



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 16 May 2025

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Magudumana v Director of Public Prosecutions, Free State (1196/2023) [2025] ZASCA 62 (16 May 2025)*

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Today, the Supreme Court of Appeal (SCA) dismissed with costs an appeal against the judgment of the Free State Division of the High Court, Bloemfontein (the high court). The appeal concerned the circumstances of the appellant's arrest, Nandipha Magudumana (the appellant) in Tanzania and her transportation from that country to the Republic of South Africa (SA). Particularly, where the members of the South African Police Service (SAPS) arrested the appellant. If it was found to have been in Tanzania, that arrest would be unlawful, and the appellant would have been entitled to a release from custody.

The appellant is/was the girlfriend to the convicted and sentenced rapist and murderer, Mr Thabo Bester (Mr Bester). The appellant, among other suspects was linked to the escape of Mr Bester from custody, arrested and faced charges for same. She surreptitiously left SA and some months later she was located in Tanzania and brought back to SA. Before her arrest in Tanzania, the appellant was a fugitive from justice, and a warrant for her arrest had been issued.

On 19 May 2023, the appellant brought an urgent application in the high court seeking an order declaring that her apprehension, arrest, and abduction in Tanzania was by members of the SAPS and her subsequent transportation to SA was unlawful. That her arraignment was a nullity and that further orders issue, entitling her to be released from detention. The high court found that the appellant's deportation constituted a disguised extradition which is inconsistent with the Constitution of South Africa and International Law. However, the high court found further that appellant's removal was not unlawful since she had willingly acquiesced to her transportation back to SA. According to the high court the appellant had given informed and enforceable consent. To this, the high court dismissed her application with costs.

There was a material factual dispute between the parties as to the arrest of the appellant in Tanzania and the circumstances under which she was returned to SA. The appellant alleged that she was arrested in Tanzania and forcibly abducted by members of the SAPS and further that she was blindfolded and taken to an airport by the said members. An aircraft, according to her, then flew her to Lanseria airport in Johannesburg. In her founding papers, the appellant stated that she was not found to be an illegal immigrant by any court in Tanzania and nor was she deported by any such court to SA. She contended that her arrest and deportation amounted to an illegal abduction and that her extradition

from Tanzania was not in accordance with the Extradition Act 67 of 1962 (the Extradition Act) or the SADC Extradition Protocol concluded in 2002 (SADC Extradition Protocol).

The first to sixth respondents, Director of Public Prosecutions, Free State; the Minister of Police; Captain Tieho Jobo Flyman; the Presiding Magistrate; the Head of Bizzah Makhate Correctional Centre: Kroonstad; and the Minister of Home Affairs (the respondents), argued that upon arriving in Tanzania, SA delegation informed the Tanzanian authorities that the SA Government had not initiated any extradition processes as it was waiting to be appraised of the decision of the Tanzanian Government in the matter. On 12 April 2023, the Tanzanian officials informed the SA delegation that their government had declared the appellant and Mr Bester prohibited immigrants and that they had decided to deport them. Adding that since SA was the country of origin of the appellant and Mr Bester, they handed them over to the SA High Commission (High Commission) to facilitate their removal from that country.

Seeing that the Tanzanian Ministry of Home Affairs would not cover the appellant and Mr Bester's deportation costs, the High Commission alleged to have engaged the SA Home Affairs officials to facilitate the removal. The SA Home Affairs officials, according to them, flew to Tanzania in a chartered aircraft to receive the appellant and Mr Bester with members of the SAPS in company to provide only security. That after the said handover, on 13 April 2023, the aircraft landed at Lanseria airport in Gauteng, and the appellant was arrested by members of the SAPS upon her arrival. SAPS argued that the appellant did not offer resistance when being handed over and denied her other allegations. Replying to these averments, the appellant denied having not resisted and further asserted that her return from Tanzania and transportation to SA was an extradition disguised as a deportation and thus unlawful.

The SCA had to determine the foregoing issue together with whether the appellant's arrest was in SA or Tanzania. On the latter, the SCA in its majority judgment held that the appellant's case against the respondents was answered in detail by the Minister of Police and the Minister of Home Affairs in their answering affidavits. Pointing out that their version was consistent with the appellant's version in her bail hearing in the magistrates' court where she had stated that she was forced by Mr Bester to leave South Africa. Relying on the *Plascon-Evans* test, the SCA found that this issue had to be decided on the Minister's version since that evidence showed clearly that the SAPS was not involved in any actions against the appellant until her arrest at Lanseria airport, highlighting further that if the SAPS arrested her in Tanzania as claimed by the appellant, it would not have been necessary for them to arrest her again when she landed at Lanseria airport. The SCA held that the appellant failed to make out a case against the Department of Home Affairs at all in the founding papers and that the Minister should not have been joined.

Regarding the former issue that the appellant's arrest in Tanzania and handing over by the Tanzanian Ministry of Home Affairs and her removal from Tanzania, were part and parcel of a disguised extradition, the SCA found that no such case was made out in the founding papers and, as a result, it was unnecessary to consider the law concerning disguised extraditions.

Dissenting, Makgoka JA in his minority judgment addressed the issue whether the appellant introduced a new case in the replying affidavit and highlighted that there was no conditional cross-appeal against the high court's order dismissing the application to strike out. Adding that the order stood, and further that it was not open to any of the respondents to re-argue that point before the SCA. He aligned himself with the conclusion of the high court on this issue.

Makgoka JA, further underscored that the legal mechanism through which a fugitive from justice can be handed over to the State which seeks her or his prosecution, was through extradition and that the procedures referred to in both the Tanzanian Extradition Act and the SADC Protocol were not followed in the appellant's case. Moreover, that the South African authorities had failed to discharge the onus resting on them to establish the lawfulness of them taking the appellant into custody and detaining her until she was arrested upon arrival in SA. Frowning at the assertion of the appellant's consent, he expressed his view that a valid consent could only be made with prior and full knowledge of the rights being waived, and not after an infraction of such rights had occurred. He pointed out that the appellant's alleged consent was made after she had been unlawfully handed over to the South African delegation.

As a result, the SCA in its majority judgment dismissed the appeal with costs.

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