



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

Not Reportable

Case no: 1223/2023

In the matter between:

THABO JOSEPH SEKABATE

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Sekabate v The State* (1223/2023) [2025] ZASCA 49 (25 April 2025)

Coram: ZONDI AP and HUGHES, KEIGHTLEY and KOEN JJA and BLOEM AJA

Heard: 06 March 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 for hand down is deemed to be 25 April 2025 at 11h00.

Summary: Application for special leave referred to oral argument in terms of s 17 (2)(d) of the Superior Courts Act 10 of 2013 – exceptional circumstances established due to several misdirections – criminal liability not established beyond a reasonable doubt – appeal upheld and conviction and sentence set aside.

ORDER

On appeal from: Mpumalanga Division of the High Court, Middelburg (Mankge and Vukeya JJ, sitting as court of appeal):

- 1 The application for special leave to appeal is granted.
 - 2 The appeal against conviction and sentence is upheld.
 - 3 The order of the high court is set aside and replaced with the following:
 - ‘(a) The appeal succeeds.
 - (b) The conviction and sentence are set aside.’
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JUDGMENT

Hughes JA (Zondi AP and Keightley and Koen JJA and Bloem AJA concurring):

Introduction

[1] The application for special leave and condonation in this matter was referred by direction of this Court for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the Act).¹ The parties were forewarned that they should be prepared, if called upon, to address the merits of the matter. At the hearing counsel addressed the Court on both the application for special leave and the merits of the appeal.

[2] Thabo Joseph Sekabate (the applicant) was convicted on one count of murder in terms of s 51(2)(a) of the Criminal Law Amendment Act 105 of 1997² in the regional

¹ Section 17(2)(d) of the Superior Courts Act 10 of 2013, states:

‘The judges considering an application referred to in paragraph (b) may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.’

² Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 provides:

‘(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-
(a) Part II of Schedule 2, in the case of-

magistrate's court, Evander, (the trial court) on 3 August 2022. He was sentenced to seven years' imprisonment. It was alleged by the State that, on 14 April 2021, at or near Lesley in the regional district of Mpumalanga, the applicant inflicted a single stab wound with a sharp object or knife on the left upper leg of Sakhile Zwelakhe Ntuli (the deceased).

[3] In terms of s 309B of the Criminal Procedure Act 51 of 1997 (the CPA), leave to appeal was granted to the Mpumalanga Division of the High Court, Middelburg (the high court). The appeal to the high court against the conviction was dismissed and the high court declined to interfere with the sentence imposed by the trial court. This resulted in the applicant bringing this application for special leave to appeal. Notably, the applicant is on bail pending the outcome of this application.

Background

[4] On 14 April 2021, the applicant was informed by his wife that his daughter had been raped by the deceased. His daughter informed him that Mr Mondli Masuku (Mr Masuku) knew the deceased. He drove his vehicle to the home of Mr Masuku, who then accompanied him to the deceased's home. On arrival at the deceased's home, Mr Masuku went into the house to call the deceased. In the yard of the deceased, a scuffle broke out between the applicant and the deceased. Mr Masuku tried to separate the applicant from the deceased. In the scuffle, the deceased sustained a '[s]tab wound [of] left upper leg. 2,54cm stab wound ... aspect of left upper leg. (23cm above the left knee. ± 5cm deep' *sic*. The cause of death recorded in the post-mortem report was '[s]tab wound of left upper leg'.

The Evidence

[5] Mr Masuku testified he was always in the applicant's and the deceased's presence during the scuffle, and he did not witness any stabbing. In fact, he stated that he was between the applicant and the deceased as he tried to keep them apart to prevent the applicant from assaulting the deceased. He and the deceased were facing

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- (i) a first offender, to imprisonment for a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.'

the applicant, with the deceased positioned behind Mr Masuku. When the applicant moved towards them, he then held on to the body of the applicant with both his hands restraining him. He stated that after the applicant had unsuccessfully tried to reach the deceased, he (the applicant) turned around and waved his hand, which had something in it. The applicant exited the yard. The applicant walked in front of him and the deceased was following behind him. He further stated that he did not see what was in the applicant's hand. Whilst they were leaving, he heard the mother of the deceased say they were coming to kill her son in her home. He went back into the yard, whilst the applicant proceeded to exit the yard. That, according to him, was when he noticed that the deceased was bleeding. He does not know what caused the deceased to bleed. Pertinently, he testified that he did not see the applicant make any kind of swinging movement with his hand, and that the object in the applicant's hand was a shiny object.

