

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(Circuit Local Division of the Eastern Circuit District)
(GAUTENG DIVISION, PRETORIA)**

CASE NO: CC149/17

1. REPORTABLE: YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED.

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DATE

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SIGNATURE

In the matter between:

THE STATE

and

VICTOR BONGANI MPHO MDLULI

Accused

JUDGMENT

Roelofse AJ:

[1] During the night of 2 March 2017, Ms Penelope Boikanyo, a 27-year-old school teacher lost her life in a brutal attack in the sanctity of the home she has shared

with her companion, the accused. She went to bed that night with her and the accused's 7- year-old boy. Later she lay dead in the living room, half naked and covered in blood. Her body was riddled with nine stab wounds inflicted by a sharp knife with a thin blade. In a fleeting moment her life was lost, two boys lost their mother and a mother lost her daughter.

[2] The State alleges that it is the accused that ended her life. The accused admits that he killed the deceased. He says that he was so overcome with disappointment, anger and distress that he did not appreciate what he was doing when he inflicted the terrible wounds. He says that he killed the deceased because he was angry. He was so overcome with grief that he attempted to commit suicide with the same knife that killed the deceased, so he says. Prelude completed, I proceed.

[3] I shall refer to the accused as Mr Mdluli henceforth. Mr Mdluli is arraigned on a charge of murder read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (as amended).

[4] Mr Mdluli tendered a plea of guilty supported by a written statement as contemplated in Section 112(2) of the Criminal Procedure Act 51 of 1977. Mr Mdluli was represented by Mr Mario Jongbluth. The content of the statement was read into the record. It reads as follows:

"I, Victor Bongani Mpho Mdluli, plead guilty to a charge of Murder and make the following admissions freely and voluntarily without any undue influence.

1.

I admit that on 2 March 2017 and at Sakhile in the District of Standerton I stabbed Penelope Boikanyo several times with a knife.

2.

I admit that she died as a result of the knife wounds that I inflicted upon her.

3.

I admit that a post mortem examination was done on the body of the deceased and admit to the findings contained in the post mortem report and that it can be handed in as Exhibit (B).

4.

I admit from the time that I inflicted the deadly wounds on the deceased up to the time that the post mortem was conducted on the body of the deceased she sustained no further injuries.

5.

I admit that the deceased's body was identified as Penelope Boikanyo and have no objection that the statement regarding the identity can be handed in as Exhibit "C".

6.

I admit that a photo album was compiled of the scene of the incident and have no objection that the photo album be handed in as Exhibit "D".

7.

Me and the deceased lived together as partners and have a child of 7 years of age.

8.

I was suspecting that the deceased was unfaithful to me for a while before the incident. On the night of the incident she was sleeping with our child in a room. I got hold of her cellphone and decided to see if my suspicion was founded. She had a number locked on her cellphone. I tried a combination of numbers and was able to unlock her cellphone. My worst fear was confirmed when I found intimate messages between her and a lover on the phone. I went to the room and woke her up and confronted her with the evidence. I told her that I was going to show this to her mother. She insisted that I hand her the phone. I did not comply. She then went to the kitchen and returned with a knife. We started wrestling for the knife and I succeeded in disarming her. I was in a state of total shock and disbelief that the woman I loved so dearly cheated on me and started stabbing her. When I came to my full senses I realized that I killed her. I then tried to commit suicide by stabbing and cutting myself but did not succeed. I then phoned people to report the matter and police arrived. I was taken to hospital and fully recovered from the self-inflicted wounds.

9.

I admit that when I stabbed her I knew that she could die as a consequence but proceeded none the less.

10.

I admit that in law I have no justification for what I have done and knew that my actions were unlawful.

DATED AT BREYTEN ON THIS THE 12TH DAY OF MARCH 2018.
SIGNED BY THE ACCUSED”

[5] After the plea was tendered, the exhibits referred to in the plea as well as a photo album of the post-mortem conducted on the deceased were handed in by the State without any objection from the accused. The exhibits that were handed in comprise the deceased's post mortem report (Exhibit “B”), the identification of the deceased body (Exhibit “C”) a photo album of the crime scene (Exhibit “D”), a photo album of the post mortem (Exhibit “E”), and the J88 report of Mr Mdluli (Exhibit “F”).

