

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

Case number: CC49/2023

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

DATE: 02/04/2024

In the matter between:

STATE

VERSUS

M[...] M[...]

ACCUSED

JUDGEMENT – SENTENCE

MLOTSHWA AJ

1. The accused is 46 years old, having been born on 2 February 1978. He was a 4th born child of his parents who are both deceased.
2. He was married to the deceased, and they have two minor daughters, O[...] 14 years old and A[...] who is 13 years old. The two children are presently in the care of their maternal grandmother.
3. At the time of his arrest the accused was self-employed. He was the owner of a driving school and a Building Construction Company. According to him he employed 12 people in these two businesses.

4. The accused has two previous convictions of reckless driving for which he was convicted in 2010 and 2020 and was sentenced to a pay a fine of R1 500 and R500 respectively.
5. The accused has been in custody for just over a year since he was arrested on the day of the incident.
6. The accused pleaded guilty to murder of the deceased read with the provisions of section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 (the Act) in that he killed the deceased, his wife, by shooting her to death on 16 January 2023 inside the premises of the Vanderbjlpark Police Station.
7. According to the provisions of section 51(1) of the Act the court is obliged to sentence the accused to life imprisonment unless it finds that there are substantial and compelling circumstances which would enable the court to deviate from the ordained sentence of life imprisonment.
8. According to Advocate Maluleke who is appearing for the accused the accused paid a sum of R32 500.00 to transport families from the Eastern Cape to attend the funeral of the deceased, though this fact is disputed by the deceased's mother according to Advocate Shivuri who is appearing for the State in this matter.
9. According to Advocate Maluleke, the accused is remorseful. He understands the pains that his children are going through.
10. According to Advocate Maluleke, the accused found out that the deceased was cheating with her boss. A meeting was held between the two families to try to sort out the problems between the parties. The deceased undertook to end her romantic relationship with her boss. The accused found out that the deceased did not stop her romantic relationship with her boss. And that all endeavours by the accused to solve the problem were all in vain.

11. The court requested that a pre-sentence report be compiled and presented to the court since the accused might be a primary caregiver as he and the deceased were parents of two minor girls. The report was compiled by Ms Shivambu, a social worker employed by the Department of Social Development. The report was handed to the court as evidence with the consent of both the State and the defence. I will draw generously from the contents of the report.
12. According to the pre-sentence report, the accused informed the social worker that the family went on holiday in December 2022 and came back to their marital home in Pretoria on 2nd January 2023. On 8th January 2023 the deceased went to visit her mother in Vanderbijlpark. A few days later, the deceased phoned the accused and told him that she was no longer going back to their marital home in Pretoria as they were fighting a lot. She further advised him that she will look for a school for the children in Vanderbijlpark. The accused informed Ms Shivambu that he told the deceased that she must bring back his children to Pretoria and if she does not do so he will come to fetch the children.
13. The accused informed the social worker that when the deceased did not return to their marital home, on the 16th January 2023, he decided to go to the Eastern Cape as his construction company was operating there. He however decided to drive pass Sandton where the deceased was employed. His intention was to assault his wife's manager as the manager had phoned him that there was nothing that the accused could do with his relationship with his wife, and that the accused could go to hell. He did not find the manager at the workplace.
14. The accused further informed Ms Shivambu that on his way to the Eastern Cape, he saw the deceased's car and he decided to follow her. When the deceased saw the accused, she drove to the police station, and he followed her into the police station premises. At the police station the accused went to where the victim had parked her motor vehicle. He stated that he got to her window and found her deleting messages from her cell phone. He became angry and took out his firearm and shot her 4 times.

