2016 (2) SA 461 (CC).

¹³ *Pretoria Garrison Institutes v Danish Variety Products (Pty), Limited* 1948 (1) SA 839 (A) at 870.

[52] The distinction drawn dovetails with the general test for appealability described in *Zweni v Minister of Law and Order (Zweni)*,¹⁴ namely, for an order to be appealable it must have three attributes:¹⁵ (a) the decision must be final in effect and not open to alteration by the court of first instance; (b) it must be definitive of the rights of the parties; and (c) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[53] Following the Constitutional Court's decision in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others (Lebashe)*,¹⁶ the common law test is no longer the sole or primary yardstick for determining whether an order is appealable. The Constitutional Court found that: '[o]ver and above the common law test, it is well established that an interim order may be appealed against if the interests of justice so dictate'.¹⁷ This Court recently held in *Commissioner for the South African Revenue Service v Virgin Mobile South Africa (Pty) Ltd*¹⁸ that:

'[t]he factors in *Zweni*, though still relevant, have been subsumed by the interests of justice standard which is now the only standard to be met. Whether it would be in the interests of justice to determine the appealability of an order in a procedural matter must be decided on a case-by-case basis, after weighing-up all the relevant factors, including those in *Zweni*.'¹⁹

[54] We disagree with the first judgment's conclusion that the separation order (and hence the questions of law arising from it) have final effect. At least until the respondents' remaining co-accused are required to plead to the charges put to them, there is nothing procedurally to prevent the respondents from being charged and tried, once again, with their co-accused. Even if this were not the case, the questions arising from the separation order do not dispose of a substantial portion of the relief sought: the State may proceed

¹⁴ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

¹⁵ *Ibid* at 532J.

¹⁶ *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC34; 2023 (1) SA 353 (CC).

¹⁷ *Ibid* para 45.

¹⁸ *Commissioner, South African Revenue Service v Virgin Mobile South Africa (Pty) Ltd* [2025] ZASCA 77; 2025 (5) SA 427 (SCA); [2025] 4 All SA 29 (SCA); 88 SATC 254.

¹⁹ *Ibid* para 13.

to prosecute the respondents, and the co-accused, and pursue their conviction even if this is done in separate trials. The common law test for appealability is not satisfied.

[55] The question, then, is whether the application for leave to appeal raises an appealable issue based on the broader interests of justice standard. In the s 319 application and in the application for leave to appeal the DPP states that the matter raises matters of public importance, having a substantial impact on the wide prosecutorial prerogative as to how an accused person is to be charged in a POCA prosecution. The DPP placed reliance on *S v Dos Santos*²⁰ in support of this submission.

[56] The first judgment does not deal with the question of appealability. However, on the merits of the s 319 application, it finds that the questions of law ought to be decided in favour of the DPP because the separation order impermissibly impinged on this prosecutorial discretion. For reasons that appear later, we do not agree with this finding. However, we accept that the question concerning the prosecutorial prerogative is an issue which falls within the scope of the broad interests of justice test. For this reason, we find the requirement for appealability is satisfied.

The s 319 jurisdictional requirement

[57] The requirements of the section are succinctly addressed in paragraphs 11 and 12 of the first judgment. It is unnecessary to repeat them, save to reiterate what this Court stated, first, in *Director of Public Prosecutions, Limpopo v Molohe and another*:²¹

‘[t]he provisions of s 319 of the CPA are peremptory and require strict compliance, as its purpose is to limit appeals by the State. It should be mentioned that s 319 has been subjected to a detailed analysis in a number of judgments, both by this Court and the Constitutional Court. Its principles have accordingly been firmly established in our law.’

Second, we reiterate the reminder by this Court in *Director of Public Prosecutions, Western Cape v Bongo* ²² that the questions of law may not be reserved where this would have no practical effect on the acquittal of the accused.

²⁰ *S v Dos Santos and Another* 2010 (2) SACR 382 (SCA) para 40.

²¹ *Director of Public Prosecutions, Limpopo v Molohe and another* [2020] ZASCA 69; [2020] 3 All SA 633 (SCA); 2020 (2) SACR 343 (SCA) para 39. See also *S v Pooe* 2021 (2) SACR 115 (SCA).