[6] The post mortem results and the photo album of the post-mortem, reveals that the deceased was dressed only in a blood stained blue nightgown. The following injuries to the deceased were recorded:

- a. *Four stab wounds to the left chest measuring between 2.3cm and 2.6cm. The wounds were core sharp on both edges and have a 2mm contusion superiorly;*
- b. *Four stab wounds to the right upper and central abdomen. The stab wounds measure between 2.2cm and 3cm. They were all sharp at both edges with a 2mm collar of abrasion superiorly;*
- c. *A 2cm stab wound to the left lower abdomen. The wound was horizontal and sharp on both edges;*
- d. *A 2.7cm stab wound to the right lower chest laterally along the mid axillae line located 17cm below the axillae;*
- e. *A 1.9cm horizontal wound below the lateral edge of the right breast;*
- f. *Multiple superficial type wounds to the left arm and left thigh measuring between 2.9cm and 5.3cm; and*
- g. *Multiple thumb imprint abrasions to the upper left and right shoulders.*

[7] The deceased sustained nine stab wounds together with the superficial cuts to her left arm and left thigh.

[8] Exhibit “D” was compiled by Constable S P Ngwenya, who is a member of the South African Police Services, stationed at the Secunda Local Criminal Record Centre. In Constable Ngwenya's sworn statement he records that he attended the scene of the incident on 3 March 2017 at 00h15 after he had been requested by a Constable Gwala to do so. Constable Ngwenya took photographs of the scene. The

photographs indicate the location where the deceased was found in the dwelling. The photographs indicate that the deceased was lying on her back. Two knives were found on the scene. A knife with a black handle and thin blade was found next to the deceased next to a chair in the living room. A larger knife with a red handle was found in close proximity to the deceased's head. On the deceased's chest was a blood-stained kitchen towel and next to her right arm was another blood-stained white cloth. The blade of the knife with the black handle is covered in blood and blood smears. The blood smear marks run parallel with the blade. It indicates that the blade was pushed in and pulled out. The blade of the knife with the red handle had a few spots of blood only on its one side. There is a plastic water container on a coffee table in the living room. There were blood marks on the bottle. A brown bed sheet was found in the entrance to a bedroom. There appears damage to the bed sheet and traces of blood next to and underneath the bedsheet.

[9] Exhibit "F" is a Form J88 that was completed by Dr Hassen at 01h40 on 3 March 2017 during his examination of Mr Mdluli. Under Column B "*General History*" the following is recorded under Relevant Medical History and Medication. "*History of assault this afternoon with multiple step done [sic] chest*". The clinical findings that were recorded upon the J88 report was the following:

"Four laceration [sic] on the epigastric area not deep, not bleeding and two laceration $\pm$ 3cm on the chest left side middle cleavicle line $\pm$ 7 to 8"

No other injuries, clinically is stable, no sign of pneumothorax or hemithorax... admitted for observation.

Under the column dealing with health and emotional status it is recorded that Mr Mdluli was "*Very depressed*".

There was no clinical evidence of drugs or alcohol.

Under the column dealing conclusions the following is recorded:

"History of assault by the wife, admitted in the ward for observation X-rays normal ... patient went to private hospital the following day".

[10] I found Mr Mdluli guilty of murder as he has admitted all the elements of the

offence. When recording the finding, I made an error by including a reference to Section 51(1) of the Criminal Law Amendment Act. I rectified the finding. The parties were in my view not prejudiced by the error and they did not indicate any prejudice to me. In any event, the State's fate was sealed when it accepted Mr Mdluli's plea. I shall return to this aspect later.

[11] Mr Mdluli testified in mitigation of sentence. The state called the deceased's mother in aggravation of sentence.

[12] Mr Mdluli is 49 years old. He has been employed as a teacher by the Department of Education for the last 25 years. The deceased was a teacher where Mr Mdluli taught. Mr Mdluli and the deceased had a relationship for 16 years. They were soon to be married as Mr Mdluli had finalized the arrangements regarding the payment of lobola. Mr Mdluli and the deceased were in the process of making arrangements for their wedding. Mr Mdluli and the deceased have a child together. It is a boy who is currently 7 years old. Since the incident, the boy was taken by the deceased's mother and she currently takes care of him. Mr Mdluli had a good father-son-relationship with the boy. The deceased was aware of this. Mr Mdluli became extremely emotional when he testified about his boy.