[6] Mr Oupa Khumalo (Mr Khumalo) testified that, at around 18h30, on the day in question, he was delivering aluminium doors at the next-door neighbour of the deceased. As he was busy offloading his delivery, he observed the applicant and the deceased arguing and a scuffle ensued. Mr Khumalo testified that he overheard two men arguing about a rape incident. He observed the occurrence from the distance of about 15 metres. He was able to see what was happening because the lighting was as clear as daylight. He stated they were holding each other by their clothing and as that happened, he said, 'I do not know, I think there was something shiny that he had on his hand on his hand behind'. The person with the shiny object was the applicant and the other person was the deceased. He further stated that he saw 'the hand coming from behind, the right hand and stabbing ... from behind *to forward in a stabbing manner.*' (Emphasis added.) At that stage he did not see Mr Masuku. He only noticed Mr Masuku, who was standing at the corner, when he jumped over the fence and entered the yard.

[7] Mr Khumalo testified further that he noticed that the applicant was holding a shiny object or knife in his hand; the applicant made an upward gesture with his hand; and stabbed the deceased on the lower body. Thereafter, the applicant walked away from the deceased. The witness (Mr Khumalo) jumped over the fence between the two properties in an attempt to apprehend the applicant. The applicant ran out of the yard

and drove away in his vehicle. Mr Khumalo further testified that, after the applicant had left, he noticed that Mr Masuku was also present at the scene. He was standing near the dining room area of the deceased's house.

[8] The applicant persisted that he only had his car keys in his hands when he went into the yard of the deceased. Further, he noted in his peripheral vision that the deceased came at him to assault him, and as a kung fu master, he performed a karate movement to defend himself from the attack. Thereafter, he saw the deceased holding his thigh, which was bleeding. At no stage did he see any object that could have caused the injury to the deceased.

In the high court

[9] The high court rejected the applicant's version and in doing so made the following finding:

'The defence pulled up two conflicting thoughts, that "it is accepted that the State indeed proved beyond reasonable doubt that the appellant indeed inflicted the injury to the deceased and further that he unlawfully in this regard" then the defence on the other hand asked a question "Did the State prove that the appellant inflicted the stab wound"? and concluded this point by stating that "There is no explanation for this aspect in the State's case. ...I am of the view that this contention is not only contradictory in nature but it cannot succeed, at least at this stage of the proceedings on the concession already made by the [applicant].'

The high court concluded that the applicant unlawfully and intentionally caused the death of the deceased. As regards the intent, it held that the evidence of Mr Masuku demonstrated that the applicant 'foresaw the risk of death occurring, but nevertheless continued to act appreciating that death might occur.'

Submissions by the parties

[10] The applicant's counsel attacked the finding of the high court. He submitted that the high court misdirected itself in finding that the applicant had conceded that he had stabbed the deceased. He argued that contrary to the high court's finding, the applicant had pertinently placed the stabbing in dispute. He denied that he had advanced a general concession. He stated that he had merely in illustrative terms, made mention of certain assumptions, during his argument in the proceedings. The State supported the findings in the high court.

Discussion

[11] Murder is the unlawful, intentional causing of the death of another person.³ Criminal liability is attributed if the conduct is an act or omission, which causes the death of another.⁴ The onus to prove the causal link is on the State. It is further trite that the conduct must comply with the definitional elements of the crime, which includes that the inflicting of the stab wound must be intentional.

[12] As to how the stabbing occurred Mr Khumalo's evidence was to the following effect: 'I saw the knife when he was holding him with his hand on the left hand side and then the other hand ... was on the right hand side behind'.

[13] The medical evidence presented by the state did not take the State's case any further. The medico-legal postmortem report compiled in respect of the deceased records the position and the size of the wound as being '23cm above the left knee'. More significantly, the medico-legal report, which although not being clear, was simply handed in without calling the author thereof, records that 'the stab wound [was] *behind* aspect of left upper leg.' (Emphasis added.) This contradicts the testimony of Mr Khumalo above, regarding how the injury was allegedly caused. This is especially so if the applicant was still holding the deceased when he executed the stabbing movement, as per Mr Khumalo, and the applicant and the deceased were facing each other.

[14] Another misdirection committed by the high court related to its finding that there was no material contradiction between Mr Khumalo's police statement and his testimony. In paragraph 13 of the judgment the high court stated: 'Even though the trial court did find contradictions in OJ Khumalo's evidence, where this witness contradicted his prior written statement, the trial court concluded and rightfully so in my view that,

³ *Rex v Ndhlovu* 1945 AD 369 at 373; See also *Rex v Valachia and Another* 1945 AD 826 at 829; *S v Sigwahla* 1967 4 SA (A) 566 at 570-571; *S v Ntuli* 1975 1 SA 429 (A) at 436 - 437.