²² *Director of Public Prosecutions, Western Cape v Bongo* [2024] ZASCA 70; 2024 (2) SACR 183 (SCA) para 36.

[58] The first question that arises is whether there is any merit in the DPP's contention that the high court erred in finding that the DPP had failed to satisfy the jurisdictional requirement that the questions of law must arise 'on the trial' of the respondents.

[59] The first judgment holds that this requirement was satisfied because when the court granted the separation order, the matter was on trial. The first judgment reasons that if it were not so, then the respondents could have decided not to go to court without any consequences. We respectfully disagree.

[60] The first judgment fails to appreciate the distinction between the pre-trial arraignment process and the commencement of the trial proper. Section 76(1) of the CPA prescribes that 'the proceedings' in a criminal trial in a superior court commence with the serving of the indictment on the accused. In terms of s 144 of the CPA, an accused person is arraigned for trial under an indictment, containing the charge. Section 144(4) stipulates that it must be served at least ten days before the date appointed for the trial. Service of the indictment is necessary for the trial to commence, however, it is not all that is required. Under s 105 of the CPA, the charge must be put to an accused. This section expressly provides that:

'[t]he charge shall be put to the accused by the prosecutor *before the trial of the accused is commenced* and the accused shall subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106.' (Emphasis added)

[61] While s 76(1) of the CPA sets out how 'proceedings' commence in the high court, s 105 specifically sets out how a 'trial' commences. The distinction in the choice of words is significant. It signifies that it is only when the charge is put to the accused, and he or she is required to plead thereto that the 'trial' of the accused commences. The first judgment fails to appreciate this distinction. The arraignment of an accused, as contemplated in s 144(4), is a necessary pre-trial procedural step. It serves an important function as it is geared to informing the accused of the allegations against him within a reasonable time before he appears at court and is asked to plead. However, it is only once an accused has pleaded to the charge that the *lis* between the State and the

accused is determined. It is the latter stage, and not the pre-pleading arraignment stage, that signals the commencement of the trial.

[62] The consequences for non-appearance at court as envisaged in the first judgment emanates from the ‘proceedings’ having commenced: the respondents have been served with the indictment and notice of a trial and the consequences of non-appearance have been fully explained.²³ However, the trial is yet to commence, with the accused pleading to the charge.

[63] The DPP contended that more recent decisions of the Constitutional Court and this Court have broadened the meaning of ‘on the trial’ in s 319, such that the prior position, as determined in *In R v Tucker (Tucker)*²⁴ and *R v Adams (Adams)*²⁵ no longer applies. In *Tucker* it was held that the word ‘trial’ is ordinarily used to denote proceedings after arraignment, upon the tendering of a plea of guilty or not guilty. Under the so-called *Adams* rule, the Constitutional Court²⁶ has explained that:

‘a question of law can only be reserved following the acquittal or conviction of the accused. The effect of the rule is that a question of law cannot be reserved following an order upholding an exception to an indictment because such an order is neither an acquittal nor a conviction of an accused.’

The central principle upon which these earlier decisions was based is that there is an interest in the finality of litigation and it is undesirable and inconvenient to hear appeals on a piecemeal basis.²⁷

²³ Section 144(4) provides:

‘(b) A return of the mode of service by that person who served the indictment and the notice of trial or, if the said documents were served in court on the accused by a magistrate or regional magistrate, an endorsement to that defect on the record of proceedings, may, upon the failure of the accused to attend the proceedings in the Superior Court, be handed in at the proceedings and shall be *prima facie* proof of the service.’

(c) The provisions of Section 55(1 and (2) shall *mutatis mutandis* apply with reference to a notice of trial served on an accused in terms of this subsection.’

²⁴ *R v Tucker* 1953 (3) SA 150 (A) at 159H.

²⁵ *R v Adams* 1959 (3) SA 753 (A).

²⁶ *S v Basson* 2007 (1) SACR 566 (CC) para 137.

²⁷ *Ibid* paras 149 and 152.

[64] The DPP relied on the decisions of *Basson*,²⁸ *Boekhoud*,²⁹ and *Porrit*³⁰ to advance the case that the *Adams* rule no longer applies and that s 319 may be available to the State before the matter is finalised. For the reasons discussed below, our view is that these cases are distinguishable from the present and do not avail the applicant.

