

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: A10/2021

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

SIMON KHUZELA TIYANE

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The appellant was arraigned in the regional court held at Mankweng on one count of murder read with the provisions of section 51(2) of the *Criminal Law Amendment Act*¹ (CLAA). The appellant was legally represented throughout the proceedings. He pleaded not guilty to the count he was facing and elected to remain silent. However, as the trial progressed, it came to light that his defence was that of self-defence. The appellant was found guilty of murder in circumstances that are found in Part 2 Schedule 2 of the CLAA, and was sentenced to 7 years' imprisonment. The appellant is appealing against conviction only, and the appeal is with the leave of the court *a quo*.
- [2] At the commencement of the trial in the court *a quo*, the appellant through his counsel admitted the chain evidence up to the time the post mortem report was conducted, and the said documents were handed in as evidence by consent between the appellant and respondent.
- [3] The respondent's first witness was Freedom Msiza. He testified that on 20th August 2016 they were from a drinking place. On arrival at the shack he was sharing with one Moses, he went to sleep. As he was sleeping, Moses came and woke him up and told him that there was a fight that had started outside, and was requesting him (witness) to intervene and separate them. The witness went out of the shack, and on arrival outside he saw the appellant carrying a bottle. The witness stood between the appellant and Walter (deceased). As the witness was trying to separate the appellant and the deceased, he saw the appellant stabbing the deceased with a bottle of hunters dry on his neck behind the ear and does not remember whether it was on the right or left side.

¹ 105 of 1997

[4] After the deceased was stabbed, the witness went back to his shack and told Moses that what was happening outside was beyond his powers, and that he was unable to separate them. The witness again went out of his shack and walked towards the gate. As the witness was about to walk out of the gate, he saw that the deceased had fallen and was leaning against a fence. The witness went to the deceased and found that he was bleeding or in a pool of blood. The appellant came to where the witness was with the deceased still carrying a broken bottle. The witness tried to call the deceased by his name, but the deceased was no longer talking. The witness then phoned his employer one Lawrence. They also phoned the paramedics and the police. On arrival, the paramedics certified the deceased dead on the scene.

[5] The witness was cross examined and he conceded that at the time of the incident it was at night and dark outside. He further stated that when he went out of his shack, he found 5 people outside who were the appellant, deceased, Vusi, Mpho and Rathleff. The witness further stated that the first thing that he saw when he went outside was the appellant and the deceased talking to each other, and the appellant was saying "yes somebody will die", whilst Vusi, Mpho and Rathleff were sitting around the fire inside the yard. According to the witness, after the appellant had uttered those words, a fight ensued between the appellant and the deceased. The witness tried to intervene and when he saw that the appellant was having a bottle and advancing towards him, he shifted to the side and that is when the appellant stabbed the deceased. After the deceased was stabbed, he started bleeding, ran out of the yard, and fell to the ground. The witness could not tell whether the deceased fell as a result of becoming weak or because he had knocked a fence.

- [6] The witness conceded that in his written statement to the police, he had stated that when he went outside, he found the deceased and appellant fighting, and the appellant was having a broken piece of bottle in his hand and he wanted to stab the witness with the bottle, and the witness ran inside the house and left them outside.
- [7] The respondent's second witness to testify was Johannes Mpho Masilela. He testified that on 21st August 2016 on arrival at the place that they were renting, they started cooking their food. He was in the company of Vusi. After they finished cooking, Rathleff arrived and wanted to join them in eating. They told Rathleff to go and wash his hands, and that is when the appellant who was asleep woke up. On waking up the appellant told Rathleff that these boys must not get used to him, and that he must just eat. The appellant then hit the deceased with an open hand, and the deceased picked up a brick and hit the appellant with it on his leg.
- [8] After been hit with a brick, the appellant went back into the shack he was sleeping in, took a windhoek drought bottle and broke it. The broken bottle went out of the appellant's hand and fell down. The appellant picked up another bottle of hunter's gold and broke it. After breaking the hunter's gold bottle, the appellant went behind the shack to where the deceased was. The witness followed the appellant and when he arrived at the place where the appellant was with the deceased, he noticed that both the appellant and the deceased were bleeding.
- [9] The witness ran to call their co-workers Vusi, Thabiso, James and Freedom. When the witness came back to where he had left the appellant and deceased, he saw the deceased moving around the house heading towards

the gate. As the deceased was about to reach the gate, the deceased fell next to the fence. That is when the appellant uttered the following words: "I have indicated before that I will kill one." The witness saw that the deceased was bleeding around his neck from a stab wound. They then phoned the police and an ambulance. When the paramedics arrived, they certified the deceased dead on the scene.

