

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, NORTH EASTERN CIRCUIT**

Case no: **CCD09/2024**

In the matter between:

**THE STATE**

and

**SIFISO NKOSINATHI DLAMINI**

**ACCUSED**

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**JUDGMENT**

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**MOSSOP J:**

[1] It is common cause that Ms Nothando Shelembe (Ms Shelembe) was involved in a love relationship with the accused. After a year, she broke the relationship off but, according to Ms Shelembe, the accused would not accept that fact. She acquired a new boyfriend with some rapidity after terminating her relationship with the accused and a week after that new relationship commenced, on 22 September 2023, the state alleges that the accused stabbed Ms Shelembe's new boyfriend, Mr Phakamani Sanele Shabalala (the deceased), to death in front of her early in the morning of that day.

[2] The accused consequently stands charged with a single count of murder, to which he pleaded not guilty. It is alleged by the state that the murder was premeditated and thus the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act), read with part 1 of schedule 2 to that Act, are applicable. The accused's legal representative, Mr Mkhwanazi (Mr Mkhwanazi), tendered no written plea explanation on his behalf when the accused pleaded but stated orally from the bar that the accused's defence would be that of self-defence.

[3] The accused indicated, initially, that he would make certain admissions and set out those admissions in a document that he signed (the admissions document) and which was subsequently read out in open court. However, immediately after it was read out, the accused indicated that he declined to admit that the deceased was known as 'Phakamani Sanele Shabalala', saying that he knew him as 'Dlamini', not 'Shabalala'. It was recorded therefore that he did not admit the name of the deceased and paragraph one, in which that admission was contained, was struck from the admissions document. This was a momentary state of affairs, for the deceased's identity was quickly resolved, apparently to the accused's satisfaction.

[4] The accused was prepared, however, to make other admissions mentioned in the admissions document, namely that the deceased was stabbed on 22 September 2023, and died as a consequence, the cause of his death being 'stab wounds – chest and abdomen'. He admitted that no further injuries were occasioned to the body of the deceased between the moment of his death and the post-mortem examination carried out on his body by Dr F A van Niekerk (Dr van Niekerk) on 26 September 2023. He also accepted the post-mortem report prepared by Dr van Niekerk, which identified two stab wounds to the deceased's chest and one to his right lower abdominal area, and he did not dispute the contents of a photographic album that had been prepared depicting the scene of the crime and the deceased's body.

[5] The accused's apparent uncertainty over the identity of the deceased was the first issue addressed by the state and was conclusively resolved by the evidence of Ms Thembani Shabalala, the deceased's aunt (Ms Shabalala). Ms Shabalala saw the deceased's body at the scene where he died and again immediately before he was buried a few days later. She also observed the photographic album in court as well, in which photographs of a body are depicted. She confirmed that the body that she saw in all three instances, was that of the deceased. She explained that the deceased had used both his mother's surname, 'Shabalala', and his father's surname, 'Dlamini', which explained the accused's confusion over his identity. Ms Shabalala's evidence was not challenged by Mr Mkhwanazi and the deceased is thus the person with the name alleged in the indictment.

[6] To fully explain what occurred it is necessary to commence with the evidence of Ms Mbali Gumbi (Ms Gumbi). She was not the second witness called by the state, but the third. It seems to me that her evidence sets the basis for what later followed and should first be considered. Ms Gumbi worked at a Total petrol station in Empangeni (the petrol station) at which the deceased and Ms Shelembe also worked. She knew both of them. On the morning of 19 September 2023, her night shift at the petrol station came to an end and she knocked off at about 06h30 and went home. At around 08h00 or 09h00 that morning, someone knocked at her front door and when she opened it, she was told by the person who had knocked that there was another person outside looking for her. She went out and saw the accused.

[7] The accused said to her: 'Hey, I have found you'. She asked him how he had done this, as no-one knew where she lived as she had only been working at the petrol station for a short while.<sup>1</sup> He said that he 'had his ways'. He said that he was actually searching for the deceased. She asked why, and he said that he had a 'surprise' for him, but that he did not know where he stayed. Ms Gumbi said that she also did not know where he stayed and added that he did not stay with her. The accused asked her to telephone the deceased and ask him where he lived but not to let on to him that he was with her. Ms Gumbi agreed to do so. She contacted the deceased on her cellular telephone, and he informed her that he stayed opposite the KwaThabeni church. She ended the call and told the accused what she had been informed by the deceased. He thanked her and said that she had helped him a lot and then left.