[65] In *Basson*, the Constitutional Court noted that the purpose of s 319 was to permit the State to appeal on a point of law by requesting the reservation of a point of law.³¹ This right is incidental to the State's right, under s 179(2) of the Constitution, to institute criminal proceedings.³² Reverting to the *Adams* rule, the Constitutional Court found that:

'The effect of the *Adams* rule is not only to prevent the State from instituting criminal proceedings where a court quashes an indictment on the ground that it does not disclose an offence, but it also takes away the right of the state to appeal against a decision upholding an exception to its indictment for another reason. Such an interpretation of section 319 is inconsistent with the right of the state to institute criminal proceedings and thus with the Constitution.'³³

[66] The Constitutional Court concluded:

'In our view section 319 should not be construed so as to prevent an appeal against an order dismissing or upholding an exception. The section should be construed so as to allow the state or the accused to appeal against an order upholding or dismissing an exception. Such a construction of section 319 brings it within constitutional bounds by recognising the right of the state to institute criminal proceedings and, if need be, to appeal an adverse finding on a question of law. It is this construction of section 319 which must be adopted.'³⁴

The DPP relies on this finding to support the contention that the jurisdictional requirement encapsulated in the phrase 'on the trial', in s 319, must be generously interpreted to permit the State, in this case, to reserve a question of law notwithstanding that the charges have not yet been put to the accused.

²⁸ *Ibid*.

²⁹ *S v Boekhoud* [2011] ZASCA 48; 2011 (2) SACR 124 (SCA).

³⁰ *Porrit and Another v National Director of Public Prosecutions and Others* 2015 (1) SACR 533 (SCA).

³¹ *S v Basson* 2007 (1) SACR 566 (CC) para 145.

³² *Ibid* para 147.

³³ *Ibid* para 151.

³⁴ *Ibid* para 152.

[67] *Basson* concerned an objection to several of the charges included in the indictment. The accused raised his objection prior to tendering his plea. The trial court heard argument and quashed all but two of the charges against the accused. At the end of the trial the accused was acquitted. Thereafter, the State launched an application under s 319 (1) to have three questions of law reserved for consideration of this Court. One of these was whether the high court had erred in quashing some of the charges on the basis that they did not disclose an offence. It was in this context that the Constitutional Court considered whether s 319 was available to the State as an avenue of appeal on a question of law arising prior to the accused having pleaded to the charge.

[68] In our view, *Basson* is not authority for an unlimited, open-door right of appeal on a question of law arising prior to the accused's plea and commencement of the trial. The discrete question for the Constitutional Court in *Basson* was whether the trial court's decision to uphold an objection to a charge, which resulted in the quashing of charges, was open to appeal in terms of s 319. The Constitutional Court's decision is limited to this issue, namely, that the section permits an appeal by the State against an order upholding an objection to a charge, which is akin to an exception. This is plain from the ratio of the judgment, cited above.

[69] *Basson* does not dislodge the principle that piecemeal appeals should be avoided. Nor is it inconsistent with the general rule that questions of law should not be reserved where they would have no practical effect on the conviction or acquittal of the accused. The Constitutional Court's finding is consistent with both these principles. An objection that leads to the quashing of charges obviously has practical effect in that it bars the State from pursuing its case against the accused on those charges. In this sense, it has as final effect as an acquittal on those charges. Moreover, the s 319 appeal was pursued after the finalisation of the trial in *Basson*. There was thus no danger of a piecemeal appeal in that case. There are obvious material differences between the situation prevailing in *Basson* and those of the present case: the respondents have not pleaded nor raised an exception to the charges levelled against them. They simply sought an order, prior to the charges being put to them, that their cases be separated from the cases of their co-accused.

[70] *Porrit*, too, arose in very different circumstances. There the accused offered a plea in terms of s 106(1)(h) of the CPA,³⁵ contending that the prosecutors had no title to prosecute. He contended further that if the plea was upheld, he was entitled to an acquittal in terms of s 106(4).³⁶ The trial court upheld the objection but refused to acquit the accused. It granted the State an order reserving certain related questions of in terms of s 319. This Court considered the accused's appeal and the reserved questions of law together. In *Porrit*, the reserved questions of law clearly arose in circumstances where the accused had pleaded and was demanding his acquittal. The accused's plea was akin to an exception, and the application to reserve questions of law fell within the ambit of the Constitutional Court's interpretation of s 319 in *Basson*. It was not contended otherwise in the *Porrit* appeal.