[10] The witness was cross examined in relation to the discrepancies in his two police statements and the oral evidence tendered in the court *a quo*.

[11] Leseka Mathews Mashamaite testified as the respondent's third witness. He testified that he was the investigating officer in that matter. That on 21st August 2016 he went to the scene of a murder crime in the company of constable Masetla. On arrival at the scene they found W/O Makhoga and constable Marokane. The crime scene was already cordoned with a police tape, and the onlookers were also at the scene. The crime scene was at a place where it was rented out to the construction people.

[12] At the scene, the witness saw a male person lying on the ground on his back facing up, and with his head leaning against a fence. That person had an open wound on his neck and his chest was full of blood. However, the witness could not remember whether the wound was on his left or right side of the neck. There was also blood on the ground leading to the house, and also at the fireplace which was outside the house.

[13] The witness was cross examined and he conceded that in the appellant's warning statement he had recorded that the appellant had an open wound on the right hand side of his head, swollen on the upper lip and right finger. The witness also conceded that he had noticed the injuries on the body of the

appellant, and that the appellant told him that he had sustained those injuries as a result of assault by the deceased with bricks. That concluded the evidence of the respondent and it closed its case.

[14] The appellant took the witness stand and testified under oath. He testified that on the night of the 21st August 2016 he was in his rented shack. Whilst there, many gentlemen came and prepared fire outside the house. These gentlemen were also renting rooms at that yard and were drunk. After preparing fire, these gentlemen started preparing their food. Whilst the appellant was in his shack sleeping, he heard noises coming outside as if people were fighting.

[15] The appellant went outside to go and check what was happening, and he found Radcliff fighting with the deceased. He went to separate the two from fighting each other. As he was separating them, Freedom and Vusi came and held the appellant's both hands and stretched them to his back. As he was held by Vusi and Freedom, the deceased started assaulting the appellant with bricks. The appellant became dizzy and fell to the ground. After falling, he stood up, went to his shack and found a bottle. He took that bottle and went out of his shack. When he got out of his shack, he found that the people were running out of the yard to the street.

[16] The appellant followed the people who were running. As he was following them, he found the deceased lying on the ground next to the fence. He asked the people who were there as to what had happened, and they told him that the deceased was cut by the fence. However, Vusi replied by saying that the deceased was assaulted and killed by Radcliff. The appellant told the people who were next to the deceased that fighting was not going to help them, and that they should rather phone the police. The said people told the appellant

not to phone the police but to rather phone the paramedics. Those people phoned the paramedics whilst the appellant phoned the police. Those people told the appellant that when the police arrive, they are going to point at him as the one who had killed the deceased. The paramedics were the first one to arrive at the scene, and on their arrival they certified the deceased dead on the scene.

[17] When the police arrived at the scene, indeed those people told the police that the appellant was the one who had killed the deceased. The police told the appellant to take off his shirt as it was blood stained, and thereafter they arrested him. The appellant stated that when the police officer took his warning statement, he showed that officer the injuries that he had sustained, and also told that officer that he was injured by the deceased. The injuries that he had sustained were swollen lips, open wound on the right hand side of the head and swollen right ring finger. The appellant denied assaulting or killing the deceased.

[18] The appellant was cross examined and he stated that he surprised why Vusi and Freedom stretched his hands to his back whilst he was trying to stop the fight between the deceased and Radcliff. The appellant further stated that he did not have time to ask why they were holding him as he was being assaulted by the person in front of him, and that when he fell down, they ran away. He also did not have time to ask the deceased why he was assaulting him as Vusi and Freedom had held him and he was trying to duck the bricks that the deceased was throwing at him. The appellant stated that when he went into his shack to fetch a bottle, he was trying to protect himself as he was injured. The appellant stated that Vusi and Freedom has grabbed him in

order to allow the deceased to assault him. He further stated that Vusi and Freedom had let him free after he fell, when they realize that he was powerless and dizzy. That concluded the evidence of the appellant and he closed his case.