[13] There were no problems in the couple's relationship. This changed since or about January 2016, when Mr Mdluli started suspecting that the deceased may be unfaithful to him. This is when the couple's quarrels started. Mr Mdluli found it strange that the deceased suddenly started locking the access to her cell phone and started coming late at the school.

[14] Mr Mdluli says that he felt sorry and regretted what he had done as soon as he came to his full senses on the night of the incident. He has never seen his boy since the incident. Mr Mdluli said he is paying maintenance of R1,500.00 per month for the boy in terms of a maintenance order. Mr Mdluli says he is going to lose his employment. He has a pension fund. He is not trained for anything else than a teacher. He has bought a new house which was transferred in his name in January 2018. Mr Mdluli also has a daughter who is 22 years old. She is currently at university. He fully supports her. He will set aside his pension fund to maintain his children.

[15] Mr Mdluli pleaded with the court to give him a second chance.

[16] Under cross-examination, Mr Mdluli confirmed that the boy was sleeping with the deceased on the night of the incident. When Mr Mdluli found the messages on the deceased's cell phone, he went to the room where the deceased and the boy was sleeping and awakened her. She came out of the room. He confronted her about the messages he had seen on her cell phone. She demanded that he returns the cell phone to her. He refused whereupon the deceased went to the kitchen and came back with the knife which killed her. The argument that ensued between the deceased and Mr Mdluli did not wake the child. The argument took place immediately outside of the room in a passage to the room. The deceased did not respond to Mr Mdluli's allegations and she also did not deny same. Mr Mdluli testified that this had made him angry. A struggle ensued between him and the deceased for possession of the knife. He eventually succeeded in taking the knife away from the deceased. The struggle started in the passage to the room where the deceased and boy were sleeping and proceeded to the living room of the dwelling.

[17] Mr Mdluli testified that he stabbed the deceased while he was in close proximity to her and while they were fighting over the possession of the knife. The deceased attempted to ward off the attack. She was defending herself. The deceased said nothing to Mr Mdluli while they were fighting.

[18] Mr Mpolweni, who appeared for the State, referred Mr Mdluli to the two knives that were found on the scene as depicted on photograph 3 of Exhibit "D" as points "C" and "D". Mr Mdluli says that he does not know how the knives got there. Mr Mdluli confirmed that he stabbed the deceased with the knife with the black handle and thin blade. Mr Mdluli testified that the fight began while he was standing at the passage leading to the room and while facing the living area in the house from where the deceased approached him with the knife. She came from the kitchen with the knife. Mr Mdluli testified and demonstrated that the deceased was holding the knife with a closed hand while the knife's blade was protruding from under her fist. Mr Mdluli first saw the deceased had a knife when she was approximately 5 metres away. He conceded that could have stepped one metre back into the room where the deceased and the boy slept and closed the door as he was in the passage leading to that

room, but he failed to do so. Mr Mdluli testified that he never thought that there was going to be a fight. He only thought that there would be an argument. Mr Mdluli testified that the stabbing started at the entrance to the room where he was standing. The fight proceeded to the living room. Mr Mdluli conceded that there was blood on the carpet at the entrance to the room. Mr Mdluli testified that he could not at first get hold of the knife and had to struggle to get the knife into his possession. He testified that he got hold of the knife by its blade with his hands. Due to this, he sustained cuts on his hand. Mr Mdluli conceded that he was not in any danger any longer when he obtained possession of the knife and that he could have stopped the fight at that moment. He did not do so. Mr Mdluli testified that he could not remember stabbing the deceased from a distance. She was close to him when he stabbed her. Mr Mdluli and the deceased fell to the ground in the living room. Mr Mdluli fell face down on top of the deceased. Mr Mdluli testified that he came to his senses when both of them fell down to the floor in the living room and he saw her bleeding. Mr Mdluli used the same knife that he stabbed the deceased to stab himself. Mr Mdluli testified that the knife went into his body through its full length up to the handle. He stabbed himself 6 times. Each time the knife penetrated his body up to its handle. When confronted by Mr Mpolweni as to why the J88 form does not record injuries to his hands, Mr Mdluli could not explain why the medical practitioner would not record such injuries on his J88 form.

