

## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE

CASE NO: 47/2021

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|-----------------------------------------------------|------------------------------------------|
| (1)                                                 | <u>REPORTABLE: YES/NO</u>                |
| (2)                                                 | <u>OF INTEREST TO THE JUDGES: YES/NO</u> |
| (3)                                                 | <u>REVISED: YES/NO</u>                   |
| DATE: <u>7/5/2025</u> SIGNATURE: <u>[Signature]</u> |                                          |

In the matter of

DIRECTOR OF PUBLIC PROSECUTIONS LIMPOPO

APPLICANT

versus

DOCTOR HEBERT MBUYANE

RESPONDENT

HEARD : 21 January 2025

DELIVERED : 7 May 2025

CORAM : KL PILLAY AJ

*This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date for hand-down is deemed to be on 7 May 2025 at 10h00AM.*

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## JUDGMENT

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**PILLAY AJ:**

**Introduction:**

- [1] The application before this court was sought by the state in terms of Section 319(1) of the Criminal Procedure Act 51 of 1977, wherein this court was requested to reserve three questions of law;
- [1.1] Whether the court may acquit the accused incriminated by his DNA found at the scene on the basis that his version was reasonably possibly true in circumstances where he had no explanation on how his DNA reach the said crime scene?
- [1.2] Whether the court considered the respondent's DNA evidence found on the crime scene before acquitting him?
- [1.3] Whether the Honourable court may acquit the accused who is unable to explain how his DNA was found on the crime scene, without first enquiring into whether the said DNA was conclusive in placing the respondent on the scene or not?
- [2] The applicant respectfully submitted that any of these questions of law if upheld on appeal would have different legal consequences, than the one resulted from this trial.
- [3] The application was opposed by the respondent on the following grounds;

- [3.1] The applicant failed to set out in the condonation application the reasons for the delay in pursuing the application in terms section 319(1) of the Criminal Procedure Act 51 of 1977.
- [3.2] That there were no prospects of success as the questions raised were factually based and therefore the application must be dismissed.
- [3.3] That the state was misguided in its assumption that the respondent did not give a version when he testified in his defence.
- [3.4] That because the respondent was linked by DNA evidence to the scene of the crime, the burden shifted to the respondent to explain how his blood was found on a Tekkie that was on the scene.
- [3.5] That because the court dismissed the respondent's application for discharge in terms of Section 174 of the Criminal Procedure Act, therefore the only result which would have to follow was a conviction.
- [3.6] That the applicant continuously referred to the *prima facie* evidence which called for the respondent to answer could not be elevated to mean the case was proved beyond reasonable doubt, and there was no reverse onus on the respondent to prove his innocence, which was not in line with the criminal jurisprudence of this Country.
- [3.7] That since the case was premised on circumstantial evidence this court in its inferential reasoning combined the circumstantial evidence with the number of pieces of evidence by the state, evidence of experts, contradictions between

the evidence of the state witnesses on the issue of the shooting, and the court correctly applied the relevant law dealing with the circumstantial evidence.

[3.8] That the DNA evidence was circumstantial evidence and was not direct evidence that a crime had been committed, the state did not provide any other evidence outside of the DNA against the respondent.

[4] The respondent indicated that the state has raised points of fact not law and what had been raised by the state in its grounds of appeal would not change the colour of the proceedings or were not essential ingredients to the conviction of the respondent, therefore there was no prospect of success on appeal by the applicant. It was for that reason the application was to be dismissed.

#### **Brief Background:**

[5] On 25 April 2018 the Fidelity Cash Solutions security officers, who were collecting cash at ABSA bank in Burgersfort, was robbed by approximately 5 heavily armed perpetrators. The SBV security officers, observed the incident and engaged the perpetrators resulting in a shoot-out.

[6] The perpetrators travelling in a VW Amarok double-cab motor vehicle left the scene chased by the SBV security officers, resulting in the VW Amarok motor vehicle colliding with a VW Polo, capsizing off the road and landing on the side of the road striking the electric transformer near the St Thomas College.