[19] The court *a quo* called two witnesses Vusi Tshabangu and Lerato Radcliff as witnesses of the court. The two court's witnesses did not witness the actual stabbing of the deceased and therefore could not assist as to how the deceased was stabbed. According to Radcliff the appellant had assaulted the deceased with an open hand. When Mpho and Vusi saw that the appellant had assaulted the deceased, they too assaulted the appellant and he fell to the ground. After the appellant fell on the ground both Mpho and Vusi ran away and Radcliff chase after them. When Randcliff came back to where he had left the appellant, he found the deceased lying on the ground, and the appellant and Freedom were standing next to the deceased. The appellant was looking at the deceased saying that if a person disrespects him, he dies. Radcliff saw that the deceased was bleeding, and Freedom told Radcliff that the deceased was dead.

[20] The appellant has raised self-defence as his defence to his actions. It is trite that for the appellant to succeed with his defence of this nature, he must show that (i) he was acting in response to an uncompleted unlawful attack on an interest deserving of legal protection, and the response must directed at the attacker; (ii) the defensive act was necessary to protect the interest in question; (iii) there was a reasonable relationship between the attack and the

defensive act; (iv) and that the appellant was aware of the fact that he was acting in private defence. (See *S v TS*²).

[21] The test for private defence is objective, would a reasonable person in the position of the accused have acted in the same way. A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. (See *S v De Oliveira*³).

[22] I have difficulties in the appellant's reliance on private defence in that he is disputing assaulting or killing the deceased. According to the appellant, when he gets out of his shack to fetch a bottle which he wanted to use it to defend himself, he found the deceased on the ground leaning against the fence bleeding, and was told that the deceased was cut by a fence. As per the appellant's own version when the deceased died he was not attacking him, and therefore there was no eminent danger to ward off, and the appellant does not even know how the deceased sustained the injuries which led to his death. From the appellant's own version self-defence is not available to him as he was not present when the deceased was killed.

[23] However, Freedom the first respondent's witness, testified that he saw the appellant stabbing the deceased with a bottle. Mpho the respondent's second witness, even though he did not witness the actual stabbing of the deceased, testified that he saw the appellant going into his shack fetching a hunter's dry bottle and breaking it, thereafter the appellant went behind the shack to where the deceased was, he followed them and on his arrival at the scene he found both the appellant and the deceased bleeding. The appellant himself has

² 2015 (1) SACR 489 (WCC) at para 29

³ 1993 (2) SACR 59 (A)

testified that he went into his shack to fetch a bottle in order to defend himself. Radcliff testified that when he arrived at the scene, he found the appellant and Freedom standing next to the deceased who was lying on the ground bleeding, and the appellant was looking at the deceased saying, anyone who disrespect him dies. Even though the appellant is denying assaulting and stabbing the deceased, the evidence of Freedom, Mpho and Radcliff point him as the person who had stabbed the deceased with a broken bottle.

[24] What this court must determine is whether the appellant's conduct has satisfied the requirements of private defence. At the time when the appellant was being attacked with bricks, his life was in eminent danger worthy of protection. However, the appellant does not make mention that when he ran into the shack to collect a bottle, the deceased was following him or that the deceased was in possession of his interest deserving legal protection. There is no evidence that the attack on the appellant continued whilst he was in the shack. When the appellant picked up the bottle from his shack, left the shack with the bottle and break it, there was no longer any act to ward off as he was no longer under attack by the deceased or anyone. By breaking the bottle and stabbing the deceased who was no longer attacking him on the neck which is a delicate place, the appellant had foreseen that his actions may have fatal consequences, hence he said anyone who disrespects him dies.

[25] Taking into consideration the evidence presented and arguments presented in this matter in its totality, the defence of self-defence cannot be sustained, and there is no reason to fault the court *a quo* in convicting the appellant. It follows that the appeal stands to fail.

[26] In the result I make the following order:

26.1 The appellant's appeal on conviction is dismissed.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

SEMENYA DJP

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the appellant	: Adv MS Mamabolo
Instructed by	: Mpho Mohale Inc
Counsel for the respondent	: Adv KG Sekhukhune
Instructed by	: DPP Polokwane
Date heard	: 1st December 2021
Electronically circulated on	: 3rd December 2021