

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

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

CASE NO: SS 49/2022

Wash State

11 August 2023

In the matter between:

THE STATE

And

NTSHABA PROMISE LINDOKUHLE

Accused

JUDGMENT

Mdalana-Mayisela J

- [1] This is the judgment on sentence. I delivered an *ex tempore* judgment in respect of the trial and conviction which followed upon it. The two judgments should be read together.
- [2] The accused was charged on counts 1 to 7 with robbery read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA"); count 8 with assault; count 9 with murder read with section 51(1) of the CLAA; count 10 and 11 with attempted murder; count 12 with murder read with section 51(1) of the CLAA; count 13 with unlawful possession of a 9mm parabellum semi-automatic pistol/firearm read with section 51(2) of the CLAA; and count 14 with unlawful possession of ammunition.
- [3] He pleaded guilty on all counts. On 14 April 2023 he was convicted on all counts. The state proved a previous conviction of theft committed on 4 August 2014, on which he was sentenced to a fine of R400 or 3 months imprisonment on 5 August 2014. The accused did not present a pre-sentencing report and he also did not testify in mitigation of sentence. The state presented two victim impact statements and led two witnesses in aggravation of sentence.
- [4] The accused has been convicted of the offences where the CLAA is applicable. The state submitted that the prescribed minimum sentences should be imposed where applicable, as there are no substantial and compelling circumstances warranting a deviation. The accused was informed before pleading in Court of the provisions of section 51(1) and 51(2) of the CLAA.
- [5] Section 51(1) of the CLAA provides that notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life. Subsection (2)(a)(i) provides that 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 Part II of Schedule 2, in the case of a first offender, to imprisonment for a period not less than 15 years. Subsection (2)(b)(ii) provides that a person who has been convicted of an offence referred to in Part III of Schedule 2, in the case of a first offender, shall be sentenced to imprisonment for a period not less than 10 years. Subsection (3) provides that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those

subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

- [6] In *S v Malgas 2001 (1) SACR 469 SCA* it was held that in determining whether there are substantial and compelling circumstances, *'a court must be conscious that the legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors - that lessen an accused's moral guilt'*. The Supreme Court of Appeal also stated that *'the specified sentences are not to be departed from lightly and for flimsy reasons'*.
- [7] The accused's personal circumstances are as follow. He is 29 years old. He is not married. He has no dependants. He has a grade 9 qualification. He was doing piece jobs selling meat and earning R400 per day before his arrest. He has a previous conviction of theft. He spent 2 years 3 months in prison awaiting trial.
- [8] It was submitted on his behalf that the following circumstances are substantial and compelling:
 - [8.1] He pleaded guilty;
 - [8.2] The previous conviction is of a lesser offence;
 - [8.3] He was relatively young when he committed the offences;
 - [8.4] He spent 2 years 3 months in prison awaiting trial; and
 - [8.5] Some stolen items were recovered.
- [9] The state submitted that the accused showed no remorse. He pleaded guilty because he was linked with his fingerprints on all the counts. He failed to testify in mitigation and explain to the court why he committed these offences and apologise to the victims. He failed to take the court into his confidence despite an opportunity to do so. He does not take accountability for his actions. His previous conviction of theft has some element of dishonesty. The Hyundai car was abandoned because the accused and his accomplice did not need it.

