

THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, KNYSNA)**

Case Number: CC 04 / 2024

In the matter between:

THE STATE

and

MBONELELI MSILA

ACCUSED NUMBER 1

MBULELO JACK

ACCUSED NUMBER 2

MONDE TSHEMESE

ACCUSED NUMBER 3

LUNGISILE LUCAS

ACCUSED NUMBER 4

Coram: Wille, J

Argument: 4 June 2025

Delivered: 4 June 2025

**INTERLOCUTORY DISCRETIONARY RULING IN TERMS OF SECTION 174 OF
ACT 51 OF 1977**

WILLE, J:

[1] The legal representative for accused number 1 requests a discharge for his client at the close of the prosecution's case. The applicable legislation provides as follows:

‘...[If], at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty...’¹

[2] Accused number 1 is effectively asking this court to find him not guilty at this stage of the proceedings. This is in circumstances where he is but one of four accused before the court. I say this because the applicable legislation determines that the court ‘*may*’ discharge an accused person. Additionally, our jurisprudence takes into account different considerations when dealing with multiple accused persons.²

[3] Even on a liberal approach to the interpretation of the discretion afforded to the court in circumstances such as these, it is challenging to understand on what basis accused number 1 holds the view that there is no evidence against him in connection with the offences preferred against him in the indictment. One must also consider that the credibility of the witnesses (even if this was relevant in this case) is not an issue that falls to be taken into account by this court. The application for a discharge has no merit at all.³

[4] I say this for several reasons:

- (a) There is no final inalterable prejudice against accused number 1 for the failure to discharge him after the closure of the case for the prosecution.

¹ Section 174 of Act 51 of 1977.

² It may be that this discretion is limited, which will be discussed later in this ruling.

³ This is in accordance with our jurisprudence.

- (b) Accused number 1 may be acquitted upon finalising the proceedings and applying the test for a final judgment on the merits.
- (c) The 'complaints' raised by accused number 1 may be grounds for appeal should a conviction be returned against him.
- (d) Thus, any discharge is manifestly premature.⁴

[5] Moreover, any application for a discharge in terms of this specified legislation is interlocutory by its very nature. This is so because once the prosecution rests after presenting its case with a finding that a *prima facie* case was made against accused number 1, he may still lead evidence and call witnesses, which may cause him to be acquitted.⁵

[6] The primary argument by accused number 1 is that there were shortcomings in the evidence presented, which established the possibility that the allegations against him might be untrue. Thus, it is contended that the only possibility for his conviction would be if he elected to testify or call witnesses. I say this because to establish this as a genuine discharge application worthy of consideration, the contentions on behalf of accused number 1 are solely underpinned by an analysis of the credibility of the witnesses for the prosecution. Applying this jurisprudential test to the facts of this case, it cannot be said there was '*no evidence*' on which a reasonable man acting carefully might convict.⁶

[7] Thus, I must indulge in the exercise of judicial discretion. Guidelines for the exercise of this discretion (concerning this species of this discretion) have been eloquently illustrated as follows:

'...It seems to me that the rule is clear, namely, that if at the close of the case for the Crown the evidence against the accused, or against one or more of the accused, is not such that a reasonable man might convict upon it, the Judge had a discretion whether or not to discharge. He is quite entitled to refuse to discharge if he considers that there is a possibility that

⁴ This application is *in medias res*.

⁵ The test to be applied at the conclusion of the trial is a different and a discrete test.

⁶ *S v Mpetha* 1983 (4) SA 262 (C) at 266H.

*the case for the Crown may be strengthened by evidence emerging during the course of the defence...*⁷

[8] Sometime after this, our jurisprudence was further developed by formulating and suggesting a two-stage approach to be considered when evaluating the discharge of an accused person after the prosecution has closed the case. What was stated was the following:

*'...The position can be summed up as follows: At the close of the State case, when discharge is considered, the first question is: (i) Is there evidence on which a reasonable man might convict; if not, (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge, and the accused should be placed on his defence...'*⁸

[9] Thus, once the prosecution establishes *prima facie* evidence linking accused number 1 with the commission of the alleged offences, credibility would only become a consideration once (and if) the evidence was of such poor quality that no reasonable person could accept it.⁹

[10] Following an objective analysis of the evidence in this case so far, no finding could reasonably be returned against the poor quality of the evidence presented by the prosecution. Thus, we are left with criticisms about the credibility of the allegations against accused number 1 to the limited extent that it is reasonably possible that he may be innocent. Undoubtedly, this does not meet the threshold test for a judicial discharge on the facts of this case given the overwhelming evidence against accused number 1.¹⁰

[11] Further, no irreparable prejudice would result should the trial be allowed to proceed to finality because accused number 1 may well be acquitted in the process. Put another way, if a conviction were to follow, the complaints raised

⁷ R v Kritzinger 1952 (2) SA 401 (W) at 406-A.