15. According to the postmortem report, the deceased had multiple gunshot wounds to the body and head. The skull had multiple fractures and there was intracranial bleeding.
16. Advocate Shivuri handed to the court by consent of the defence a certified copy of an interim order that the deceased filed at the Emfuleni Magistrate Court at Vanderbijlpark.
17. In the supporting affidavit to the interim order, the deceased stated *inter alia* that she had separated with the accused, that she was then staying with her mother in Vanderbijlpark. The accused threatened her that he would go to the Eastern Cape to fetch his firearm. He will then come to her parents' house with the firearm and stay with them there by force. She stated that she feared the accused. She stated that she was afraid that the accused would hurt her as he had previously assaulted her badly and pointed a firearm at her threatening to kill her and the children. She further stated that the accused is aggressive and violent.
18. The deceased further stated in the affidavit that the accused told her that if the children were not returned to Pretoria, they would further their studies in their graves.
19. The above averments of the aggressiveness and violent behaviour/nature of the accused are supported by the parties' children. O[...] told Ms Shivambu amongst other things that they have been living in this toxic environment, her parents used to fight in their presence, her father has fulfilled his dream because he used to tell their mother in their presence that he would kill her. She is not surprised because her father used to say it daily that he would kill their mother and them. She further told Ms Shivambu that the accused is unpredictable and has mood swings. He would come home and become angry for no apparent reason, start shouting at them and threatens to kill them.
20. A[...] also related incidents to Ms Shivambu that her father one day came with his friends. He instructed one of his friends to take out a gun and kill all of them. The friend took out a gun and pointed it at them. He then forcefully took their mother into their bedroom and closed the door. The deceased was screaming begging him not to kill them and asking for forgiveness.

21. One of the accused's friends, Litha Ntongwana also confirmed to Ms Shivambu that the accused has anger issues and struggles to control his temper.
22. It is clear from the averments alluded to above that the accused and deceased marriage was besieged with problems and violence. It also appears that the accused had difficulties controlling his temper even in the presence of their children. This has unfortunately led the children to have a negative attitude to their father. One hopes that in time the accused and the children would be able to find each other.
23. The accused has been found guilty of a very serious offence. Murder is a very serious offence. It becomes more serious when it is committed by a partner against his/her other half. Gender based violence is very rife in South Africa to such an extent that the legislature has introduced a 16-day activism against gender-based violence.
24. This court in the short space of time that it is sitting in this circuit, more than 70 % of its roll are murders of partners/spouses committed against their other half.
25. In **S v Mudua**¹ an unreported judgement by Mathopo AJA, as he then was, he stated the following:
"Domestic violence has been a scourge in our society and should not be treated lightly but deplored and severely punished. Hardly a day passes without a report in the media of a woman, or a child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity."
26. The above remarks by Mathopo AJ as he was then, are very much apposite in the circumstances that the family of the accused found themselves in. They lived in constant fear of their lives as the accused constantly threatened to kill them. They were regularly reminded that the accused has a firearm that he can use against them. The accused instead of being a protector to the family became instead a monster the family

¹ 2010 JDR 0641 (SCA): (547/13) [2014] ZASCA 43

constantly feared. As the children told the social worker, they did not know what to expect from the accused whenever he entered the house.

27. The deceased did everything and anything that one can do to protect herself from the accused. She left him to stay with her mother kilometres away in Vanderbijlpark. She approached the court to apply for a protection order against the accused. When she saw the accused following her on the day she was killed she drove to a place she thought was the safest, a police station. All the above were in vain to prevent the accused from killing her.
28. Your action of killing the deceased at a police station is the utmost contempt of the law enforcement agencies of the country one can think of. Where else could the deceased have run to, to save her life other than to a police station?
29. You, yourself informed the social worker that you left your house and drove to the deceased's place of employment to assault her manager. You armed yourself with a firearm and drove to Sandton to assault your wife's manager. Luckily, he was not on duty. No one knows what would have happened to him if you, armed with a firearm, found him at his workplace.
30. When determining the appropriate sentence, the classic triad enunciated in **S v Zinn**² is to be taken into account. This court has to consider the gravity of the offence, the circumstances of the offender and the public interests.
31. In **State v Banda and Others**³ Friedman J explained that:

"The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a

² 1969 (2) SA 537(A)

³ 1991(2) SA 352 (B) at 355A-C

judicial incantation, the mere stating whereof satisfies the requirement. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concerns.”

31 In **S v Rabie**⁴, Corbett JA put it as follows;

“A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive for severity, nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contribute to criminality.”

