



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Not Reportable**

Case no: 957/2023

In the matter between:

**THULANI MKHIZE**

**APPLICANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Mkhize v The State* (957/2023) [2026] ZASCA 143  
(21 October 2026)

**Coram:** MBATHA JA and MBHA and KOOVERJIE AJJA

**Heard:** 14 September 2026

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date and time for hand down is deemed to be 21 October 2026 at 11h00.

**Summary:** Practice and procedure – section 17(2)(f) of the Superior Courts Act 10 of 2013 – special leave to appeal – reconsideration of decision to refuse special leave – special leave granted – criminal law – the cumulative nature of sentences

imposed not considered – the offences committed are inextricably linked and committed with one intent – appeal on sentence upheld – sentences imposed on counts 1 and 2 are to run concurrently.

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## ORDER

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**On application for consideration:** referred to the Court by the President in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013:

- 1 The order made by the two judges of this Court dismissing the applicant's petition for special leave to appeal against sentence is set aside and is substituted with the following:  
'Special leave to appeal against sentence is granted.'
- 2 The appeal against sentence is upheld.
- 3 The order of the high court is set aside and replaced with the following:  
'Count 1: attempted murder: 5 years;  
Count 2: attempted escape: 8 years. Both sentences in respect of count 1 and count 2 are to run concurrently;  
Count 3: possession of firearm: 15 years;  
Count 4: possession of ammunition: 5 years. Both sentences in respect of count 3 and 4 are to run concurrently.'
- 4 The total effective sentence is 23 years imprisonment.
- 5 The effective sentence is antedated to 22 April 2013.'

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## JUDGMENT

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**Kooverjie AJA (Mbatha JA and Mbha AJA concurring):**

### Introduction

[1] This is an application in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act), for the reconsideration of the order of two judges of this Court

refusing Mr Mkhize's application for leave to appeal. The applicant's main contention is that the trial court misdirected itself by failing to order that the sentences imposed run concurrently.

## **Background**

[2] On 22 April 2013, the applicant, Mr Thulani Mkhize (Mr Mkhize), and his co-accused, Mr Mahlangu, were convicted and sentenced by the Regional Court in the Regional Division of the Free State, Odendaalsrus, (the trial court) as follows:

- (a) Count 1 – attempted murder – 8 years' imprisonment;
- (b) Count 2 – attempted escape from custody – 5 years' imprisonment;
- (c) Count 3 – possession of an unlicensed firearm – 15 years' imprisonment; and
- (d) Count 4 – possession of ammunition – 5 years' imprisonment.

[3] In imposing the sentences on both accused, the trial court ordered only the sentences in respect of counts 3 and 4 to run concurrently. It did not make a similar order in respect of the sentences on counts 1 and 2. This resulted in an effective sentence of 28 years' imprisonment.

[4] Aggrieved by the findings of the trial court, both Mr Mkhize and Mr Mahlangu sought leave to appeal against their convictions and sentences. Their respective applications for leave to appeal were dismissed by the trial court. They thereafter petitioned the Judge President of the Free State Division of the High Court (the high court), which granted them leave to appeal against their sentences only. The high court subsequently dismissed their appeals against their sentences. Mr Mkhize thereafter petitioned this Court for special leave to appeal, but his application was dismissed on 28 October 2019. He then petitioned the President of this Court in terms of s 17(2)(f) of the Act. On 7 August 2024, the President, inter alia, ordered that:

‘...’

2. The decision of the court dated 28/10/2019 dismissing the applicant’s application for leave to appeal with costs is referred to the court for reconsideration and, if necessary, variation.
  3. The application for leave to appeal is referred for oral argument in terms of s 17(2)(d) of the Superior Court Act 10 of 2013.
  4. The parties must be prepared, if called upon to do so, to address the court on the merits.
- ...’

[5] The crimes that led to their respective convictions were committed at the Odendaalsrus Correctional Centre, where both Mr Mkhize and Mr Mahlangu were awaiting trial on charges for armed robbery committed at the Spar Supermarket in Wesselsbron on 26 September 2010.

[6] On 17 November 2010, the correctional service authorities received information that certain inmates were planning to escape from the correctional centre. An emergency team was deployed to conduct a search of the prison. During the search operation, Mr Mahlangu produced a 9mm semi-automatic pistol (the firearm) and threatened the prison officials. Mr Mahlangu held one of the officers, Mr Gerber, hostage and became involved in a physical altercation with him. Mr Mahlangu assaulted Mr Gerber on the head with the firearm, causing an open wound. During the struggle between Mr Mahlangu and Mr Gerber, a shot was discharged. Mr Mkhize then took the firearm from Mr Mahlangu and pointed it at Mr Gerber’s head with the intention of shooting him. Mr Mahlangu ordered Mr Mkhize to shoot Mr Gerber. The firearm, however, malfunctioned several times when Mr Mkhize attempted to shoot him. It was only at that point that the officials intervened and apprehended both Mr Mkhize and Mr Mahlangu. Mr Gerber received medical treatment for the injuries he sustained.