[8] Mr Mkhwanazi cross examined Ms Gumbi and put it to her that the accused denied that he had gone to her home or that she had told him where the deceased resided. This was soundly rejected by Ms Gumbi. She said that there was ample evidence that would confirm that what she had said was the truth: the person who knocked on her door to tell her that the accused was looking for her could be called to verify her version; when she had gone to work that evening, she had repeated to

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<sup>1</sup> She had commenced working at the petrol station in June 2023.

her colleagues what had transpired earlier that morning and those persons could also be called to testify as to what she had told them; and, finally, she indicated that her cellular telephone could be examined to prove that she had called the deceased.

[9] Ms Shelembe, as may be expected, was the principal witness for the state. She testified that on 15 September 2023, being four days before the incident described by Ms Gumbi in her evidence, she had terminated her love relationship with the accused. She had telephoned him to tell him of her decision and had advised him that she was going to continue with her own life. The accused had said:

‘That will never happen.’

According to Ms Shelembe, the accused apparently would not accept her decision to call time on their relationship. True to her word that she was intent on continuing with her own life, she immediately commenced a new relationship with the deceased.

[10] Ms Shelembe testified that on the evening of 21 September 2023 she had spent the night at the deceased’s home. Early the next morning, 22 September 2023, they had left his home together at approximately 05h25 on their way to their common place of employment at the petrol station. They had scarcely walked 10 metres from his home, when the accused suddenly appeared in front of them, walking towards them holding an open Okapi knife. She stated that the deceased was unarmed. Without uttering a single word, the accused came up to them and pushed the deceased with both of his hands on his upper chest. Ms Shelembe said she was so close to what then happened that she could have touched the accused. The accused then stabbed the deceased in the chest. The deceased did not fight back or resist the attack of the accused but fell to the ground. The accused then stabbed him for a second time as he lay on the ground.

[11] At that point, Ms Shelembe fled to try and summon help, dropping her handbag as she did so. She ran to a house next to the KwaThabeni church but could not get anyone there to help her. She explained that she was screaming and banging on the doors and windows of the house, desperately wanting help, but no one came to her assistance. As she was leaving that house, the accused appeared

again, still holding the knife, now bloodied, and her handbag, both of which he held in his blood stained hands. Ms Shelembe cried out and the accused grabbed her hand and said that they should run away together, pointing to a truck parked about 20 metres away.

[12] Just then a minibus taxi drew up. The driver observed what was happening and quickly resolved to intervene. He and his single male passenger alighted, and the accused took fright and fled with Ms Shelembe's handbag still in his possession. In that handbag was her cellular telephone and her bank cards. The taxi driver declined to load the deceased into his taxi but took Ms Shelembe to the Ngwelezane police station. At the police station, Ms Shelembe told a member of the South African Police Services (the SAPS) what had just happened and indicated that she could identify who had committed the murder because she knew him. She asked for an ambulance to be sent to the scene.

[13] When she later returned to the scene, the deceased had already passed away, but his covered body was still lying there. She identified who he was to the SAPS members in attendance and went with a policeman to the deceased's nearby home to locate his identity document. She found it there and the SAPS took possession of it.

[14] Ms Shelembe stated that the accused was originally from the Jozini area but, for work purposes, he resided at uMhlathuze. She agreed that the uMhlathuze area was approximately 25 kilometres from the place where the deceased was struck down. She also stated that she did not think that the accused knew that she had a new boyfriend.

[15] In his cross examination, Mr Mkhwanazi proposed to Ms Shelembe that the accused did not have a knife and asserted that the person who did have a knife was the deceased. This was categorically rejected by Ms Shelembe. She indicated that she believed that the deceased had seen that the accused was armed with a knife, but she could not testify that he had definitely done so because only he would know what he had seen. With regards to the truck that the accused had demanded that

she get into, she stated that it was parked on a gravel road and not on the main road and that it appeared to have been hidden as it was not easily observable.