[71] The same can be said of *Boekhoud*, which also involved a special plea entered at the commencement of the trial. The accused there tendered a plea in terms of s 106(1)(f)³⁷ of the CPA, on the basis that the court lacked jurisdiction to try him on all counts but one because these offences were alleged to have been committed in the United Kingdom. His plea was upheld and the State applied to reserve certain questions of law relating to the plea of lack of jurisdiction. A plea of this nature is also akin to an exception: if upheld (as it was) it prevents the State from pursuing a prosecution on the affected charges. *Boekhoud* falls within the same category as *Basson* in this respect, with the result that s 319 was obviously available to the State. Albeit it that the trial had not been finalised, the questions of law related to an order that had final effect on the outcome of the prosecution because the order limited the charges in respect of which he could be convicted.

³⁵ This section reads:

'(1) When an accused pleads to a charge he may plead –

...

(h) that the prosecutor has no title to prosecute.'

³⁶ This subsection reads:

'(4) An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.'

³⁷ Section 106(1)(f) provides: 'When an accused pleads to a charge he may plead that the court has no jurisdiction to try the offence...'

[72] The present application is clearly distinguishable from *Basson*, *Porrit* and *Boekhoud*. The DPP seeks to reserve questions of law before any charges have been put to the respondents and thus before they could plead or object to the charges. Moreover, the questions of law relate to a procedural issue – the separation of trials – and have no bearing on the substance of the charges against the respondents or their ultimate conviction or acquittal.

[73] While *Basson* widens the jurisdictional basis for appeals under s 319, it does not do so without limitation. The general rule against permitting piecemeal appeals remains a salutary principle, post-*Basson*. The limitation inherent in the phrase ‘on the trial’ in s 319 cannot be interpreted so generously in favour of the DPP as to accord to this Court the jurisdiction to consider questions of law arising from interlocutory, procedural disputes between the accused and the State which arise before a plea. Not only would this permit piecemeal appeals on issues that have no practical effect on the outcome of the criminal proceedings, but it undoubtedly would cause a delay in the administration of criminal justice to the prejudice of all the accused and the public interest.

[74] For these reasons, we disagree with the conclusion in the first judgment that the questions of law arose ‘on the trial’ of the respondents. We find that the DPP failed to satisfy this peremptory jurisdictional requirement for the reservation of questions of law. Consequently, this Court has no jurisdiction to consider the questions of law, and the high court was correct in dismissing the application on this basis.

[75] This finding is dispositive of the application for leave to appeal. However, as the Constitutional Court recently reiterated,³⁸ this Court is no longer the apex appeal court

³⁸ *Jordaan v MEC, Local Government, Environmental Affairs and Development Planning, Western Cape and Others* (CCT 331/24) [2026] ZACC 25; 2026 (9) BCLR 975 (CC) at paras 49-50, citing *Spilhaus Property Holdings (Pty) Ltd v Mobile Telephone Networks (Pty) Ltd* [2019] ZACC 16; 2019 (4) SA 406 (CC); 2019 (6) BCLR 772 (CC).

and, as such, it is obliged to deal with all issues arising before it, albeit that a preliminary issue may be dispositive of the case.

The questions of law

[76] Whether leave to appeal should be granted depends on the DPP's prospects of success in persuading this Court on the merits of its application to reserve the identified questions of law.³⁹ This necessitates a consideration of whether the peremptory requirements for a reservation under s 319 are satisfied and the prospective merits of each of the identified questions sought to be reserved. Although the first judgment cites the requirements for the reservation of a question of law in terms of s 319, save for the jurisdictional requirement discussed earlier, it does not consider and apply the remainder. We proceed to do so.

[77] The respondents contend that some of the identified questions are not legal but rather factual questions. Further, that they are not accurately framed, as is required. We consider these complaints in the context of each of the identified questions, below. A third general complaint raised by the respondents, which merits special attention, is that the questions have no practical effect on the outcome of their trial.