- [7] The perpetrators fled from the Amarok vehicle on foot and Mr Ngalo, one of the perpetrators, was shot by the SBV employee and succumbed to his injuries and died on the scene. The scene was contained, the recovered money returned to ABSA by the Fidelity officials.
- [8] The applicant relied on the DNA evidence connecting the respondent, in the form of blood, found on the Nike shoe, the epithelial cells on the white cap and blood found on an item of clothing collected in a bucket, placed outside the school entrance. In respect of how the incident unfolded the applicant relied on the evidence of Elias Mbumbé, an employee of the SBV, who was on duty as a driver with his 3 colleagues. His evidence briefly was that they were at the Total Burgersfort when he heard the gunshots and saw the Fidelity vehicle. His colleague looked to see what was happening and the perpetrator started shooting at his colleague, who returned fire.
- [9] Mr Mbombi moved the vehicle to give his colleague some cover and started shooting at the assailants. The assailants fled in an Amarok motor vehicle, and he gave chase with his colleague, during which time a shootout ensued between them and the Amarok. The Amarok, trying to overtake, collided with the VW Polo, lost control, capsized and landed on the side of the road, striking the electric transformer.
- [10] During this process, the money bag fell out of the vehicle on the ground. Mr Mbumbé was driving at a high speed, passed the Amarok and had to reverse. He was still observing them, from a distance of 10 metres, when he saw 2 men exit the vehicle, still shooting and ran across the road towards the mountain.

- [11] The second two pointed the guard of the school and was allowed access into the school. They continued shooting at him and he was also returning fire, but then stopped, as it was break and there were children all over. The last occupant exited the vehicle running towards the school gate and was shooting at them. They returned fire and this person was shot and killed outside the school.
- [12] He indicated that one of the perpetrators who ran towards the mountain was missing a sneaker, however, that he did not see what type of shoes the perpetrator was wearing as they were shooting at him. A grey Nike shoe, having a blood stain was located under the Amarok. It is not disputed that the DNA found on this Nike shoe belong to the respondent. The applicant was relying upon this evidence in support of the application in terms of Section 319 of the Criminal Procedure Act 51 of 1977.
- [13] The respondent testified, and his evidence briefly was that on the 24th of April 2018, he was at Steelpoort where he was looking for employment as a truck driver. He was wearing a black T-shirt, jeans, a pair of boots and a white cap. He only finished after 5pm and due to the lateness of the hour, slept over in a truck.
- [14] The following morning, he went to the hitchhiking spot approximately 10 metres near the school entrance where a group of people were gathering to hitchhike. He heard gunshots from far and the shots got nearer, he started running away, he tripped over the paving, fell, injured his finger and his knee.
- [15] He saw the vehicle in the distance and like a movie, he saw himself running for his life because of the gunshots. He managed to escape the scene, leaving behind his cap. He injured his finger where his nail came out and he was bleeding from his injuries.

- [16] He denied owning a firearm, ammunition, being involved in any robbery of the Fidelity security at the Twin City in Burgersfort. He denied any involvement with the shootout with the SBV security or any knowledge of the persons that were shot and killed at the school where he was hitchhiking. He was unable to explain how his blood landed on the Nike shoe as depicted in photo 153 and 154 which was located under the damaged VW Amarok.
- [17] The applicant did not lead any evidence in rebuttal of his allegation, that he was the night before at Steelpoort in Burgersfort, where he was looking for employment as a truck driver. No rebuttal evidence in respect of the clothing he was wearing especially the boots, and him sleeping over at this place. No evidence was led to rebut his allegation of being in a group of people hitchhiking, the group running, when they heard and saw the shootout. No evidence was led in rebuttal of him trying to escape the scene, tripping, falling, injuring his finger, causing his nail to come out and injuring his knee. His version amidst being tested under cross examination was left unscathed. There was no rebuttal to his version that at the time he was running away he was bleeding, from falling and injuring himself. The respondent testified that he did not know how his blood landed on the Nike shoe.

**The Legal Principles and Applicability:**

- [18] Section 319(1) and (2) provide that:
- (1) "If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first mentioned court shall state the question reserved and shall



direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.

(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law.”