## **Interference by the Appellate Court**

[7] The principles governing the circumstances in which an appellate court may interfere with a sentence imposed by a lower court are well established. The salient principle is that an appellate court may interfere where there has been a material misdirection or where there is a gross disparity between the sentence imposed by the trial court and the sentence that the appellate court would have imposed.

[8] Sentencing remains within the discretion of the trial court. The essential enquiry in an appeal against sentence is not whether the sentence was right or wrong or whether the court, in imposing it, exercised its discretion properly and judicially. A mere misdirection is not by itself sufficient to interfere. It must be of such a nature, degree or seriousness that it shows that the discretion was exercised improperly or unreasonably.<sup>1</sup> This Court in *S v Malgas* affirmed that: ‘A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach a question of sentence as if it were the trial court and then substitute the sentence arrived by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh... It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.’<sup>2</sup>

## **This application**

[9] The application for reconsideration was lodged on 29 September 2023, and the President granted the application on 7 August 2024. Section 17(2)(f) was amended on 3 April 2024,<sup>3</sup> after the institution of this application. Prior to the

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<sup>1</sup> *S v Pillay* 1977 (4) SA 531 (A) at 535E-F.

<sup>2</sup> *S v Malgas* [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) para 12.

<sup>3</sup> Section 17(2)(f) was amended by section 28 of the Judicial Matters Amendment Act 15 of 2023 which came into operation on 3 April 2024. The effect of the amendment was that it replaced ‘exceptional circumstances’ with grave failure of justice that would result or the administration of justice may be brought into disrepute.

amendment, the President of this Court had to be satisfied that ‘exceptional circumstances’ existed before referring the matter to this Court for reconsideration.

[10] Section 17(2)(f) before the amendment reads:

‘The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.’

[11] It has been confirmed by this Court in *RAF v Sarah Wilson Lewis*,<sup>4</sup> that, since the application in terms of s 17(2)(f) was instituted before the amendment, the pre-amendment version of the provision applies.

[12] The threshold to be met is a high one, requiring the existence of truly exceptional circumstances. Prospects of success alone do not constitute ‘exceptional circumstances’. The requirement entails more than merely satisfying the criteria for special leave to appeal. This Court in *Avnit v First Rand Bank*,<sup>5</sup> expressed that the remedy is an extraordinary one and that the circumstances must truly be exceptional. It further expressed:

‘I emphasise that the section is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President of this Court to deal with a situation where otherwise injustice might result.’<sup>6</sup>

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<sup>4</sup> *Road Accident Fund v Lewis* [2025] ZASCA 174; 2026 (3) SA 490 (SCA); [2026] 1 All SA 70 (SCA) para 24. In *J.M.M and Another v Cara Dorothy Masureik and Others* [2026] ZASCA 1; [2026] 1 All SA 259 (SCA); 2026 (4) SA 367 (SCA) para 16, this Court applied the amended provision as the application was filed after the amendment.

<sup>5</sup> *Avnit v First Rand Bank Ltd* (20233/14) [2014] ZASCA 132 (23 September 2014) para 7.

<sup>6</sup> *Ibid* para 6.

This reasoning was affirmed by the Constitutional Court in *S v Liesching & Others*.<sup>7</sup>

[13] Mr Mkhize persisted with his argument that exceptional circumstances warranted this Court's intervention. He contended that a failure by this Court to reconsider the decision of the two judges refusing leave to appeal would result in a grave injustice.

[14] To demonstrate that exceptional circumstances existed, Mr Mkhize advanced two main grounds. Firstly, he contended that his co-accused, M Mahlangu, was granted special leave to appeal by this Court in terms of s 16(1)(b) of the Act. He submitted that his own application had not been afforded the same consideration as that of Mr Mahlangu. Both he and Mr Mahlangu were convicted for the same offences and received the same sentences. In fact, during the hearing, both counsel undertook to ensure that the outcome of this application would be brought to Mr Mahlangu's attention.

[15] Secondly, Mr Mkhize contended that the trial court misdirected itself by failing to order that the sentences on counts 1 and 2 run concurrently. He submitted that the cumulative effect of the sentences resulted in an unduly harsh and disproportionate sentence.

[16] Section 280(2) of the Criminal Procedure Act 51 of 1977 (the CPA), empowers a sentencing court to order that sentences run concurrently where more than one sentence of imprisonment is imposed. In such circumstances, the court must have regard to the cumulative effect of the sentences imposed.<sup>8</sup>

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<sup>7</sup> *S v Liesching and Others* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC) para 139.