[16] Mr Mkhwanazi put it to Ms Shelembe that the accused would testify that he had been driving along the main road when he observed her and had stopped his truck. Ms Shelembe rejected this proposition, saying that she had barely walked ten metres from the deceased's home before the accused, already on foot, accosted them. Mr Mkhwanazi indicated that the accused's version would be that he had approached her to retrieve his keys from her. This was denied by the witness who said the accused did not utter a word before stabbing the deceased. Then, so the version continued, the deceased had attacked the accused. The deceased was stronger than the accused and drew a knife. The accused, during a struggle that then eventuated, managed to pry the knife away from the deceased and stabbed him. Having seen off the threat from the deceased, the accused had followed Ms Shelembe, still intent on retrieving his keys. The court asked the witness if she knew what keys were being referred to and she indicated that she did not. It was explained to her by Mr Mkhwanazi that these were the keys to the accused's front gate and his house. Ms Shelembe denied having any keys that belonged to the accused. The accused's version was completed by Mr Mkhwanazi informing the witness that the accused became scared and took the truck to its owner's place at KwaMduku, where he was then arrested. Ms Shelembe stated that she did not know what the accused did, but when she and the SAPS went to his place of employment, he was not there.

[17] Mr Mkhwanazi said that the accused regretted what had happened as he did not intend to stab the deceased. Ms Shelembe scotched this suggestion, saying that it was his intention because he had approached them with the knife already drawn.

She said:

'He was ready for a fight'.

[18] It then emerged that the accused's version would be that he did not know that Ms Shelembe had broken up with him. She had never told him of this. Ms Shelembe said that if this was the accused's version, he was lying: she had telephoned him to

specifically tell him that their relationship was at an end. It was on the date of that telephone call, 15 September 2023, that she had last had a conversation with the accused. Mr Mkhwanazi put it to her that she had, in fact, spoken to the accused on 21 September 2023, an allegation that she denied, saying that she was at work on that date. It appeared that the accused agreed with this, but it was then put that he had met her after work in Empangeni where he had purchased cultural clothing for her young son. This was denied by Ms Shelembe.

[19] Finally, in response to a question from the court, Ms Shelembe indicated that her home was approximately a one hour walk from the deceased's home. Their homes were located in two quite distinctly separate areas.

[20] On the morning of 22 September 2023, at about 05h40, constable Bayanda Mthiyane was driving to his place of work at the Empangeni Public Order Policing Unit. It was part of his duties to pick up other members of the SAPS in his area who also worked there. However, while alone in the vehicle, he noticed oncoming motor vehicles flicking their lights at him, the drivers thereof pointing to something lying on the right-hand side of the road as viewed from Cst Mthiyane's perspective. He stopped his vehicle and got out and approached what turned out to be a male person's body. The body was clad, inter alia, in a white T-shirt that was blood stained. He noticed stab wounds to the body. He telephoned Empangeni SAPS and requested assistance and an ambulance. Upon the arrival of the ambulance, the person lying there on the side of the road was declared dead and Cst Mthiyane surrendered the scene to the members of the SAPS who arrived from Empangeni. Cst Mthiyane was shown photographs in the photograph album and confirmed that the body depicted in those photographs was the body that he observed on that morning. He was not cross examined by Mr Mkhwanazi.

[21] On the same day as the death of the deceased, 22 September 2023, Captain Steven Mandla Nkabinde was on duty as the acting branch commander at SAPS Hluhluwe. He had been informed of the murder of the deceased and he had personally verified that information by contacting a Lt Col Mthethwa of the Empangeni detective unit. He then received information that the accused was driving in the direction of Hluhluwe. Later that day, the accused was brought to him in

handcuffs by some security guards. Capt Nkabinde informed the accused of his rights and he subsequently handed over the accused to a SAPS officer sent to fetch him from the Empangeni police station.

[22] That was all the evidence led by the state.

[23] The accused elected to testify in his defence. He stated that on the morning of 22 September 2023 at about 05h30 he was on his way to work to uplift a load of river sand from uMhlathuze. As he drove along the road, he came across Ms Shelembe, walking. He was not immediately able to discern whether she was walking alone or with the deceased because there was a distance between them. He parked his truck on the side of the road, rolled down the window of the driver's door and asked Ms Shelembe if she would give him his keys as his landlord was fighting with him over the keys. She said that he should come and fetch them from her, so he alighted from his truck and walked towards her but as he got closer to her, she moved behind the deceased. The deceased then began assaulting him and a scuffle ensued. The accused fought back, and they struggled over a knife. The accused managed to dispossess the deceased of the knife and stabbed him with it. Notwithstanding that he had been stabbed, the deceased continued to fight with the accused and the accused thus stabbed him a second time. The accused then left the deceased at that spot with the deceased still alive, on his feet, but bent forward with his hands on his knees, and went to his truck.