[19] In an application before this court for the reservation of issues in terms of s 319 of the CPA, this court is only required to decide whether the issues sought to be reserved are questions of law. 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 the 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.’<sup>1</sup>

[20] 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

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<sup>1</sup> *Magmoed v Janse Van Rensburg and Others* [1992] ZASCA 208; 1993 (1) SACR 67 (A) at 94 a-c.



(c) all of this must be clearly set out in the record<sup>2</sup>.

In addition, questions of law should not be reserved where they will have no practical effect on the acquittal of the accused<sup>3</sup>.

- [21] The applicant argued that the respondent did not give a version in response to the *prima facie* evidence against him, namely his blood on the scene. The honourable court ought to have enquired into whether the state's *prima facie* evidence measured up to the required standard of acceptability as enunciated in *State v Francis*<sup>4</sup>
- [22] The respondent argued that the duty of the Court was to assess all the evidence, not consider evidence in isolation of each other which would be favourable to one or the other side. The respondent highlighted that the court mentioned that it appreciated the route taken by the state in its heads of arguments, focussing on the relevant issues and connecting the evidence to the accused, however, the Court was obliged to focus its attention in holistically evaluating all the evidence, which includes the version of the accused in response to those allegations.
- [23] This court accepted the fact that at the time the VW Amarok had landed colliding with the electrical box, the Nike shoe in issue was no longer being worn, otherwise there would have been a dead body also found under the vehicle. The applicant led no evidence concerning any injuries to any bystanders, amidst this volatile, moving

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<sup>2</sup> *Director of Public Prosecutions, Western Cape v Schoeman and Another* [2020 \(1\) SACR 449](#) (SCA) para [39].

<sup>3</sup> *Attorney General, Transvaal v Flats Milling Company (Pty) Limited and Others* 1958 (3) SA 360 (A) 373 to 374.

<sup>4</sup> 1991(1) SACR198(A) at 203H -I

scene, all the way from Twin City ABSA to St Thomas College. The applicant led no further evidence of any other observers of the incident, especially at St Thomas College where this Nike shoe was located. The applicant did not ventilate with Mr Mbombi the duration of time that passed waiting on the police to secure the scene and whether any members of public came near the scene where according to the photos all this money was lying all over the street and pavement.

[24] The applicant unfortunately was somewhat economical in the contents of the application and heads of arguments, concerning the evidence favourable to the respondent. The crucial evidence pertaining to the respondent fleeing in a group of people, falling and being injured whilst this shoot-out was occurring was never ventilated. The uncontested evidence of the respondent was that he was running with the other hitchhikers when he fell and injured himself. He testified that on account of the fall, his nail on his finger broke off and his finger was bleeding. He also injured his knees and thereafter got up and continued to run away. The applicant during cross examination was unable to discredit this evidence and did not elicit any information concerning the number of people present with the respondent when this sequence of events was unfolding especially when the respondent had fallen.

[25] These circumstances as testified could have resulted in the respondent's blood spilling all over, whilst the respondent was running away, in the company of the other persons. This aspect was never canvassed with the respondent under cross examination, nor rebutted by any other evidence from the applicant. The fact that the

respondents blood was found on this Nike shoe, which was located under the vehicle is rebutted by the respondents uncontested version of bleeding in the vicinity of the scene, whilst in a group of people. Amidst the respondent's indication of his lack of knowledge, of how his blood landed on the Nike shoe, at the time when this injury occurred, he was not alone but in the company of other people, who possibly, could have had blood land on them, and who possibly could also have scattered in various directions, including where the Amarok landed. There was no evidence tendered by the applicant that these circumstances were non-existent, or that the respondent was misleading this Court when he testified about the surrounding incident. His evidence is more consistent with the present circumstances, rather than the inference sought by the applicant that the respondent was involved in the commission of the offence, which is not the only reasonable inference, to be drawn from the circumstantial evidence, especially as the respondent's evidence was credible, concerning the circumstances he found himself in whilst this incident occurred. This must be seen in the context where the applicant failed to lead rebuttal evidence specifically on this point. This is also in the circumstances where the applicant bares the onus to prove that the respondent's version is not reasonably possibly true.