32 As aforesaid the accused is the father of two minor children aged 13 and 14 years old. It is therefore imperative to this court in the light of section 28 of the Constitution and other relevant statutory provisions to take into account when sentencing the accused that he is a father of the two minor children whose mother has unfortunately died at the hands of their father, the accused.

33 Section 28 (2) of the Constitution provides that “(a) child’s best interests are of paramount importance in every matter concerning the child”.

34 In **S v M**⁵ it was held that:

“Indeed, it is the very sweeping character of the provision that has led to be asked about its normative efficacy. For example, in Jooste, Van Dijkhorst J stated:

⁴ 1975 (4) SA 855 AD at 862D-F

⁵ 2008 (3) SA 232(CC)

‘The wide formulation of section 28(2) is ostensibly so all-embracing that the interests of the child would override all other legitimate interests of parents, siblings, and third parties. It would prevent conscription or imprisonment or transfer or dismissal by the employer of the parent where that is not in the child’s interest. That clearly could not have been intended. In my view, this provision is intended as a general guideline and not a rule of law of horizontal application. That is left to the positive law and any amendments it may undergo.’

- 35 Section 28 of the Constitution like all other rights conferred by the Constitution is subject to the limitation clause contained in section 36 of the Constitution as the Constitutional Court found in **Sonderup v Tondelli and Another**⁶ that the international obligation to return a child to the country of his or her residence for determination of custody would constitute a justifiable limitation under section 36 of section 28 rights. It was found that this limitation on section 28(2) was counterbalanced by the duty of courts to weigh the consequences of the court’s decision on children”. See **S v Mphahlele**⁷ and **S v Howells**⁸.
- 36 Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.
- 37 The question to be asked in this case is whether the accused is a primary caregiver to the minor children. In **S v M**⁹, a primary caregiver was described as “the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly”. Of course, as the court found “as in all matters concerning children, everything will depend on the facts of the particular case in which the issue might arise”.

⁶ 2001 (2) BCLR 152(CC)

⁷ [2023] ZAGP JHC 792 (14 July 2023)

⁸ 1999 (1) SACR 675 (C)

⁹ *supra*

- 38 According to the pre-sentence report the children are presently taken care of by their maternal grandmother. They have been with the grandmother for over a year now. And according to the report they are at school doing grades 7 and 8 respectively. Strictly speaking the accused is therefore presently not the primary caregiver of the children.
- 39 It is therefore clear that if the accused is sentenced to a custodial sentence, although it would be ideal for the children to be brought up by a parent, the impact on the children will be minimal as their status will not change and are presently being taken care of adequately. The children's best interests are therefore sufficiently taken care of. In any event as alluded to above, not surprisingly, the relationship between the children and the accused is strained. They have never visited the accused since the death of their mother. They have verbally informed the social worker of their disappointment of what the accused did.
- 40 As the Constitutional Court further found in **M**¹⁰ that the purpose of emphasizing the duty of the sentencing court to acknowledge the interests of the children is not to permit errant parents unreasonably to avoid appropriate punishment. Rather it is to protect innocent children as much as is possible in the circumstances from avoidable harm.
- 41 Further an appropriate order may be made that the Department of Welfare and Population Department be requested to see to it that the children are properly cared for during their father's imprisonment and are kept in touch with him.
- 42 The State on the other hand contended that the accused displayed no remorse. The post-murder behavior of the accused should also be taken into account when one assesses whether or not the accused is remorseful. In **S v Matyityi**¹¹ Ponnar JA stated the following regarding remorse:

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine

¹⁰ *supra*

¹¹ 2011 (1) SACR 40 SCA

remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from the appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look."