[24] As he was about to get into his truck, the accused saw Ms Shelembe at the gate of a nearby house and went to her to ask for his keys again. She said the keys were in her handbag. The accused testified that she had thrown her handbag in front of his truck when she had run away. He retrieved the handbag and opened it but did not find his keys. At that stage, a taxi arrived, and Ms Shelembe was taken away by it. He went back to his truck and drove off with the handbag and then took the truck to its owner at Hluhluwe.

[25] The accused denied that he had ever been to Miss Gumbi's house, saying that he did not know where she stayed. While he said that he knew her by sight, he stated that he had never had a conversation with her. He also testified that it had not

been his plan to kill the deceased and he sincerely apologised for the fact that 'a person had been injured'.

[26] Mr Ngubane, for the state, then cross examined the accused. He commenced by identifying a series of facts testified to by the accused in his evidence in chief that had never been put to Ms Shelembe: that he could not tell whether she had been walking with the deceased because there was a gap between them, that she had said that his keys were in her handbag, that she had apparently thrown her handbag away, that what was in her handbag was a broken cellular telephone and the like. The general response of the accused to these propositions was that he had told his counsel of these facts.

[27] The accused conceded that when he saw Ms Shelembe and the deceased together that morning, he felt 'aggrieved'. Yet, when he was asked why he had not asked her what she was doing with another man, given his version that he did not know that their relationship was over, the accused said that he did not suspect her of doing anything. He also said that he was not suspicious of the fact that Ms Shelembe and the deceased were together so early in the morning.

[28] The accused confirmed that his defence was self-defence. When shown the photograph album, he ultimately conceded that the body of the deceased had three stab wounds, whereas he had only described stabbing him twice. Importantly, he agreed that he had stabbed the deceased when the deceased was not armed and when he posed no danger to himself. In making that admission, the accused testified that he must apologise, explaining that he acted as he did because of 'emotion'. He stated that he had made a 'mistake' in stabbing the deceased, but he denied that he had stabbed the deceased because of the latter's involvement with Ms Shelembe. He then explained that it was a combination of all these factors that had caused him to stab him, including the fact that he had been assaulted by the deceased and that the deceased was in a love relationship with Ms Shelembe. Mr Ngubane asked him why he had stabbed the deceased as he lay on the ground. The accused simply said that is where he made a mistake.

[29] The accused was asked whether he had told the investigating officer that he had acted in self-defence. He said that he had not. Asked why this had not occurred, his explanation was that he had never spent time with the investigating officer. When it was put to him that he had interacted with the investigating officer on the day of his arrest, the accused then said that he did tell him. Asked why he had not handed himself over to the SAPS at Empangeni because he had the defence of self-defence available to him, the accused irrelevantly explained that he feared 'the people' might torch his truck.

[30] The accused then mentioned that he knew the deceased had died even though he was still alive when he, the accused, left the scene. This he had ascertained, so he explained, when a certain Mr Mkhwanazi (not his defence counsel) had telephoned him. Asked how Mr Mkhwanazi would know to associate him with the death of the deceased, the accused immediately contradicted himself and said that, in fact, he had first telephoned Mr Mkhwanazi. Not only had he telephoned him, but he had also met Mr Mkhwanazi at a place called Bonvini. This was entirely new evidence that had never previously been mentioned. Asked why he did not go to the SAPS and explain that he had acted in self-defence, but went rather to Hluhluwe, the best the accused could come up with was that he was shocked.

[31] When he was asked by Mr Ngubane when he had given his keys to Ms Shelembe, the accused said that he could not remember, nor could he remember whether she had been given the original or a duplicate set of keys. It became clear that the accused's version was that he had given her the only set of keys that he had to his own accommodation so that she could access his accommodation on those occasions that she visited him there. On a practical day to day level, he would then require his landlord to lock and unlock his rented accommodation when he left and returned because he now no longer had any keys.