- [26] The applicant failed to investigate, verify, or cross examine the respondent to rebut the allegation of there being a group of people, who were hitchhiking as alleged by the respondent, prior to the shootout occurring. Nor did the applicant lead evidence to prove that there were no other persons observing the scene, where the VW Amarok landed. The only evidence pertaining to the school and the people present



at the school, was from the witness Mr Mbombi, concerning him having to stop shooting at the perpetrators, who fled into the school, as the school children, were in the school yard. Amidst this evidence of the presence of the school children, the witness still shot and killed the last perpetrator, who was shooting at him, whilst also running towards the school. This witness did not testify concerning there not being a group of fleeing people, whilst chasing the V W Amarok or seeing any bystanders prior to coming to a halt outside the school.

[27] Mr Mbombi indicated that the SBV vehicle was fitted with cameras, yet no video footage from the SBV was obtained or presented as evidence to give clarity concerning how this entire incident unfolded, surely this real evidence would have ventilated and possibly identified how this shoot-out occurred and possibly bolstered the applicant's case in securing implicating evidence against the respondent.

[28] The applicant makes no mention of the white cap with the respondent's DNA which the respondent admitted to wearing, which was not located by the VW Amarok but near the school. From the photos it was self-evident that the Nike shoe (photo 153 and 154) was not the only shoe located on the scene, there was a brown shoe in the vehicle as depicted on photo 192 and 193 and another Addidas black shoe also located near the vehicle on photo 151 and 152 of exhibit E. From the photos this was a scene cluttered with items of clothing, money, firearms, ammunition and other items. This was not a sterile isolated scene where this one Nike shoe was located. It was surprising to this court that forensic evidence was so limited given the number of exhibits recovered from the various locations, pertaining to the alleged incident.



The evidence in totality, conflicted materially with the applicants attempt at dealing with the evidence of the Nike shoe in a vacuum, creating the impression that no evidence was led pertaining to same, yet the respondent's explanation is specifically directed at how he was injured in the company of other people, whilst fleeing which simply could not be ignored by this court especially as this explanation was not shown not to be reasonably possibly true, given the totality of all the evidence which was evaluated.

- [29] The applicant sought this court to accept that by relying on the case of *S v Francis*<sup>5</sup> the respondent's inability to explain how his blood landed on the Nike shoe, which was in effect silence according to the applicant, on the part of the respondent to this evidence. This court in Judgment considered the evidence tendered by the respondent, his detailed explanation of hitchhiking in a group, experiencing this traumatic incident, fleeing, being injured and bleeding. Offset against the presence of the blood, this version is not silence, it is the inability to explain where his blood landed. This court highlighted in Judgment why the DNA and fingerprint evidence had to be considered in totality, with all the evidence tendered. The request to reserve this question cannot be sustained. The applicant was relying on this isolated piece of evidence to justify approaching the Appeal Court in an attempt to cure, what the applicant was obliged to cure, during the trial when the evidence was led and the applicant whilst having all this evidence available to it, failed to rebut the respondent's version which consisted of testimony pertaining to how his DNA was located at the various locations. This court was also surprised that the applicant

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<sup>5</sup> See footnote 4 above

failed to even trace the person from the school who collected the other exhibits and placed it in a bucket at the entrance of the school. This person's identity could have been verified by Mr Mbombi, yet this evidence was not led by the state, causing that evidence to be excluded.

- [30] In considering the argument raised by the applicant, "that the presence of the respondent's blood on the Nike shoe under the Amarok motor vehicle, placed him on the crime scene, and the respondent denies being at the crime scene, may the court acquit the respondent without enquiring into whether his DNA is conclusive in placing him at the crime scene"<sup>6</sup>. This court had regard to the evidence of the respondent and photos 11, 12 and 95 of exhibit E, which depicted the path that the respondent ran, prior to the arrival of the Amarok motor vehicle, and from the pictures, the path is exactly adjacent to the spot where the motor vehicle landed. The respondent also placed himself within a group of people which was not rebutted by the applicant and further, being injured, bleeding. There was nothing presented from the applicant in rebuttal of this evidence. It was not disputed by the respondent of being in this vicinity, whilst bleeding. The fact that his blood was on this Nike shoe, was but one of the many facets of evidence which was holistically evaluated, which included the version of the respondent, in response to those allegations.