- 43 I agree with the State advocate that your pleading guilty to the murder charge is not a sign of remorse. The odds were stacked very much against you. The State had a formidable case against you. You killed the deceased with your own firearm in the premises of a police station, after having followed her into the premises of the police station. You were arrested there and then. As they say, "you were caught red-handed". You had no choice other than to plead guilty.
- 44 According to Ms Shivambu "the accused verbally mentioned that he is remorseful, however he did not take responsibility for his actions in the sense that he did not acknowledge that shooting his wife (was wrong) instead he blames his wife that he shot her because he found her deleting messages from her phone. He regrets for his actions that he took for shooting his wife and wish if it was possible to reverse the clock and do things better."
- 45 It is therefore clear that the accused is not genuinely remorseful but instead he is sorry that his actions created problems for himself. It is also not a mitigating factor that the accused paid thousands of Rands to transport people from the Eastern Cape to attend the deceased's funeral. It would have been better if he gave the money to the children's grandmother to help support the children.
- 46 As stated by the State advocate, you have no regard for other people's right and choices. Its either your way or the highway. From when you left your house with the firearm driving to Sandton to look for the deceased's manager and from Sandton to Vanderbijlpark, you had enough time to reflect and think of the consequences of your actions.

- 47 As aforesaid the applicable sentence for the murder is subject to the provisions of section 51(1) of Act 105 of 1997 (the Minimum Sentences Act). In this instance the minimum sentence is life imprisonment.
- 48 It is trite that where the minimum sentence is applicable, a court can only deviate therefrom if substantial and compelling circumstances are found to justify the imposition of a lesser sentence.
- 49 In **S v Malgas**¹² it was stated that when dealing with crimes falling under the regime of the Minimum Sentences Act, it is no longer “business as usual” and that minimum sentences should not be departed from lightly and for flimsy reasons which could not withstand scrutiny.
- 50 The deceased died a painful, brutal, violent, and sadistic death. The accused shot her at point blank. One shudders to think of the fear the deceased experienced when you approached her with a firearm and the agony when the bullets infiltrated her body so many times. The accused’s actions were callous, heartless, and cold. It is unimaginable that you did this to the mother of your children with whom you were married for so many years.
- 51 The accused has deprived the deceased’s minor children of a mother. The grandparent is left with the invidious task of bringing up these children with her meager pension and government child grant.
- 52 As aforesaid, the crime of murder is very prevalent. What makes this crime more despicable is that it was committed against an intimate life partner. Crime in South Africa is out of control. The society expects courts to pass sentences that should deter would-be criminals. The minimum sentences Act was passed more than 20 years ago, mainly to curb the spiraling of the offences mentioned in the Act, one of which is murder. The minimum sentences as contained in the Act seem to hardly deter criminals

¹² 2001 (1) SACR 469 (SCA)

for if this was the case then there would be a steady decline in the rate of murders and more especially murders committed against life partners.

- 53 It is trite that the minimum sentences are ordained to be the sentences that must ordinarily be imposed unless the court finds substantial and compelling circumstances which would justify a departure therefrom.
- 54 The court has to evaluate all the circumstances cumulatively including the mitigating and aggravating circumstances to decide whether substantial and compelling circumstances exist in the matter to justify a departure from the ordained sentence. The court must be alive to the fact the legislature has ordained a particular sentence for the offence the accused has been convicted.
- 55 The court has to balance the aggravating and mitigating factors in this matter. The court has further to consider that you are a father of two minor children. According to you, the deceased had an intimate relationship with her boss. You were a useful member of the society. You operated two businesses, a driving school, and a building construction company. For the purposes of sentence in this matter, the court will regard you as a first offender as the offences you were convicted of have no relevance to murder. You have been in custody for over a year awaiting the trial of this matter. It does not however follow that as a matter course that the sentence should be reduced with mathematical precision having regard to the time spent incarcerated awaiting trial. See **S v Ndziweni, Lawrence Zamile**¹³
- 56 It is a fact that you came to court and pleaded guilty and did not waste the court's time. But as indicated above you had no choice but to plead guilty. Unfortunately, the mitigating factors in this matter are far outweighed by the aggravating circumstances.
- 57 Due to the seriousness of the offence, you committed, although the court has to exercise a measure of mercy, **S v Rabie**¹⁴, it is required that the elements of retribution

¹³ [2018] ZAGPJHC117

¹⁴ *supra*

and deterrence should come to the fore, and that your rehabilitation should be accorded a smaller role. The Supreme Court of Appeal in **S v Mhlakaza and Another**¹⁵ also pointed out that, given the high level of violent and serious crimes in the country, when sentencing an accused person for such offences, emphasis should be on retribution and deterrence. It is therefore not wrong to conclude that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and victims of crime may be inclined to take the law into their own hands.