[32] The accused denied that he had been telephoned by Ms Shelembe on 15 September 2023 and thus he explained that he could not have asked her to return the keys during that alleged conversation. Asked if he had demanded the return of the keys prior to stabbing the deceased, he then said that he had and had even gone to Ms Shelembe's home to get them from her, but that she had not been there when

he called, and he had left a message with her mother to the effect that he wanted his keys back. This was also not put to Ms Shelembe.

[33] There then followed the most tortuous series of questions regarding the accused's desires, hopes and expectations concerning his relationship with Ms Shelembe. His answers were in large part entirely contradictory. Thus, in response to a proposition that he did not want to break up with Ms Shelembe, he said that it was a lie. When he was asked if he did want to break up with her, he said they had never had problems. He agreed that he wanted to be with her and initially said that he did not want to lose her to another man. He then said that it was not true that he did not want to lose her to another man. Then he again said he did not want to lose her but then denied that he did not want to lose her.

[34] As regards the evidence of Ms Gumbi, the accused stated that he had no issues with her and that there was no bad blood between them. He did not, however, agree with the proposition that she had no reason to lie about him coming to her house. He said that there might be a reason. That reason was that she was friends with Ms Shelembe. For this reason, she might tell lies about him. This was never put to either Ms Gumbi or Ms Shelembe.

[35] At the end of Mr Ngubane's cross examination, the court requested the accused to clarify certain parts of his evidence. The accused was asked whether the deceased would have heard him ask Ms Shelembe for his keys and would have heard her say to the accused that he should come to her and fetch them. He agreed that the deceased would have heard that. He was asked then why the deceased would start assaulting him when he approached them as the deceased would have known he posed no threat but was responding to Ms Shelembe's request. He had no answer for this. As to the assault that he allegedly suffered at the hands of the deceased, the accused revealed for the first time that he had been struck on his left eye and left ear by the deceased. After that happened, he and the deceased grabbed each other and the knife, allegedly possessed by the deceased, fell to the ground, not from his hand, but from the deceased's trousers. The accused's jacket was torn in the ensuing fracas, and he stepped back. The deceased then slipped and fell to the ground. The accused grabbed the knife now lying on the ground and

stabbed the deceased while he was also on the ground. The accused immediately varied this and said that he had stabbed the deceased when he was between standing up and lying on the ground. The deceased stood up and came towards the accused, notwithstanding that he had just been stabbed, and grabbed him. He then stabbed the deceased again. He did not take notice of how many times he stabbed the deceased or which parts of his body suffered the stab wounds. He was asked to clarify why he had not simply left once he had secured possession of the knife. His answer to this was that he apologised, but he had reacted as he did out of 'emotion'. Asked what that emotion was, he said that he was extremely angry that the deceased had assaulted him. He stated that he was not emotional about the deceased being with his girlfriend. The latter statement contradicted his earlier statement that he had acted as he did by virtue of a number of factors, including the fact that he had been assaulted by the deceased and that the deceased was in a love relationship with Ms Shelembe.

[36] The accused had no witnesses to call and closed his case.

[37] The state's case is simple: it is the timeless example of a spurned lover exacting his revenge on his successor. The accused was the spurned lover of Ms Shelembe and planned to exact revenge upon the successor to her affections. He planned his attack on the deceased and sought out his address and then struck early one morning when the deceased and Ms Shelembe were on foot on their way to work. The accused was the aggressor and struck the deceased down mercilessly and without compunction by stabbing him three times with a knife that he, the accused, had brought to the scene. He then left the scene and left the deceased to die. The accused, on the other hand, also presents a simple explanation for what occurred on 22 September 2023. He asserts that whilst posing no threat to the deceased, he was unlawfully set upon by him and acted in self-defence in warding off the deceased's attack. He accepts that his actions killed the deceased, but asserts that his actions were lawful in the circumstances.