- [31] There was no evidence tendered from the applicant of any trace DNA in the shoe, who it could belong to, or how much blood and where exactly on the shoe, this blood

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<sup>6</sup> See paragraph 13.1 of the applicants HOA

was found. If the applicant was so focused on relying on this specific evidence, then surely a blown-up picture of the location of the blood on the Nike shoe, would have been presented and the rebuttal version of the respondent's evidence. The applicant attempted to make an analogy with the respondent's version as being alibi evidence in rebuttal of the blood on the Nike shoe which was not the case. According to the respondent he was present prior to the Amarok capsizing and landing where it did.

[32] The applicant was very clear in the heads of argument submitted at paragraph 23 that it was irrelevant concerning who was wearing the Nike shoe and that the only concern of the applicant was the fact of the presence of the blood, which was not explained, which according to the applicant tantamounted to silence in response to this evidence.

[33] The applicant cited various case law and made specific reference to the case of Director of Public Prosecutions, Limpopo v Mokgotho<sup>7</sup> which dealt specifically with the circumstance wherein the accused had closed his case without testifying and related it to the current circumstance, drawing a correlation with the respondent being unable to explain the whereabouts of his blood as being "silent" and that there was no evidence placed before this court. This analogy is misplaced, the respondent did explain the circumstances leading up to his injury and bleeding. The fact that he did not know how and where his blood had spilt, which was not disputed, is not the same as remaining silent and not testifying concerning the aspect that his blood was found on the scene.

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<sup>7</sup> See Mokgotho case no (068/2017) [2017]ZASCA 159(24 November 2017)



[34] The questions of law, raised by the applicant in respect of the evidence pertaining to the Nike shoe is without merit as highlighted above and stands to be refused. The applicant clearly on account of focusing on one aspect of the evidence failed to consider the evidence in totality thus not being able to see the wood from the trees. There was nothing untoward with the respondent's version of being unable to explain the presence of his blood on this Nike shoe in light of the chaotic circumstances he found himself in, which was evidenced by the photos of the scene, and this was never disputed. To call for an answer as to how this blood landed on the Nike shoe would be expecting the respondent and court to speculate especially as the applicant failed to provide a rebuttal version of the circumstances prior to the presence of the blood on the Nike shoe, by tendering evidence to the effect that there was no hitchhiking spot or other persons on this scene prior to this incident occurring or during cross examination exposing weakness or inconsistencies in the respondent's version, raising doubts of the respondent's credibility thus leaving the only conclusion to be drawn that the respondent was involved, due to his version being rejected thus relying only on the applicants version being his blood on the scene, which proved his involvement in the commission of this offence. This was not done by the applicant.

[35] The respondent in opposing this application raised the issue of condonation not being fully addressed by the applicant, to explain the delay in moving this application. This court accepted that the applicant provided details pertaining to why the delay occurred and in as much as not every aspect was ventilated this court

condoned the delay in respect of the launching of the application. This ensured that the merit of the application could be ventilated and the application not being dismissed based on the ancillary aspect pertaining to condonation.

**Ruling:**

[36] Having taken all the aspects raised, in relation to the evidence led and the arguments placed before this court, the applicant has failed to establish grounds for seeking the application in terms of S319 of the Criminal Procedure Act 51 of 1977, there is no merit in the questions of law sought to be reserved as it clearly was based on misinterpretation of the law and its applicability to the current facts of this case.

**Order:**

[37] The application in terms of Section 319 of the Criminal Procedure Act 51 of 1977 is dismissed.

  
PILLAY KL  
ACTING JUDGE OF THE HIGH COURT,  
LIMPOPO DIVISION, POLOKWANE

**APPEARANCES**

|                    |   |                                                 |
|--------------------|---|-------------------------------------------------|
| FOR THE APPLICANT  | : | Advocate M Sebelebele<br>msebelebele@npa.gov.za |
| FOR THE RESPONDENT | : | Advocate P Maluleke<br>Pmaluleke@sabar.com      |
| DATE OF HEARING    | : | 21 January 2025                                 |
| DATE OF JUDGEMENT  | : | <del>7</del> May 2025                           |