

SOUTH AFRICA / JUDGMENT

Mashego v S (A31/2025) [2025] ZAGPJHC 545 (4 June 2025)

[2025] ZAGPJHC 545

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

A31/2025

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER: A31/2025

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

4 June

2025

In

the matter between: DIKANE
 SELBY MASHEGO
 APPELLANT
 and
 THE
 STATE
 RESPONDENT

JUDGMENT

DOSIO J:

Introduction

- [1] This is an appeal against the refusal of bail by the Alexandra Regional Court on 6 February 2025.
- [2] The appellant is charged with the following offences:
 - (a) murder,
 - (b) attempted murder, and
 - (c) robbery with aggravated circumstances.
- [3] The appellant's formal bail application was brought in terms of s60(11)(a) of the Criminal Procedure Act 51 of 1977, hereinafter referred to as ('Act 51 of 1977').
- [4] In terms of the prescribed schedule 6, the onus rests upon the appellant to prove on a balance of probabilities that exceptional circumstances exist which in the interest of justice will permit his release in bail.
- [5] The appellant was legally represented and elected to lead evidence in support of the application by way of affidavit. The respondent in opposing the bail application, elected to lead evidence in opposition by way of an affidavit.
- [6] The appellant has raised the following issues as grounds of appeal, namely that:
 - (a) The court a quo erred and/or misdirected itself in considering the grounds in s60(4) without any due regard to the provisions of s60(9) of Act 51 of 1977.
 - (b) The court a quo erred and/or misdirected itself in making a finding that the appellant would abscond and/or is a flight risk, without the State having had led compelling evidence on record, suggesting that the appellant is a flight risk.
 - (c) The court a quo erred and/or misdirected itself in failing to place due consideration on the factors surrounding the circumstances of arrest of the appellant and the link of the appellant to the offences.

- (d) The court a quo erred and/or misdirected itself in failing to attach sufficient weight to the fact that the items recovered were not in the possession of the appellant. Further, that there is no DNA, fingerprints or any forensic evidence linking the appellant or placing the appellant at the crime scene, besides the fact that his wife's vehicle was seen at the vicinity of the crime scene on the day of the incident.
- (e) The court a quo erred and/or misdirected itself by failing to conduct a proper evaluation of the presence of exceptional circumstances and/or the interests of justice.
- (f) The court a quo failed and/or did not engage in an exercise of weighing up the five broad considerations mentioned in section 60(4)(a) to (e) of Act 51 of 1977.
- (g) The court a quo failed and/or did not give due consideration to the period which the appellant is likely to be detained before the disposal or conclusion of the trial, which is likely to be long.
- (h) The court a quo failed to give due consideration to the Constitutional Court's interpretation of the word 'likelihood' in s60(4) of Act 51 of 1977.
- [7] During the bail application the following personal circumstances of the accused were put on record, namely, that:
 - (a) He is 50 years of age and a citizen of South Africa. He possesses a South African passport but has no assets outside the country. His entire family resides in South Africa. He has lived most of his life in Gauteng.
 - (b) He completed grade 10 and was self-employed, using his own car to transport children to school and was earning R6000.00 a month. His car is fully paid up and valued at R60 000.00.
 - (c) He resides and rents the property situated at unit 3[...] H[...], W[...] Road, L[...], Johannesburg with his customary wife, namely, Petunia Mbanjwa and his two minor children aged 10 and 15 years old. He has resided at this address since his release on parole in October 2023. Both his children and customary wife are financially dependent on him.
- (d) The appellant owns various household furniture, clothing and household equipment valued at R180 000.00.
- (e) He has four previous convictions. In 1996 he was given a suspended sentence for theft. In 1996 he was sentenced to 10 years imprisonment for robbery with aggravated circumstances. In 2009 he was sentenced to 20 years imprisonment for house robbery with aggravated circumstances. In 2010 he was sentenced to 10 years imprisonment for robbery with aggravating circumstances. He was released on parole during October 2024.

- (f) The appellant will plead not guilty as he alleges he was not arrested near the scene of the robbery and murder. Furthermore, no items taken during the robbery were found in his possession and no firearm either. He alleged there are no fingerprints, video footage or photographic evidence linking him to these crimes. No identity parade has been held.

Background

- [8] The appellant concedes that he was arrested at his house on 9 January 2025 and that when the armed police entered his home, he decided to leave the home by exiting through the ceiling, whereafter he was caught on the roof of his home and arrested.