[38] Throughout the trial, the basis of the accused's defence has been referred to as 'self-defence'. A more correct classification of his defence is that of private

defence.<sup>2</sup> The requirements for private defence are well-settled. The attack upon the person acting in private defence must be unlawful, must be directed at an interest which legally deserves to be protected and must be imminent but not yet completed.<sup>3</sup> As regards the defence, it must be directed at the attacker, it must be necessary in order to protect the interest threatened, there must be a reasonable relationship between the attack and the defensive act, and the person attacked must be aware of the fact that he is acting in private defence.<sup>4</sup>

[39] The test for assessing private defence is an objective one and is to be considered as against the conduct of a reasonable person.<sup>5</sup> The question whether an accused person claiming to have acted in private defence can successfully maintain that defence, is determined by objectively examining the nature of the attack and defence to determine whether they conform with the principles of law just mentioned. In doing so, each aspect and requirement of the attack and the defence must be judged from an external perspective rather than in terms of the accused's perceptions and his assessment of the position at the time that he resorted to private defence. Whether an attack is to be regarded as imminent is decided by the court's assessment of the evidence of the circumstances of the attack and not according to the accused's belief that he was in imminent danger of being attacked. However, as was said in *S v Ntuli*:<sup>6</sup>

'In applying these formulations to the flesh-and-blood facts, the Court adopts a robust approach, not seeking to measure with nice intellectual callipers the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death.'

[40] In other words, the court must guard against becoming an arm-chair critic. In *R v Patel*,<sup>7</sup> Holmes AJA re-affirmed that the court should recognise that decisions in the real world are often made in split seconds:

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<sup>2</sup> *Ehrke v S* [2012] ZAGPPHC 189 para 12.

<sup>3</sup> *SV Hoor Snyman's Criminal Law* 7 ed (2020) at 86-88.

<sup>4</sup> *SV Hoor Snyman's Criminal Law* 7 ed (2020) at 88-94; *Botha v S* [2018] ZASCA 149; [2019] 1 All SA 42 (SCA); 2019 (1) SACR 127 (SCA) para 10.

<sup>5</sup> *S v Ntuli* 1975 (1) SA 429 (A) at 436E; *Mugwena and another v Minister of Safety and Security* 2006 (4) SA 150 (SCA) at 157J-158D.

<sup>6</sup> *S v Ntuli* supra at 437.

<sup>7</sup> *R v Patel* 1959 (3) SA 121 (A).

“Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pro and cons. Allowance must be made for the circumstance of their position.”<sup>8</sup>

[41] In *S v De Oliveira*,<sup>9</sup> the Supreme Court of Appeal observed that where the defence of self-defence has been specifically pleaded by the accused or becomes obvious from the evidence that has been led in a matter, the onus remains on the state to prove beyond reasonable doubt that the accused acted unlawfully and that he realised, or ought reasonably to have realized, that he was exceeding the bounds of self-defence. Where, in the performance of that exercise, it is found that it is reasonably possible that the accused might be innocent, he is entitled to be acquitted.<sup>10</sup>

[42] There are fundamental differences between the two versions presented regarding the death of the deceased. On the state version, the accused was the aggressor, whereas on the defence version the deceased was the aggressor. The evidence must therefore be carefully assessed to determine this factual dispute.

[43] In assessing the state’s case, the first point to acknowledge is that both the evidence of Ms Gumbi and the evidence of Ms Shelembe is the evidence of single witnesses. Neither of them testified about events at which the other was present. Their evidence covered different days and did not overlap but described discrete and separate incidents. The evidence of these two witnesses constitutes the critical core of the state’s case and must accordingly be approached with caution given that they are single witnesses.

[44] In argument, Mr Ngubane for the state drew attention to s 208 of the Criminal Procedure Act 51 of 1977 (the CPA). It reads as follows:

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<sup>8</sup> Holmes AJA quoting from *Union Government (Minister of Railways & Harbours) v Buur* 1914 AD 273 at 286.

<sup>9</sup> *S v De Oliveira* 1993 (2) SACR 59 (A) at 63H-64A.

<sup>10</sup> *R v Difford* 1937 AD 370 at 373 and 383.

‘An accused may be convicted of any offence on the single evidence of any competent witness.’

In *S v Mahlangu and another*,<sup>11</sup> the Supreme Court of Appeal, with reference to that section of the CPA, restated the approach to the evidence of a single witness as follows:

‘The court can base its finding on the evidence of a single witness as long as such evidence is substantially satisfactory in every material respect or if there is corroboration. The said corroboration need not necessarily link the accused to the crime’.

[45] Ms Shelembe was a confidant witness who expressed herself clearly and logically. She had a good recall of events and was very certain in her rejection of the accused’s version of events. She was cross examined by Mr Mkhwanazi but adhered totally to her version and would not be persuaded to depart from it. She created a good impression. While her evidence does not account for the three wounds suffered by the deceased, that is explained by the fact that she fled after the deceased had been stabbed for a second time and therefore did not witness the third stabbing. The post-mortem report confirms her first observation that the deceased suffered a stab wound to the chest.