<sup>8</sup> Section 280(1) and (2) of the CPA states:

[17] Mr Mkhize took no issue with the sentences imposed in respect of counts 3 and 4 (possession of firearm and the possession of ammunition). The trial court sentenced him to 15 years' imprisonment for possession of a firearm and 5 years' imprisonment for possession of ammunition. These sentences were ordered to run concurrently, resulting in an effective sentence of 15 years' imprisonment. Mr Mkhize was sentenced to the statutory maximum of 15 years' imprisonment in terms of the Firearms and Ammunition Control Act 60 of 2000. The trial court explained why the maximum sentence was appropriate in the circumstances and highlighted the aggravating factors. It took into account the manner in which the firearm had been obtained within the correctional centre and the intention to use it against prison officials.

[18] It considered the consequences of Mr Gerber's injuries, the fact that he may not have survived had the firearm not malfunctioned, and expressed that Mr Gerber had stared death in the face. It noted that the community, as well as the correctional officials on duty at the time, would have considered these circumstances to be very serious. The escape had been orchestrated in advance, and part of their plan was to utilise a firearm.

[19] The trial court further weighed the interests of the community, the nature of the crime, and the personal circumstances of the accused. In mitigation, it noted that both accused were in their late thirties; had their own families; their children were being cared for by their mothers; were first offenders; and had spent more than two years in custody awaiting trial. On appeal, the high court found no reason

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'(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.'

to interfere with the sentences imposed by the trial court and confirmed that they were appropriate under the circumstances.<sup>9</sup>

[20] It is salutary practice that, when an accused is sentenced for two or more related offences, the sentencing court should have regard to the cumulative effect of the sentences imposed to ensure that the total sentence is not disproportionate to the accused's blameworthiness for the offences of which he or she has been convicted. A court of appeal is required to consider an offender's total punishment and determine whether, having regard to all the circumstances, the cumulative sentence is too severe. It may interfere with the exercise of the sentencing court's discretion only where it is satisfied that the sentencing court misdirected itself or failed to did not exercise its discretion properly or judicially.<sup>10</sup>

[21] In *S v Mokela*,<sup>11</sup> this Court further held that an order directing sentences to run concurrently is called for where the relevant offences are inextricably linked by locality, time, protagonists and, importantly, the fact that they were committed with one common intent. Where the offences constitute a continuous act committed at the same place, at the same time, by the same accused and with the same intention, the sentences should ordinarily be served concurrently. The closer the connection between the different offences, the greater the need to reduce the cumulative effect of the sentences imposed.<sup>12</sup> In *S v Young*,<sup>13</sup> this Court expressed:

'Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful or practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused.'

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<sup>9</sup> *Mahlangu and Another v S* (A31/2015) [2015] ZAFSHC 105 (25 May 2015) paras 6-7.

<sup>10</sup> *S v Mokela* [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) para 9.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid* para 11. See also: *S v Sekwati* (A445/2015) [2016] ZAGPPHC 849 (14 September 2016), at para 13.

<sup>13</sup> *S v Young* 1977 (1) SA 602 (A) at 610E-H.

[22] On the plain facts of this matter, the offences of attempted murder and attempted escape were inextricably linked and committed with the sole intention of effecting an escape. The trial court, in its reasoning, failed to address why the sentences on counts 1 and 2 should not run concurrently. It further failed to have regard to the cumulative effect of the sentences imposed. This constituted a material misdirection. In the circumstances, interference by this Court is warranted. I am also satisfied that the threshold for special leave to appeal has been met.

[23] In *S v Cele*,<sup>14</sup> this Court, with reference to various authorities of this Court, cautioned that, when an accused is convicted of multiple offences, the court must not lose sight of the fact that the aggregate sentence must not be unduly severe. The interests of society are not served by the imposition of a sentence of such severity that it negates all possibility of rehabilitation and hope.

### **Conclusion**

[24] Consequently, the sentences imposed on count 1 (attempted murder), namely 8 years' imprisonment, should run concurrently with the sentence imposed on count 2 (attempted escape), namely 5 years' imprisonment. The effect of ordering these sentences to run concurrently is an effective sentence of 8 years' imprisonment. The cumulative effect of the sentences imposed would therefore be an effective sentence of 23 years' imprisonment, which sentence is antedated to 22 April 2013.

### **The order**

[25] The following order is granted:

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<sup>14</sup> *S v Cele* [2025] ZASCA 199; 2026 (1) SACR 445 (SCA) paras 30-31. See also: *S v Moswathupa* [2011] ZASCA 172; 2012 (1) SACR 259 (SCA) para 8.

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'Special leave to appeal against sentence is granted.'
- 2 The appeal against sentence is upheld.
- 3 The order of the high court is set aside and replaced with the following:  
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Count 3: possession of firearm: 15 years;  
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- 4 The total effective sentence is 23 years imprisonment.
- 5 The effective sentence is antedated to 22 April 2013.'

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H KOOVERJIE  
ACTING JUDGE OF APPEAL

**Appearances**

For appellant: D Botha

Instructed by: Blair Attorneys, Bloemfontein

For respondents: J W Roothman with M M Moroka

Instructed by: Director of Public Prosecutions, Bloemfontein