

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: CC44/2025

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

18 March 2026

DATE

SIGNATURE

In the matter between:

THE STATE

And

THAMSANQA MHLONGO

Accused

JUDGMENT ON SECTION 174 APPLICATION

More AJ

[1] At the end of the prosecution's case, the accused brought an application in terms of section 174 of the Criminal Procedure Act 51 of 1977 (CPA).

[2] The application for discharge at the end of the state case is regulated by section 174 of the CPA, which 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."

[3] There is no doubt that the court hearing applications of this nature is enjoined to exercise a discretion as to whether to grant or to refuse the application for discharge, where the court is of the opinion that there is no evidence that the accused committed the offences he is charged with.¹

[4] In the matter of *S v Lubaxa*,² the court, dealing with the discretion to be exercised by the courts, said the following:

"[9] The refusal to discharge an accused at the close of the prosecution's case entails the exercise of a discretion and cannot be the subject of an appeal (*Hiemstra Suid-Afrikaanse Strafproses* 5de uitg deur Kriegler bl 825). [...]

[10] Section 174 of the Act repeats in all material respects the terms of its predecessors in the 1917 and 1955 Criminal Codes. It permits a trial court to return a verdict of not guilty at the close of the case for the prosecution if the court is of the opinion that there is no evidence (meaning evidence upon which a reasonable person might convict: *S v Khanyapa* 1979 (1) SA 824 (A) at 838F-G) that the accused committed the offence with which he is charged, or an offence which is a competent verdict on that charge.

[11] If, in the opinion of the trial court, there is evidence upon which the accused might reasonably be convicted, its duty is straightforward - the accused may not be discharged and the trial must continue to its end. It is when the trial court is of the opinion that there is no evidence upon which the accused might reasonably be convicted that the difficulty arises. The section purports then to give the trial court a discretion - it may return a verdict of not guilty and discharge the accused there and then; or it may refuse to discharge the accused thereby placing him on his defence."

[5] The two main questions to be asked are as follows:³

¹ *S v Ngwenya and Others* [2022] ZAGPPHC 217 at para 3.

² [2001] ZASCA 100; 2001 (4) SA 1251 (SCA); [2002] 2 All SA 107 (A) at paras 9-11.

³ *Ngwenya* above n 1 at para 5 and *Lubaxa* above n 2.

(a) Is there evidence on which a reasonable person might convict?

(b) If not, is there a possibility that the defence evidence might supplement the State's case?

[6] Failure to discharge where there is no evidence at the close of the State's case would amount to an irregularity that may violate the constitutional rights of the accused. Section 35(3) of the Constitution of the Republic of South Africa, 1996 guarantees every accused person the right to a fair trial, which includes, amongst others, the right to be presumed innocent, to remain silent and not to testify during proceedings.⁴

[7] However, the right to be discharged at the end of the State's case does not ordinarily arise from considerations relating to the burden of proof, the presumption of innocence, the right to silence or the right to testify, but originally from a consideration that is of more general application.⁵

[8] The State is required to present prima facie evidence against the accused to support a conviction at the conclusion of its case. If, at the close of the State's case, the court determines that there is no evidence indicating the accused committed the alleged offence or any related offence for which a conviction could be conferred under the charge, it may render a verdict of not guilty. No evidence means no evidence on which a reasonable court, acting carefully, might convict.⁶

[9] Section 174 of the CPA is a safety valve. It prevents an accused person from being forced to present a defence when the State has not produced any evidence on which a reasonable court might convict. It is not whether the State has proved its case beyond a reasonable doubt. It is not about weighing credibility in the final sense. It is not about choosing between competing versions. It is simply about the threshold question of whether the State has produced some evidence on each element of each charge. If the answer is yes, the application must fail. If the answer is no, the accused is entitled to be discharged on that count.

⁴ Ngwenya above n 1 at para 6.

⁵ Lubaxa above n 2 at para 19. Also see *S v Agliotti* [2010] ZAGPJHC 129; 2011 (2) SACR 437 (GSJ) at para 280.

⁶ *Agliotti* above n 5 at para 257 and *R v Shein* 1925 AD 6.