⁸ S v Lubaxa 2001 (2) SACR 703 (SCA).

⁹ S v Mpetha 1983 (4) SA 262 (C).

¹⁰ This is not a ground for a discharge.

may provide grounds for an appeal but are not grounds that this court must deal with in *medias res* for an application for a discharge.¹¹

[12] Furthermore, the complaints raised may be connected with accused number 1's rights regarding an infringement of his right to a fair trial. These complaints must be viewed in the context that the trial process regarding accused number 1 has not yet been completed. The position in our law concerning this issue has been eloquently formulated as follows:

*'...Once again, it is our respectful view that the applicant's reliance on the provisions of the Constitution with regard to his fair trial rights does not justify interference in criminal proceedings which are mid-stream, and more so where the applicant has failed to demonstrate any legal basis for the relief sought in this court...'*¹²

[13] Many significant trial rights exist and find application in our criminal and procedural law. One of the most important ones is the presumption of innocence. A failure by the prosecution to mount sufficient evidence at the closure of its case gives an accused person an opportunity to escape having to defend themselves.¹³

[14] It is trite that the threshold test of evidence presented and thus required by the prosecution at the closure of its case to avoid discharge is considerably lower than the standard the prosecution has to meet to secure a conviction (if any). This threshold test, relating to the discharge of an accused after the prosecution has closed the case, has been consistently applied by our courts over many years. However, it is the exception to this test, which is a cause for caution, like that of a chameleon.¹⁴

[15] The exception in our procedural law is that a court may discharge an accused when the evidence presented by the prosecution is of such poor quality that no reasonable man acting carefully could convict based on it. What this

¹¹ These complaints may later manifest as grounds of appeal at a later stage(if at all).

¹² *Motikeng v Regional Magistrate Beaufort West and Another* 2023 JDR 0119 (WCC) at [39].

¹³ This is not the case that has been presented.

¹⁴ *S v Lubaxa* 2001 (2) SACR 703 (SCA).

exception may permit is a limited probe into the issue of the credibility of the evidence presented by the prosecution.¹⁵

[16] In my view, this is where the difficulty lies, as this ‘credibility’ exercise does not strictly fall within the remit of a judicial officer at the stage when the prosecution has closed its case.¹⁶

[17] Thus, this discharge device in our law is, in real terms, just a sentinel against conviction in the face of *spurious* evidence presented by the prosecution. Harm may occur when this procedural mechanism is used as a device by an accused person to attempt either:

- (a) impermissibly persuade a judicial officer to embark on premature credibility findings regarding the evidence presented by the prosecution and/or,
- (b) impermissibly gain a window into the judicial thought process of the judicial officer so that an accused person may tailor his or her defence case going forward.¹⁷

[18] It is also not for this court, *in medias res*, to now evaluate the evidence presented by the prosecution, except in limited circumstances in the category of the discharge procedure, which I have styled as an exception to the standard method to be followed.¹⁸

[19] Undoubtedly, we are dealing with out-and-out issues about credibility, which this court is best suited to decide on after hearing all the available evidence. Put another way, accused number 1 will not suffer irreparable prejudice if the trial proceeds in that he may be acquitted. Besides, even if a conviction were to follow, the complaints he raises may constitute grounds for appeal. In my view, accused number 1 is impermissibly attempting to utilise the discharge provisions as a mechanism or tool to gain insight into the strengths and weaknesses of the case

¹⁵ S v Schwartz 2001 (1) SACR 334 (W).

¹⁶ This is an area of some vigorous academic debate.

¹⁷ This is precisely what accused number 1 is attempting to do.

¹⁸ This is what may occur ultimately in the appeal process.

for the prosecution to tailor his evidence from now on or to assist him with his decision on whether or not he should testify in his defence and call witnesses. This is not the purpose for which the discharge provisions were designed.¹⁹

[20] Thus, the application for the discharge of accused number 1 is refused.

E. D. WILLE
(KNYSNA)

¹⁹ This is legally impermissible.