[19] Mr Mdluli testified that he wanted to commit suicide and that is why he stabbed himself. The state put it to Mr Mdluli that the doctor's conclusions on the J88 form was that Mr Mdluli did not sustain deep injuries. Mr Mdluli could not answer why only shallow wounds with no bleeding were recorded on the J88 form whereas his testimony was that the stab wounds he has inflicted upon himself were deep. Mr Mdluli confirmed that he stabbed the deceased because he was angry. Mr Mdluli conceded that he could at that moment not control his anger and that is why he stabbed the deceased multiple times. He had just found out that his wife had cheated on him and that he was not in right frame of mind. The boy woke up during the struggle, saw his mother in the living room, went to his mother, shook her and asked her to wake up. By that time, she was already deceased. The boy then went to the front

door of the dwelling, opened the door but the security gate was locked. Once again Mr Mdluli became emotional when he testified about his boy. A group of people was already at the scene of the incident outside the house. Mr Mdluli called 2 of his friends and told them that there was a fight at their house and that the deceased was injured.

[20] During the re-examination, Mr Mdluli confirmed that he was treated at a private hospital on the Friday, Saturday and Sunday and discharged on the Monday after the incident.

[21] The Court proceeded to question Mr Mdluli in order to get clarity regarding his evidence. I referred Mr Mdluli to the photographs depicting the brown bed sheet which lay in the passage to the bedroom. He testified that he does not know the bed sheet but conceded that there was blood next to and under the bed sheet. I referred Mr Mdluli to photograph 6 on page 3 of annexure “D”. The photo depicts the deceased as she was found. On the deceased’s chest was a dish cloth and next to the deceased was another cloth, white in colour and stained in blood. Mr Mdluli does not know where the dish cloth and the other cloth came from. The court referred Mr Mdluli to photo 15 on page 8 of annexure “D”. The photo depicts a coffee table. On top of the coffee table is a plastic jug as well as a container used to store tablets. Mr Mdluli confirmed that blood was visible on the plastic container. He testified that after he came to his senses and after he called the people to report the matter, he took the mug and drank juice from it. During the questioning over this photograph, Mr Mdluli testified that he was HIV positive and that the medication that was on the table was his prescription for this condition. He consumed all the tablets in the container after the incident because he wanted to commit suicide. He also testified that he took the knife with the red handle while the paramedics were there and tried to commit suicide once again. Mr Mdluli therefore alleges he tried to commit suicide 3 times. The suicide attempts by taking the medication and by attempting to stab himself with the knife with the red handle while the paramedics were there was not part of the Section 112(2) statement. The court referred Mr Mdluli to the J88 form that was completed subsequent to the doctor examining him. He confirmed that the examination took place at 01h40 on 3 March 2016, i.e. in the early morning hours after the incident had occurred. In the report, the doctor examining Mr Mdluli recorded what is set in the J88. Mr Mdluli

confirmed that he did not tell the medical practitioner that he attempted to commit suicide.

[22] I was extremely hesitant to refer Mr Mdluli to the photographs of the murder scene due to the graphic nature thereof and the pictures of the deceased. I thought that this would disturb and traumatise Mr Mdluli. I apologised to Mr Mdluli that I had to refer him to the photographs. I carefully observed Mr Mdluli as he looked at the photographs which showed the deceased. He acted with indifference to the photographs and showed no emotion. This was unexpected in light of the measure of emotion he has shown when the trial commenced.

[23] Mr Mdluli testified that he has a pension fund which will pay out if he is dismissed from his employment. He will set aside money from the pension fund in order to maintain his son and his daughter. Mr Mdluli confirmed that one of the stab wounds was sustained at the back of the deceased.

[24] The state called the deceased's mother, Betty Boikanyo. Ms Boikanyo testified that she was taking care of the boy since the incident as well as the deceased's other boy from a previous relationship. That boy is currently 15 years old. She testified that the deceased was maintaining her and Ms Boikanyo's brother as well the deceased's other boy. Since the deceased's passing, Ms Boikanyo has been struggling to keep ends meet. She was surviving from social grants. Ms Boikanyo described the emotional pain and suffering she was enduring as a result of the death of her daughter. She cannot forgive Mr Mdluli for what he has done. She declined to accept his apology. She said that, in her culture, the proper way for Mr Mdluli to apologise to her for the harm he has caused was for his family to do so. Ms Boikanyo testified that the incident has caused her health to deteriorate. Both children struggle to cope with their mother's death. The boy does not want to see his father. The deceased's mother is in the process of claiming the deceased's pension benefits in order to assist her with the care of the deceased's children.