Legal Principles

- [9] Section 60[11](a) of Act 51 of 1977 states:

‘Notwithstanding any provision of the Act, where an accused charged with an offence referred to:-

(a) in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release on bail.’

- [10] In the context of s60(11)(a) of Act 51 of 1977, the concept ‘exceptional circumstances’ has meant different things to different people. In *S v Mahommed*,^[1] it was held that the dictionary definition of the word ‘exceptional’ has two shades of meaning: The primary meaning is simply: ‘unusual or different’. The secondary meaning is ‘markedly unusual or specially different’. In the matter of *Mahommed*,^[2] it was held that the phrase ‘exceptional circumstances’ does not stand alone. The accused has to adduce evidence which satisfies the court that such circumstances exist ‘which in the interests of justice, permit his or her release’. The proven circumstances have to be weighed in the interests of justice. The true enquiry is whether the proven circumstances are sufficiently

unusual or different in any particular case as to warrant the appellant’s release on bail.

- [11] In so far as the weakness of the State’s case in a bail application is concerned, the Supreme Court of Appeal in the matter of *S v Mathebula*^[3] held that:

‘...to successfully challenge the merits of the State case in bail proceedings, the applicant must prove on a balance of probability

that he will be acquitted of the charge.’^[4]

- [12] In the matter of *S v Smith and Another*,^[5] the Court held that:

‘(f) the appellant failed to testify on his own behalf, and no attempt was made by his counsel to have him testify at the bail application.

There was thus no means by which the Court a quo could assess the bona fides or reliability of the appellant save by the say-so of his counsel.’ [6]

[13] In *S v Bruintjies*, [7] the Supreme Court of Appeal stated that:

‘The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court a quo could assess the bona fides or reliability of the appellant save by the say-so of his counsel.’ [8]

[14] In *Mathebula*, [9] the Supreme Court of Appeal stated that:

‘In the present instance, the appellant’s tilt at the State case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive.’ [10]

Evaluation

[15] In terms of s65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong. [11]

[16] The appellant bears the onus to satisfy the Court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his release. A mere denial of the considerations and/or probabilities of events, as contained in s60 (4) – (9) of Act 51 of 1977, would not suffice in order to succeed in convincing the Court of the existence of exceptional circumstances, in order for bail to be granted.

[17] The appellant did not present viva voce evidence in order to discharge the onus. He sought to rely on an affidavit accepted as an exhibit in the bail proceedings. As stated in the case of *Bruintjies* [12] and *Mathebula*, [13] evidence on affidavit is less persuasive than oral evidence. The denial of the appellant rested solely on his say-so with no witnesses or objective probabilities to strengthen this. As a result, the State could not cross-examine the appellant to test the veracity of the averments in his affidavits. This affects the weight to be attached to the averments made in the affidavits as the probative value of the affidavits could not be tested.

[18] Sections 60(4)(b) and (d) of Act 51 of 1977 are of importance in the matter in casu. The sections state the following:

‘60(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established: ...

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or...

(d) where there is the likelihood that the accused, if he or she were released in bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;...

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.'

[19] In considering whether the ground in subsection (4)(b) of Act 51 of 1977 has been established, the court may, where applicable, take into account the factors referred to in s60(6) of Act 51 of 1977, namely:

'(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) the nature and the gravity of the charge on which the accused is to be tried;

(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;

(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached.'

[20] In evaluating whether the court a quo misdirected itself, this court has considered the strong emotional ties the appellant has in Gauteng, as well as the fact that he has moveable assets to the value of R240 000.00. This court has also borne in mind the fact that he will suffer financial loss owing to his inability to run his business. However, in light of the provisions of s60(4)(b) and (d) of Act 51 of 1977, these aspects referred to supra are not to be viewed in isolation.

[21] Should the accused be convicted on a charge of premeditated murder he will face a term of life imprisonment. Should he be found guilty of the crime of robbery with aggravated circumstances, he will also face a minimum term of 15 years imprisonment.

