



**IN THE HIGH COURT OF SOUTH AFRICA,  
FREE STATE DIVISION, BLOEMFONTEIN**

**Reportable:**  
**NO**  
**Of Interest to other Judges:**  
**NO**  
**Circulate to Magistrates:**  
**NO**

Case No: 08/2022

In the matter between:

**THE STATE**

**And**

<b>MBANA PETER THABETHE</b>	<b>ACCUSED 1</b>
<b>LIMAKATSO MOOROSI</b>	<b>ACCUSED 2</b>
<b>SEIPATI SILVIA DHLAMINI</b>	<b>ACCUSED 3</b>
<b>IQBAL MEER SHARMA</b>	<b>ACCUSED 4</b>
<b>NULANE INVESTMENTS 204 (PTY) LTD</b> (as represented by Accused 4)	<b>ACCUSED 5</b>
<b>DINESH PATEL</b>	<b>ACCUSED 6</b>
<b>ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD</b> (as represented by Accused 8)	<b>ACCUSED 7</b>
<b>RONICA RAGAVAN</b>	<b>ACCUSED 8</b>

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**HEARD ON:** 03 NOVEMBER 2022

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**CORAM:** N.M. MBHELE DJP

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**DELIVERED ON:** 14 DECEMBER 2022

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- [1] This is an application to note a special entry in terms of section 317(1) of the Criminal Procedure Act 51 of 1977(CPA)<sup>1</sup> brought by accused 6, 7 and 8 (the accused). The accused unsuccessfully brought an application to compel the state to furnish them with further and better particulars in order to prepare for their criminal trial. This application was triggered by the judgment in which the accused's aforementioned application was refused.
- [2] Aggrieved by the refusal of the accused's application in terms of section 87, Mr. Aldwage, on behalf of accused 6, and Mr. Hellens, on behalf of accused 7 and 8, moved an application in terms of section 317(1) from the bar immediately after delivery of judgment.
- [3] There was no substantive application filed. Messrs. Aldwage and Hellens submitted that the refusal of the application to compel the state to furnish the accused with further and better particulars constitutes and irregularity in that the particulars provided by prosecution are inadequate to enable the accused to prepare for trial. They contended that the further particulars provided do not sufficiently inform the accused of the case they have to answer.
- [4] Section 317 (1) of the CPA provides as follows:
- “(1) If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made *bona fide* or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.”

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<sup>1</sup> Criminal Procedure Act 51 of 1977

[5] **In S v Khoza And Others<sup>2</sup> 2010 (2) SACR 207 (SCA)**

[44] The grounds open to a trial judge in refusing to note a special entry are restricted: that the application is not made bona fide; or that it is frivolous or absurd; or that the granting of the application would be an abuse of the process of the court. There is a further ground not expressly mentioned in s 317(1), but inherent in the section: when the irregularity appears from the record itself the special entry procedure, whilst convenient, may be unnecessary because of the wide powers of appeal enjoyed by the SCA in terms of s 316 of the Act.

[45] In an application for leave to appeal against the refusal to note a special entry, it is necessary for an applicant to show a reasonable prospect of success on appeal, whether the irregularity appears *ex facie* the record or not.

[46] Even if the court considers that the trial of the appellants was rendered unfair by the presence of an irregularity, that is not enough to vitiate the proceedings, unless the irregularity is per se such as to have that effect, or there has been a failure of justice, in that the evidence (and credibility findings, if any) unaffected by the irregularity was insufficient to prove the guilt beyond a reasonable doubt.<sup>5</sup> In the last-mentioned regard, s 322(1) of the Act, it seems to me, provides a reasonable and justifiable limitation on the constitutional right to a fair trial. No argument was addressed to us on this matter, but counsel did not submit otherwise. The Constitutional Court has held that the meaning of the concept 'failure of justice', in s 322(1), must be understood to raise the question whether the alleged irregularity stated in the special entry has led to an unfair trial.

[6] **In Nkabinde v The State (115/17) [2016] ZASCA 75 (01 June 2017)**<sup>3</sup>the following the SCA remarked as follows when dealing with the provisions of Section 317:

"[27] The purpose of a special entry is to raise an irregularity in connection with or during the trial as a ground of appeal against conviction under s 318(1) of the Act. The latter section provides, inter alia, that if a special entry is made on the record, the person convicted may appeal to this Court against his conviction on the basis of the irregularity stated in the special entry. Recently this Court has held that the sole purpose of a special entry is to record an irregularity that does not appear on the record. As is shown below, all of the so-called special entries are not proper special entries but grounds of appeal under s 316 of the Act, because they appear on the record. Some 60 years ago this Court held that the special entry procedure is of vital importance and should be utilised where the irregularity does not appear on the record of the proceedings. So, the statement in the application for leave to appeal to this Court that a special entry is 'simply a method of applying for an appeal in regard to irregularities on or off the record' is quite wrong.

[28] The proviso to s 322(1) of the Act makes it clear that a conviction or sentence must not be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the appellate court that a failure of justice has in fact resulted from such irregularity or defect. In Naidoo JA identified two broad categories of irregularities: those of a serious and gross nature that per se vitiate a trial; and those of a less serious nature, where the court can separate the good from the bad and is able to consider the merits of the matter.

[32] It must be stressed that an application for a special entry is not there for the asking the requirements of s 317(1) of the Act must be met, and the court must satisfy itself that the application is bona fide and that it is not frivolous, absurd or an abuse of the process. The court a quo failed to do so. All the so-called special entries should not have been made. In some instances, they are simply not bona fide. In others, they are frivolous and consist of points that lack any substance and cannot be seriously

<sup>2</sup> S v Khoza And Others 2010 (2) SACR 207 (SCA) at par. 44-46

<sup>3</sup> Nkabinde v The State (115/17) [2016] ZASCA 75 (01 June 2017) par. 27....

taken; or they are absurd in that they are inconsistent with reason or common sense and unworthy of serious consideration."

- [7] It is clear from the above authorities that the purpose of special entry is to record irregularities that do not appear on the record.<sup>4</sup> The court does not have a discretion to refuse the application unless it is of the view that: the application is not made bona fide; or that it is frivolous or absurd; or that the granting of the application would be an abuse of the process of the court.
- [8] The accused's complaint stems from a judgment that refused their section 87 application. The judgment with full reasons forms part of the record. For the application to succeed the accused must show that there was an irregularity in the proceedings. It is well established that an irregularity in the proceedings relates to deviation from prescribed procedures and legal principles. It is not about the results or incorrect judgment; it is about the process that led to the decision. There is a legal process available for the accused to demonstrate their displeasure with the verdict returned in their section 87 application other than the noting of a special entry. They may lodge an appeal at the end of the trial should they be dissatisfied with its outcome. The court of appeal would deal with the irregularity if it is found to exist.
- [9] The indictment that the accused were provided with contains the elements of the offense they are charged with. It informs them of the case they have to answer at trial. It contains a statement of facts detailing how the alleged offences were committed. The accused know which witnesses the prosecution intends to call to prove its case. They have been provided with statements of witnesses that the state intends to call. All this information is sufficient to enable the accused to answer to the charges and prepare for trial.
- [10] In **Nkabinde** it was emphasised that the application for special entry is not there for the taking. The court must be satisfied that it meets the requirements set out in section 317. Having considered the submissions made on behalf of

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<sup>4</sup> See Hiemstra's Criminal Procedure at 31-29: When the irregularity appears on the record, it is unnecessary to use the process in terms of section 317, because the irregularity can simply be raised as grounds for appeal in the appeal under section 316. See also *S v De Vries* 2012(1) SACR 186 SCA at par. 29