[46] Ms Shelembe testified that she did not believe that the accused knew that she had commenced a relationship with the deceased. That may have been her view. But it does seem that this is one part of her evidence where she was not correct. The ‘surprise’ in respect of which Ms Gumbi testified demonstrates that the accused had such knowledge. Even the accused, when explaining that he had acted because of ‘emotions’, at least initially stated that he was upset that the deceased had commenced a relationship with her. The accused thus knew about the relationship and her view must be regarded as being incorrect.

[47] Ms Gumbi also created a favourable impression when she testified. She came across as an intelligent young lady who had no axe to grind with the accused, a fact

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<sup>11</sup> *S v Mahlangu and another* 2011 (2) SACR (SCA) 164.

that the accused himself conceded. The accused's suggestion that she was favouring the version of Ms Shelembe has no merit. Her evidence, in fact, did no such thing. She did not testify that the accused had stabbed the deceased. Ms Shelembe also did not testify that the accused had gone to Ms Gumbi's home before killing the deceased. Both women simply testified to the facts that they knew and did not stray into testifying about matters outside their direct knowledge. Ms Shelembe, in particular would not be enticed into any form of speculation: she declined an invitation to speculate on whether the accused had seen the knife that she said the accused carried nor would she speculate on what the accused had done after he had fled from the scene of the fatal stabbing.

[48] The suggestion by the accused that Ms Gumbi would be prepared to perjure herself because she was friendly with Ms Shelembe was made by him when he was under cross examination. It was, however, not a proposition that was put to either Ms Gumbi or Ms Shelembe. It appears unlikely to me that this has occurred after seeing and hearing both witnesses. It cannot be denied that the two ladies must have known each other as they worked together at the same petrol station. But it was unchallenged that Ms Gumbi had only worked there for a short time, a few months in total, before the deceased was killed. It was thus not a friendship of long standing and it is improbable that such a nascent friendship would be sufficient to entice Ms Gumbi to commit perjury. Furthermore, if Ms Gumbi's evidence was part of a conspiracy to falsely implicate the accused, it had to have been conceived of both immediately and speculatively. Immediately, because Ms Gumbi testified that when she went to work later that day for her night shift, she told her colleagues there of what had occurred earlier that morning. And speculatively, because no one could possibly have known that three days after the events testified to by Ms Gumbi, the accused would find the deceased and Ms Shelembe together on the road and that he would then kill the deceased. Finally, the proposition presupposes that at least Ms Gumbi had some knowledge of the contents of the Act and knew that there is a difference between a murder and a premeditated murder. There was no evidence that she had any such knowledge.

[49] I found the evidence of these two witnesses to be satisfactory in all material respects.

[50] On the other hand, the accused was an appalling witness. In the short span of time between his version being put to state witnesses and he himself entering the witness box, his version regarding the events on 22 September 2023 changed remarkably. In the end, most of his version was never put to the witnesses who could reasonably be supposed to have had an interest in being told what his version was. Thus, the accused's version that he was still in the cab of his truck when he addressed Ms Shelembe was not a version put to her. Neither was the fact that he allegedly spoke to her within earshot of the deceased and asked her about his house keys. Ms Shelembe's version was that he was not in the truck but on foot when she first saw him and that he never uttered a word to anyone.

[51] Critically, the alleged struggle between the deceased and the accused had two iterations. The first was that the deceased drew a knife and during a struggle that then eventuated, the accused managed to pry the knife away from him and stabbed him. That version changed when the accused himself testified. Now, the knife had not been produced by the deceased at all nor had there been a struggle to pry it from his grasp. Instead, the knife fell to the ground from his trousers. Thus, it had never been produced at all by the deceased, let alone used by him against the accused.

[52] The most remarkable aspect about the version testified to by the accused regarding the stabbing of the deceased, given his defence of private defence, is that not once did the accused state that he held the view that his life was under threat. He never described any physical attack more serious than a blow to his left ear and his left eye.