[22] As regards the strength of the State's case, the affidavit of the investigating officer sets out the following facts:-

- (a) This incident occurred on 14 December 2024 at number 1[...] S[...] Drive, H[...] P[...], B[...] ('the house'), where two suspects entered the house where Mrs Catania Enza and Alessandro Lowndes were both shot. Mr Lowndes passed away and Mrs Enza was badly wounded in her breast.
- (b) One of the laptops that were taken from the house was retrieved at 2[...] S[...] Crescent, A[...] / 2[...] Avenue, A[...]. The suspects car, a Hyundai i-20 with registration number H[...] was identified and the s205 results of the movement of the car, shows that this car proceeded to 2[...] S[...] Crescent, A[...] / 2[...] Avenue, A[...], where the robbed items were recovered in the possession of Trevor Raphela and Thulane Nyathi. After this address, the car proceeded to H[...], W[...] Road, L[...], Johannesburg, which is the address where the appellant resided.
- (c) According to tracker movement and camera video footage the following is depicted:

On 2024-12-14 at 23:14 the car dropped off the suspects at number [...] C[...] Road and it is next to 1[...] S[...] Drive. The video footage allegedly also shows the car at outside the house of Mrs Enza.

On 2024-12-15 at 01:14 the car came back to the same place collecting the suspects, after that, it went to A[...]

On 2024-12-15 at 01:36 the car was picked up at S[...] C[...] number 2[...] Avenue A[...]

On 2024-12-15 at 01:58. The car left S[...] C[...]

On 2024-12-15 at 02:15, the car was stationary at W[...] Road, L[...], where Selby Mashego stays

On 2024-12-15 at 09:45, the car left W[...] Road

- (d) Ownership of the said car was done and it shows that it belongs to Miss Thembisile Pertunia Mbanjwa, the customary wife of the applellant. Her statement was obtained and she said her car was driven by Selby Mashego. This witness, according to the respondent's counsel, will testify on behalf of the State.

[23] From the above, it is clear the State has a strong case against the appellant in that upon the police's arrival at his house, he attempted to escape through the ceiling. The other accused, in whose possession the stolen items was found, namely, Thulane Nyathi, who is accused two in this matter, has also been arrested and was identified by Mrs Enza as being present at the time the robbery occurred.

[24] In considering the provisions of s60(4)(e) the court a quo considered the history of violent offences the appellant has committed in the past and the likelihood that if released, he may continue to commit such offences. It is clear that the past and the present offences for which he is being arraigned, are similar in nature.

- [25] The appellant failed to adduce evidence once his previous convictions were dealt with by the investigating officer, as well as the circumstances under which he was arrested for the present crime. Accordingly, this court can find no fault in the court a quo's finding that if the appellant is released, he may abscond and continue to commit violent offences. This is a valid ground for the court a quo to have refused the appellant bail. Furthermore, there is the likelihood that he will endanger the safety of the public or commit Schedule 1 offence, in that these offences were committed whilst the appellant was on parole. The victims in the matter in casu were robbed whilst the perpetrator's were in possession of firearms. The properties were violently taken from the victims.
- [26] The appellant failed to adduce evidence which satisfies this court that exceptional circumstances exist which in the interests of justice permit his release, or that he will be acquitted, on the charges preferred against him.
- [27] After perusal of the record of the court a quo, this court finds that there is no persuasive argument to release the appellant on bail. The appellant has not successfully discharged the onus as contemplated in s60(11)(a) of Act 51 of 1977 that there are exceptional circumstances which permit his release on bail. Accordingly, there are no grounds to satisfy this court that the decision of the court a quo was wrong.

Order

- [28] In the result, the appeal of the appellant is dismissed.

D DOSIO

JUDGE OF THE HIGH COURT

JOHANNESBURG

APPEARANCES

ON BEHALF OF APPELLANT: Mr E Sithole (Attorney with right of appearance)

ON BEHALF OF THE RESPONDENT: Adv. Staffa

Instructed by the Office of the National

Director of Public Prosecutions, Johannesburg

DATE OF HEARING: 3 June 2025

DATE OF

JUDGMENT:

4 June 2025

[1] S v Mahommed 1999

- (2) SACR 507 (C)
- [2] Ibid
- [3] S v Mathebula 2010
- (1) SACR 55 [SCA]
- [4] Ibid para 12
- [5] S v Smith and Another 1969 (4) SA 175 (N)
- [6] Ibid pg 177 para E – F.
- [7] S v Bruintjies 2003
- (2) SACR 575 (SCA)
- [8] Ibid para 7
- [9] Mathebula (note 3) above
- [10] Ibid page 59 B-C
- [11] S v Rawat 1999
- (2) SACR 398 (W).
- [12] Bruintjies (note 7 above)
- [13] Mathebula (note 3 above)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2025/545.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mashego-v-s-unknown-topic-agpjhc-2025>

Prepared on 13 October 2026 · Esheria