[25] This court must consider and impose an appropriate sentence. Before I do so, I must first determine whether the murder falls under the provisions of Section 51(1) or Section 51(2) of the Criminal Laws Amendment Act. The relevant portions of the sections provide as follows:

“51. Discretionary minimum sentences for certain serious offences.—
(1) 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 I of Schedule 2 to imprisonment for life.

(2) 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—

(a) Part II of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 15 years;

.....

(3) (a) 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:.....”

Premeditated murder is an offence under Part I of Schedule 2 and murder is an offence under Part II of Schedule 2.

[26] In the event that I find that the murder was premeditated, the minimum sentence that is prescribed is life imprisonment. If I find that the murder was not premeditated, the minimum sentence that is prescribed is 15 years. The minimum sentences must be imposed unless I am satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed under sections 51(1) and 51(2). Minimum sentences are not to be lightly departed from.

[27] The State urges me to find that the murder was premeditated whereas Mr Mdluli urges me to find otherwise because the murder was committed in the heat of the moment. The State argued that the premeditation and planning of the murder commenced the moment Mr Mdluli became angry because of the deceased’s betrayal and decided that he was going to stab the deceased.

[28] While Mr Mdluli’s testimony in mitigation must be regarded for purposes of determining whether or not compelling circumstances exist for a departure from the minimum prescribed sentences, the State is confined to Mr Mdluli’s section 112(2)

statement for purposes of the enquiry into the application of Section 51(1) or Section 51(2). This is confirmed in *Kekana v S* (629/13) [2014] ZASCA 158 (1 October 2014), where the following is said in paragraph 19 by Mathopo AJA (Lewis JA and Gorven AJA concurring):

“In S v Jansen it was held that where an accused pleads guilty and hands in a written statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (CPA) detailing the facts on which his plea is premised and the prosecution accepts the plea, the plea constitutes the essential factual matrix and cannot be extended or varied in any manner which adversely impacts on the measure of punishment as regards the offence. The plea defines the lis between the prosecution and the defence. See also S v Ngubane”. [References omitted]

There is no hard or fast rule to determine whether or not an act was premeditated. The circumstances of each case will dictate such a finding. I apply what was set out in *S v Raath* (A82 / 2008) [2008] ZAWCHC 72; 2009 (2) SACR 46 (C) (10 December 2008) at paragraph 16 by Bosalec J (as he then was):

“Planning and premeditation have long been recognised as aggravating factors in the case of murder. See S v Khiba 1993 (2) SACR 1 (A) at 4 and S v Malgas 2001 (1) SACR 469 (SCA) at para 34. As Terblanche, Guide to Sentencing in South Africa, Lexis Nexis, 2nd edition 6.2.2 states, planned criminality is more reprehensible than unplanned, impulsive acts. However, there must be evidence that the murder was indeed premeditated or planned. See e.g. S v Makatu 2006 (2) SACR 582 (SCA) at paras 12 – 14. The concept of a planned or premeditated murder is not statutorily defined. We were not referred to, and nor was I able to find, any authoritative pronouncement in our case law concerning this concept. By and large it would seem that the question of whether a murder was planned or premeditated has been dealt with by the court on a casuistic basis. 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'. [References omitted].

[29] The State must lead evidence to establish the period of time between the accused forming the intent to murder and the carrying out of his intention – See: *Kekana* supra. The State accepted the plea and by that acceptance, was precluded from leading evidence in order to extend the factual matrix for purposes of a finding that the murder was premeditated – see: *S v Jansen* 1999 (2) SACR 368 (C). In my view, Mr Mdluli's Section 112(2) statement does not establish premeditation. The relationship between the parties suffered from some turmoil since approximately 2016. The State accepted Mr Mdluli's version that it was the deceased that first approached him with the knife and that he managed to get hold of the knife where after he stabbed the deceased to death. I find that the murder was not premeditated. The sentence to be imposed must therefore be consonant with the provisions of Sections 51(2) and 51(3) of the Criminal Law Amendment Act.