[78] We discussed the same problem earlier, in the context of the jurisdictional requirement necessary for a s 319 application. For the reasons adduced above, we find that the complaint by the respondents is sound. Even if it were to be assumed that this Court has jurisdiction to consider the s 319 appeal, because, contrary to what we have found, the questions of law arose 'on the trial' of the respondents, the high court cannot be faulted for refusing to reserve questions which have no practical effect on the respondents' conviction or acquittal. The questions relate to a procedural order, and the State is not precluded from proceeding with its prosecution of the respondents. This, too, is fatal to the DPP's application. However, bearing in mind the need to consider all issues before us, we turn to the questions identified by the DPP.

³⁹ Section 319(3) read with s 317(5). See *S v Khoza and Others* 2010 (2) SACR 207 (SCA).

Questions 1 and 2: Was the discretion to order a separation of trials exercised judicially; and did the high court duly consider the prosecutorial prerogative?

[79] Although the DPP identifies these as separate questions, in substance they address the same legal point. The DPP contends that in ordering the separation of trials, the high court impermissibly interfered with the DPP's prosecutorial prerogative. In doing so, the high court failed to exercise its discretion judicially, and this Court has the power to interfere with the order. While the questions could, perhaps, have been stated more clearly, we accept that they meet the requirement of clarity inherent in s 319.

[80] An order of separation of trials under s 157(2) involves the exercise of a discretion by the trial court. It is a discretion in the 'strict' or 'true' sense, in that the court has available to it a range of equally permissible options, none more 'correct' than the other. It exercises its discretion based on what the interests of justice require in a particular case.⁴⁰ The power of a court of appeal to interfere with the exercise of a true discretion is limited. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*,⁴¹ the Constitutional Court explained it as follows:

'[w]hen a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised "judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles". An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court'.⁴²

[81] The nub of the DPP's complaint is that this Court is entitled to interfere because the high court infringed the wide prosecutorial prerogative as to how an accused person is to be charged. The DPP relies on s 179(2) of the Constitution in support of that case.

⁴⁰ *S v Ntuli and Others* 1978 (2) SA 69 (A) at 73.

⁴¹ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC).

⁴² *Ibid* para 88.

The first judgment finds that the DPP's contention is well-founded and that the separation order should be set aside for this reason. We respectfully disagree.

[82] Under s 179(2) the prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out the necessary, incidental functions. This does not give the prosecuting authority an unlimited power to determine how criminal trials should unfold. The CPA contains a multitude of provisions that regulate the conduct of criminal proceedings, the power of a court to order a separation of trials under s 157(2) being just one example. The DPP points to no provision affording to the prosecuting authority the overriding prerogative to make procedural determinations regarding the conduct of a trial without judicial regulation. The prosecuting authority does not have, as the DPP asserted, 'the constitutional right to institute proceedings as it deems fit'. If that were the case, a constitutional challenge to s 157(2) would be necessary. In its absence, the starting point of the inquiry is that s 157(2) permits a trial court to order a separation of trials, and that this constitutes a lawful limitation of prosecutorial power.

[83] The DPP's complaint is that the high court went too far in ordering a separation because it failed to give sufficient weight to the prejudice to the State in trying the respondents separately. In particular, the DPP averred that the high court overlooked the difficulty the State would have in presenting the whole 'mosaic' of evidence necessary in a racketeering trial under POCA.

[84] For purposes of an appeal against the refusal to reserve this question of law, the question is not whether the DPP, or this Court, might weigh the various factors considered by the high court differently. The question is whether there was a misdirection committed by the high court in exercising its discretion. The judgment of the high court in the separation application demonstrates that it considered all relevant factors. It was at pains to record that it understood why the State wished to have the accused tried jointly. It appreciated that there might be a duplication of witnesses if the trials were separated and that this would impact the resources of the State. It pointed out, however, that the State had adduced no evidence to support the prejudice it averred it would suffer. Ultimately,

the high court was persuaded by the rights of the respondents' co-accused to a fair and speedy trial. It appreciated, too, that this was in the public interest.

[85] We find no misdirection or failure by the high court to exercise its discretion judicially. There being no merits in an appeal on these questions, the application for leave to appeal must be refused.