[53] The accused appeared to make his evidence up as he went along. He initially adhered to the version that the deceased was still alive when he, the accused, left the scene. Later he stated that he knew the deceased had died. Asked how he knew this he conjured up the telephone call that he received from Mr Mkhwanazi, already discussed previously in this judgment. That evidence was far from convincing, and created the impression that it had been offered up to extricate the accused from a difficulty of his own making.

[54] Rather than offer convincing facts that would support his version, the accused preferred to apologise for his conduct. An apology is not usually an exculpatory way of explaining something. Despite the magnitude of what he was accused of, at one stage the accused expressed his sorrow that someone had been injured. Of course, that is not the reason that he stands trial. He is not charged with injuring the deceased: he is charged with killing him.

[55] The accused appeared to advance the version that he came upon Ms Shelembe and the deceased by chance on the day that the deceased died. He had an interest in advancing this version because if it was accepted it might dispel any possibility that he intentionally set out to kill the deceased on that day. He may have taken strength in advancing this version from the wording of the summary of substantial facts put up with the indictment by the state. That summary makes a similar allegation, when it states that the accused 'coincidentally' met the deceased on the morning that he killed him. The wording employed by the state in the indictment is unfortunate for at the same time it is also alleged therein that prior to killing the deceased the accused had gone to the home of Ms Gumbi to learn of the address of the deceased. Why the state should hold the view that the death of the deceased was not intended to occur on 22 September 2023 is not clear to me. In the view that I take of the matter, there is no evidence of any 'coincidence'. Prior to acting, the accused took steps to find out where the deceased lived. Three days later, at an early morning hour he was at that very address which was a long way from where he, the accused, resided. He was thus in the place he wanted to be at the time that he planned to be there. Nor can there be any room for coincidence in the version of Ms Shelembe: on that version, the accused was already out of his truck and in the road that she and the deceased stepped into as they left the deceased's home. That can only have occurred if the accused was waiting for them to emerge. Finally, even on the accused's own version there is no room for coincidence. It is common cause that he resides in uMhlathuze. He testified that he was required to upload river sand that morning at uMhlathuze. Why was he then some 25 kilometres from uMhlathuze at that very early morning hour? He could only have been there by design. Chance had nothing to do with him encountering the deceased and Ms Shelembe.

[56] The accused was an unsatisfactory witness whose version cannot be relied upon or accepted. Where it diverges from the evidence of Ms Gumbi and Ms Shelembe, it is rejected. The specific defence raised by the accused of private defence accordingly cannot be sustained. It fails at the first hurdle. The accused was not the person that was attacked: he was the attacker. Private defence cannot be raised where the person pleading it was the initial aggressor for it is in its essence a defence to an attack initiated by the true aggressor.

[57] As to the killing of the deceased being premeditated, the evidence of Ms Gumbi is an important component in the state's case against the accused. It shows that three days before he acted, he was planning on delivering a 'surprise' to the deceased. In other words, he had already conceived of a plan to do something about the deceased's involvement with his former paramour. Mr Ngubane drew my attention in argument to *S v Raath*.<sup>12</sup> In that matter Bozalek J considered what a premeditated murder is:

'The Concise Oxford English Dictionary, 10th edition, revised, gives the meaning of premeditated as to "think out or plan beforehand" whilst "to plan" is given as meaning "to decide on, arrange in advance, make preparations for an anticipated event or time". Clearly the concept suggests a deliberate weighing up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may have been conceived and planned over months or even years before its execution. In my view only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is "planned or premeditated". In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was "planned or premeditated".'

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<sup>12</sup> *S v Raath* 2009 (2) SACR 46 (C) para 16.

[58] I have considered all the evidence and weighed it up. I am ineluctably driven to conclude on the strength of the evidence of Ms Gumbi that the killing of the deceased by the accused was premeditated.

[59] In the circumstances, the accused is found guilty as charged.

**MOSSOP J**

### **APPEARANCES**

|                               |   |                                                     |
|-------------------------------|---|-----------------------------------------------------|
| Counsel for the state         | : | Mr C Ngubane                                        |
| Instructed by:                | : | Director of Public Prosecutions<br>Pietermaritzburg |
| Counsel for the three accused | : | Mr D Mkhwanazi                                      |
| Instructed by                 | : | Legal Aid South Africa<br>Empangeni                 |
| Date of trial                 | : | 18, 19, 20, 25 March 2024                           |
| Date of judgment              | : | 26 March 2024                                       |