- 58 In affirming that retribution should carry more weight because of the seriousness of the crime which an accused person has been convicted of, when the court considers the aspects relating to the purpose of punishment, it was put in **S v Swart**¹⁶ as follows:

“In our law, retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each, according to the circumstances. 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”.

- 59 As aforesaid, the deceased was killed in a ruthless manner and showed that the accused has no regard for human life. It is very scary that a partner could be so heartless and coldblooded towards a woman with whom he has spent so many years with and is the mother of his two minor children. The sentence must surely show the indignation of the society about this type of crime.
- 60 The Constitution of our country provides that “everyone has a right to life”. It is therefore the duty of the courts to protect the citizens of the country and the society in general

¹⁵ 1997(1) SACR 515(SCA)

¹⁶ 2004(2) SACR 370(SCA)

from the scourge of these violent crimes, and to send a clear message that this behavior is unacceptable and will not be tolerated.

- 61 Society has a legitimate expectation that apprehensible criminal activities as displayed by the accused should not be left unpunished. The society demands and commands that serious crimes warrant serious sentences and expects that the courts send a clear and strong message that such acts of gruesome criminality will not be tolerated and will be dealt with effectively. See **S v Holder**¹⁷
- 62 It is hoped that you will use the time in custody to attend to the necessary programs offered by the Correctional Services fruitfully to attend to your anger management problems, to learn that life is not about you only, other people have rights too. Hopefully you will learn that bullying and controlling other people, especially a life partner is not ideal.
- 63 In your case, the court has to consider that, as aforesaid, you are a father of two young children. The court has therefore not to look at your personal circumstances only but also take into account the interests of your children, their mental and physical health, their safety, education, primary needs, care and protection.
- 64 As aforesaid, the minor children are being taken care of by the deceased's mother. Their financial needs may also be met in the form of the government's monthly child grant.
- 65 This court is mindful that a sentence must also be fair to the accused as well as to the community and be blended with a measure of mercy. This court has considered the best interest of the children. The court has considered the test to be applied by sentencing courts when sentencing a primary caregiver to a custodial sentence as set out in the **M**¹⁸ matter. I have applied my mind as to whether the minor children will be adequately cared for while the accused is incarcerated, and this court is satisfied that

¹⁷ 1979 (2) SA 70 (A)

¹⁸ *supra*

whilst they are cared for as alluded to above, the measures incorporated in the order of this court has catered for the children's wellbeing and their best interests are considered.

66 This court has also taken into account the other sentencing options like a fine, a suspended sentence, a correctional supervision sentence and is of the opinion that due to the heinous crime committed by the accused, all are unsuitable. As was stated in **S v Shaik**¹⁹ that:

"The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one-way street conferring an unlimited right to an accused to demand the most favourable possible treatment. A fair trial also requires-fairness to the public as represented by the State. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime".

67 Having considered all the circumstances of this case, and the question whether substantial and compelling circumstances exist which call for the imposition of a lesser sentence than the prescribed minimum sentence in terms of the Act, I am of the view that no substantial and compelling circumstances have been shown to entitle this court to deviate from the ordained sentence of life imprisonment. I hold the view that the minimum sentence in the circumstances of this case is not unjust and is not disproportionate to the crime committed by the accused.

68 In the circumstances the court makes the following order:

1. You are sentenced to life imprisonment.
2. You are declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000;

¹⁹ 2008 (1) SACR 1 (CC) para 43

3. The Registrar of this Court is requested immediately to approach the Department of Welfare and Population Development with a request:

3.1. That the Department of Welfare and Population Development investigate the circumstances of the accused's two minor children without delay and take all appropriate steps to ensure that;

3.1.1. The children are properly cared for in all respects during the accused's incarceration.

3.1.2. The children remain in contact with the accused during his period of incarceration and see him on a frequent basis, insofar as prison regulations may permit.

**MLOTSHWA J
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA**

APPEARANCES

STATE: Adv M Shivuri

The office of the Director of Public Prosecutions, Gauteng North

DEFENCE: Adv Maluleke

Private Counsel, briefed by Attorney Bongani Tshabalala