- [10] The accused and his accomplices killed two people who were not resisting their orders. Mandla Mcebiseni Msimango who was shot by the accused and his accomplices shortly after killing Du Plessis, is wheelchair bound and his medical condition is permanent. He is no longer fit to work as a security guard. The accused fled to KwaZulu-Natal and he was arrested as a result of a private investigation ordered by and paid for by the deceased, Du Plessis's father, Willem Johannes Du Plessis. The deceased, Du Plessis was the only child to his parents. The accused and his accomplices had no reason to shoot at the victims because they took the money and other items they wanted. The accused has been convicted of very serious offences. The period spent in prison awaiting trial is a relevant factor to be considered to his credit, but when considering the nature and seriousness of the offences in question and the prescribed minimum sentences for the offences in question, this factor has little weight.
- [11] I have considered the personal circumstances of the accused, the aggravation factors and the submissions made by counsel. I find that the accused's personal circumstances cumulatively taken do not amount to substantial and compelling circumstances warranting a deviation from imposing the prescribed minimum sentences.
- [12] It is trite that punishment should fit the criminal as well as the crime, be fair to the accused and to society, and be blended with a measure of mercy (*Moswathupa 2012 (1) SACR 259 (SCA)*). The sentence also needs to be victim-centred. The victim or the victim's family must be afforded a more prominent role in the sentencing process (*S v Matyityi 2011 (1) SACR 40 (SCA)*).
- [13] Mcebisi testified that he was shot at the back three times. He was 33 years old when this incident occurred. His entire life is negatively affected by this incident. It is difficult and expensive for him to visit his family in the rural area where he was born and to go to other places because of the mobility limitations. He is depended on other people for assistance on things that he was able to do for himself before he was shot. His job opportunities are limited due to his disability. He lost his father who fell ill after he was shot because he could not accept his medical condition. He had to sell his car after the incident occurred because he was financially strained. He has three children and is unable to play with them. The youngest child who was born in 2016 has never seen him walking and that causes him pain. He now has a low self-esteem. He feels torn inside. The shooting left him with permanent scars.

- [14] Willem in his victim impact statement stated that Duncan was a good hearted person. He was an above average performer and generous. Since he was killed Willem experiences anxiety. He feels guilty that he allowed Duncan to manage a store where he was robbed and killed. He misses his son dearly and feels empty. He has attended counselling, but the pain is not going away. He has become emotional and very short tempered since the incident. He now drinks alcohol excessively and his marriage is negatively affected. He had to spend a lot of money and upgrade the security in his business. He spends a lot of time watching cameras and that makes it difficult for him to do his work. He sold the Wilropark store because his wife was not coping with the stress of losing Duncan. The police could not arrest the suspects in this case. He appointed two private investigators and paid for the investigation that resulted in the accused's arrest. He is battling to understand why the accused killed Sabelo Kunyane, a security officer who was unarmed and off duty.
- [15] The accused has been convicted of very serious crimes that are prevalent in our communities. To elevate the accused's personal circumstances above that of the society in general and the victims in particular would not serve the well-established aims of sentencing, including deterrence and retribution (*S v RO and another 2010 (2) SACR 248 (SCA) para 20*). Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role (*S v Swart 2004 (2) SACR 370 (SCA) para 12*). I find that the accused has very slim chances of rehabilitation, if any.
- [16] In my view the appropriate sentences that fit the accused as well as crimes, fair to him, the victims and society are those that follow.

Order

[17] The following sentences are ordered:

1. COUNT 1: 15 years direct imprisonment.
2. COUNT 2: 15 years direct imprisonment
3. COUNT 3: 15 years direct imprisonment.
4. COUNT 4: 15 years direct imprisonment.

5. COUNT 5: 15 years direct imprisonment.
6. COUNT 6: 15 years direct imprisonment.
7. COUNT 7: 15 years direct imprisonment.
8. COUNT 8: A fine of R800 or 4 months direct imprisonment.
9. COUNT 9: life imprisonment
10. COUNT 10: 5 years direct imprisonment.
11. COUNT 11: 7 years direct imprisonment.
12. COUNT 12: life imprisonment.
13. COUNT 13: 15 years direct imprisonment.
14. COUNT 14: 5 years direct imprisonment.
15. The sentences imposed on counts 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 13 and 14 will run concurrently with the sentence imposed on count 9.
16. In terms of section 103 of the Firearms Act the accused is declared unfit to possess a firearm.



MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division, Johannesburg

Date of delivery: 11 August 2023

Appearances:

On behalf of the State:	Adv S Khumalo
Instructed by:	National Prosecuting Authority
On behalf of Accused:	Ms S Bovu
Instructed by:	Legal Aid South Africa