Question 3: Whether the court erred in not considering the provisions of POCA, and related authorities, when it interfered in the directive of the National Director of Public Prosecutions in terms of s 2(4) of POCA that the Respondents must be prosecuted together?

[86] It is not entirely clear what the point of law is that the DPP seeks to address in this question, nor how it differs from the first two questions, discussed above. Insofar as it is possible to discern a point of law, it appears to relate to the contention that the high court failed to have regard to the underlying public and constitutional purpose of POCA in ordering the separation. Specifically, the point seems to be that racketeering offences require that all those who are alleged to be part of the 'enterprise', as defined in POCA, must be tried together. The DPP contends that the high court did not pay sufficient regard to this and ignored the authorities cited by the DPP in support of its objection to the separation of charges.

[87] This would seem to be a slightly different way of saying that the high court failed to exercise its discretion judicially. Insofar as it might be read as constituting a separate legal question to questions one and two, the difference appears to lie only in the specific reliance on the nature of the charges as a factor that is contended to have been overlooked by the high court.

[88] We were not referred to any provision in POCA that stipulates that all the accused in a racketeering case must, without exception, be prosecuted in the same trial. We understand that a joint trial of the accused in these cases is optimal, as all the evidence

relating to the activities of the enterprise and the accused's connection to it would only need to be presented once. The court would have the benefit of the full spectrum of evidence linked to each member of the enterprise. However, while this may be optimal, it is not a pre-requisite for a POCA prosecution.

[89] The authorities cited by the DPP do not hold otherwise. *Dos Santos*⁴³ concerned a dispute about whether racketeering charges involved an impermissible splitting of charges. This Court observed that POCA prosecutions usually involve a considerable overlap in the evidence. However, it went no further than this. *Rodrigues v National Director of Public Prosecutions and Others*⁴⁴ notes that the public interest is an important consideration in deciding whether to grant a permanent stay of prosecution. *Basson*⁴⁵ also highlights the general principle that the prosecuting authority fulfils an important constitutional function in prosecuting offenders. None of these cases suggest that the interests of the State take precedence in the balance of interests weighed for purposes of s 157(2).

[90] How the high court exercised its discretion and weighed these competing interests is, for the reasons stated above, not open to interference by this Court. As with the first two questions, there are no prospects of success in respect of this question and the application for leave to appeal must fail for the same reasons.

Questions 3 and 4: Whether the high court erred in exercising its inherent powers under s 173 of the Constitution instead of conducting an enquiry under s 342A of the CPA; and whether the high court erred in relying on s 342A without properly applying its provisions.

[91] We are unable to distil any clear point of law from these related questions. The DPP takes issue with the high court's reference in its judgment to s 342A of the CPA. It appears to be suggested that the high court ought to have conducted an inquiry to determine the cause of delay under s 342A, rather than entertaining the application for a

⁴³ *S v Dos Santos and Another* 2010 (2) SACR 382 (SCA) para 43.

⁴⁴ *Rodrigues v National Director of Public Prosecutions and Others* 2021 (2) SACR 333 (SCA) at para 31.

⁴⁵ *S v Basson* 2007 (1) SACR 566 (CC).

separation of trials. None of the parties raised s 342A nor sought to invoke its provisions. The high court referred to this section tangentially in its judgment in support of the separation order as part of a broader discussion about the issue of delay in criminal trials. It made no findings based on s 342A, nor was it required to do so.

[92] These questions lack the clarity that is a prerequisite for the reservation of questions of law under s 319. Moreover, to the extent that some sense can be made of the questions, they appear to lack legal foundation. There being no prospects of success in respect of these two questions, leave to appeal must be refused.

Conclusion and Order

[93] We conclude that the application for leave to appeal must be dismissed. First, because the DPP has failed to satisfy the jurisdictional requirement necessary for this court to consider an appeal against the refusal to reserve questions of law in terms of s 319. In addition, and in any event, there are no reasonable prospects that, were an appeal to be entertained, it would be upheld. There is no merit in any of the questions of law sought to be reserved by the DPP.

[94] In the result, the following order is granted:

1. The application for leave to appeal is dismissed.

RM KEIGHTLEY
JUDGE OF APPEAL

EF DIPPENAAR
ACTING JUDGE OF APPEAL

P MOLITSOANE
ACTING JUDGE OF APPEAL

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