⁴ *S V Hoor and C R Snyman Snyman's Criminal Law* 7ed (2020) at 26.

“there is not that much of a big contradiction in the way he describes that he saw the stabbing”.

[15] The conclusion affirmed by the high court clearly indicates that the high court misunderstood the evaluation of the evidence of a single witness. This Court in *Sekoala v S*⁵ stated the following about the evidence of a single witness:

‘It is common cause that the evidence of the complainant is evidence of a single witness and needs to be treated with caution. In terms of s 208 of the CPA, an accused may be convicted on any offence on the single evidence of a competent witness. In *S v Mafaladiso en Andere*, this Court held that where there are material differences between the witness’ evidence and their prior statement, the final task for the judge is to weigh up the previous statement against viva voce evidence, to put all the evidence together and to decide which is reliable and whether the truth has been told despite any shortcomings. This means that the court is enjoined to consider the totality of the evidence to ascertain if the truth has been told.’

[16] There are conflicting versions advanced by Mr Khumalo and on the totality of the evidence the State did not prove its case beyond a reasonable doubt. The conclusion that the State did, plainly amounts to yet another misdirection by the high court.

[17] I agree that the high court materially misdirected itself in finding that the applicant had conceded that he had stabbed the deceased. It is clear from the record that the applicant had denied that he had stabbed the deceased and that it was not clear from the evidence of the state witnesses how the deceased sustained the injury which according to the postmortem report had caused the deceased’s death.

[18] The view of the high court was that the trial court’s decision to convict required its attention. It concluded that it was ‘...very disastrous that the trial court in its analysis of the evidence, misapplied the principle of “*dolus indirectus or dolus eventualis*” ...the trial court’s reflection [on *dolus indirectus* and *dolus eventualis*] was the beginning of

⁵ *Sekoala v S* (579/2022) [2024] ZASCA 18 (SCA) (21 February 2024); 2024 JDR 0732 (SCA) para 29.

the misdirection on its part'.⁶ It resolved that the trial court was confused as to the applicable principle.

[19] In paragraph 23 of its judgment, the high court held that the trial court's finding that '[the applicant] *did it but he did not necessarily foresee that it would lead to the death of the deceased*' was indicative of the fact that it was not satisfied that an intent to commit murder in the form of *dolus eventualis* had been established. But contrary to its finding, the trial court found the applicant guilty of murder on the basis of *dolus eventualis*. The fact that the trial court was hesitant and confused the principles of *dolus eventualis* with those of *dolus indirectus* is clear evidence that it misdirected itself on the application of the law.

[20] It is difficult to discern the basis on which the trial court based its conclusion to convict the applicant of murder. It therefore boggles the mind as to how the high court, considering the aforesaid criticism, concluded that the trial court was correct in finding that the State had established that the applicant unlawfully and intentionally, in the form of *dolus eventualis*, caused the death of the deceased. In my view, this is yet another misdirection by the high court.

[21] To address the deficiency in the trial court's judgment the high court invoked the provisions of s 322(1)(b)⁷ of the CPA. But the high court erred in doing so because the mechanism created by s 322 is not suited to correct the kind of a problem the high court was faced with. This was another misdirection by the high court.

[22] In my view, the reasoning and conclusion of the high court amount to a misplaced attempt to rectify the flaws in the trial court's judgment. Together with the other misdirections mentioned above, they present exceptional circumstances for this Court to reassess the merits of the case.

⁶ Paragraphs 20 and 21 of the high court's judgment.

⁷ Section 322(1)(b) states:

'In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may -

(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial.'

Conclusion

[23] In the circumstances, special leave to appeal is granted. The onus rests on the State to prove all the elements of the crime beyond a reasonable doubt. The State must prove that the applicant through his actions, unlawfully and intentionally, caused the death of the deceased. As was stated in *S v Der Meyden*⁸ the test is as follows:

‘The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383...’

[24] An injury was indeed inflicted upon the deceased, however, how the injury was caused and who caused that injury has not been proven by the State beyond a reasonable doubt. This failure creates a great deal of speculation about how the injury could have been inflicted, by whom and at what stage.

[25] In the result, I make the following order:

- 1 The application for special leave to appeal is granted.
- 2 The appeal against conviction and sentence is upheld.
- 3 The order of the high court is set aside and replaced with the following:
 - ‘(a) The appeal succeeds.
 - (b) The conviction and sentence are set aside.’

W HUGHES
JUDGE OF APPEAL

⁸*S v Van der Meyden* 1999 (1) SACR 447 (W) at 448F.

Appearances

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