[10] An application is brought where there is a complete evidentiary vacuum on an essential element; where it is clear that the State's case cannot sustain a conviction, or where the State failed to link the accused to a particular count or counts.

[11] The accused was charged with the following counts:

- (a) Count 1- Murder read with the provisions of section 51(1) and Part I of schedule 2, alternatively section 51(2) and Part II of schedule 2 of the Criminal Law Amendment Act 105 of 1997.
- (b) Court 2 - Contravention of section 18(2)(a) of the Riotous Assemblies Act 17 of 1956 – Conspiracy to commit murder.

[12] The State relied on the doctrine of common purpose, in that the accused acted with common criminal intent when committing the charges he is currently facing.

[13] The accused pleaded not guilty to the charges preferred against him and tendered no plea explanation.

Analysis

[14] The prosecution must establish a *prima facie* case against the accused, as opposed to the applicable test in criminal cases being that the State must prove its case beyond a reasonable doubt.⁷

[15] The State led evidence of five witnesses in total. Sthembiso Sibanyoni and Christian Lunga Maphosa testified that they were sitting at the corner when they saw a white vehicle passing with four occupants inside, and two alighted. The two walked behind the deceased until one shot him. Sibanyoni did not identify anyone. Maphosa identified the accused through dock identification. It is also important to note that when he testified previously, he did not identify the accused, as the case had started *de novo*.

[16] Neither of them was close enough to give a positive identification of the accused. As stated in the well-known case of *S v Mthethwa*.⁸

⁷ Ngwenya above n 1 at para 10 and *Rex v Hepworth* 1928 AD 265.

⁸ 1972 (3) SA 766 (A) at 768A-C.

[17] After the plea, section 220 admissions were made and marked as Exhibit "A", postmortem report as Exhibit "B", photo album as Exhibit "C", section 212 statement by Warrant Officer Mashilo Elias Shadung as Exhibit "D". Later, video footage was handed in as Exhibit "E".

[18] They (Sibanyoni and Maphosa) also took the number plates, which they gave to the police at a later stage. The two police officers, Lynette Soga and George Tebogo Mbedzi, testified. They both confirmed that they were at the scene and, at a later stage, viewed video footage from a nearby house which had a camera. At that point, they had the number plates, but the assailants were not visible on the footage. Basically, what they saw confirmed the position of the two witnesses, but they could not identify the accused positively from the video footage. The same video footage was played in court when the last State witness, Raputla Moloi, testified.

[19] From the video footage presented in court, one cannot positively identify the accused.

[20] The two officers who testified are the ones who effected the arrest of the accused before the court. Upon his arrest, nothing was found in his possession.

[21] Hearsay evidence was led. I won't say anything about it, as no witnesses were called to verify what was said.

[22] The issue of credibility plays a very limited role but the evidence ought to be ignored if it is of such a poor quality that no reasonable person could possibly accept it.⁹

[23] The State intended to call a section 204 witness, but they could not trace him. I understand he is the one who was going to place the accused at the scene or explain his participation.

[24] The State further informed the court that they intended to lead evidence relating to a confession, but at a later stage, I was informed that they will not proceed as the chain is incomplete, and the documents were not completed properly.

⁹ Agliotti above n 5 at para 273.

[25] The video footage does not show the face of the accused. Even though the vehicle was traced and found, it does not belong to the accused. The other occupants of the vehicle also did not testify, one of whom could have been the section 204 witness. So far, nothing links the accused to the offences.

[26] I am of the view that the absence of the section 204 witness, the failure to lead the evidence of the confession, and the video footage not showing the face of the accused destroyed the State's case.

[27] From the above, one could see that the state did not succeed in proving that the accused was one of the assailants on that day. The state failed to present a prima facie case that requires the accused to answer to, as a result, after having considered all the evidence and the submissions made by counsel, I am of the view that this application must succeed.

Order

[28] In light of the above, I make the following order:

- (a) The application in terms of section 174 of the Criminal Procedure Act succeeds and the accused is discharged on both counts.



MORE AJ
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Date of Judgment :18 March 2026

Appearances:

For the State: Adv Khosa

Instructed by: Director of Public Prosecutions

For the accused: Mr Elias Thabang Paile

Instructed by: ET Paile Attorneys