[30] In determining an appropriate sentence I have regard to the sentence triad: the personal circumstances of the accused; the nature of the crime; and the interests of society (*S v Zinn* 1969 (2) SA 537 (AD) and *S v Rabie* 1975 (4) SA 855 (AD)). The Court will also, depending on the circumstances of the case, endeavour to exercise a measure of mercy (*S v Rabie* supra).

[31] I also borrow from *S v Mchunu and Another* (AR24/11) [2012] ZAKZPHC 6 (10 February 2012) at paragraph 4 where Patel JP said as follows:

“It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in S v Scott-Crossley 2008 (1) SACR 223 (SCA) at para 35:

‘Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.’

The judgment continues:

‘. . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.’”

[32] Mr Mdluli’s personal circumstances were set out in his testimony set out above. I take full cognisance thereof.

[33] With regards to the interests of society, I apply what was set out in *Kekana supra* at paragraph 20 as follows:

“Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also 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 for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity. This was well articulated in S v Chapman when this court said the following:

‘Women in this country have a legitimate right to walk peacefully on the streets to enjoy their shopping and their entertainment to go and come from work and to enjoy the peace and tranquillity of their homes without the fear the apprehension and the insecurity which constantly diminish the quality and the enjoyment of their lives.’”

[34] I also regard what is set out in *DPP v Mngoma 2010 (1) SACR 427 (SCA)* at paragraph 14 by Bosielo JA (Mthiyane, Lewis, Malan, JJA et Griesel AJA concurring) as follows:

“A failure by our courts to impose appropriate sentences, in particular for violent crimes by men against women, will lead to society losing its confidence in the criminal

justice system. This is so because domestic violence has become pervasive and endemic. Courts should take due cognisance of the salutary warning expressed by Marais JA in S v Roberts 2000 (2) SACR 522 (SCA) para 20 where he stated:

'It [the sentence] fails utterly to reflect the gravity of the crime and to take account of the prevalence of domestic violence in South Africa. It ignores the need for the courts to be seen to be ready to impose direct imprisonment for crimes of this kind, lest others be misled into believing that they run no real risk of imprisonment if they inflict physical violence upon those with whom they may have intimate personal relationships.'

[35] It cannot be gainsaid that Mr Mdluli was under serious provocation, hurt and anger caused by the deceased's perceived infidelity. Mr Mdluli resolved to confront the deceased immediately upon him believing that he has found proof of the deceased's infidelity. He went to the room where she was sleeping with their young boy, awoke her and there and then confronted her with what he discovered on her cell phone. Moments later she succumbed in the living room of their dwelling. He threatened her that he will disclose her conduct to her family. This was the flashpoint of the tragic events that followed. All that Mr Mdluli achieved was the loss of a mother to her children and her family, the loss of a normal relationship with his children, the loss of his soon to be wife which he professes to have loved dearly and he must now face punishment after a 25-year career as a teacher. Violence was far too rife and readily employed as a solution to problems. The interests of the society must be served. Members of society must understand that dire consequences will follow as a result of such heinous acts. In that, society will be protected from perpetrators committing similar acts of senseless violence.

[36] Mr Mdluli relies upon diminished responsibility as factor to be taken into account for purposes of sentence when consideration is given to the nature of the crime and whether or not compelling circumstances exist. I find the following that was set out by Nugent JA in *DPP Transvaal v Venter 2009 (1) SACR 165 (SCA)* at paragraphs 64 to 66 also applicable in this matter:

"[64] I do not understand Mlambo JA to suggest that the criminal responsibility of the respondent was undiminished at the time he committed the crimes. I think it is perfectly clear that the respondent was in a state of distress that contributed to his

conduct. Had that not been the case I would have sentenced him to life imprisonment.

[65] *The difference between my colleagues seems to me to lie rather in the degree to which each considers the respondent's powers of restraint and self control to have been diminished. For what has come to be referred to as diminished criminal responsibility is not a definite condition. It is a state of mind varying in degree that might be brought about by a variety of circumstances. The circumstances that produce that state of mind—the effects of alcohol, jealousy, distress, provocation, and the like—have always been matters to be taken account of in mitigation and I do not think anything is altered when they are brought together under a label. My colleague Cloete JA views those circumstances in this case as having substantially reduced the respondent's powers of restraint and self control—my colleague Mlambo JA views them as being considerably less than substantial—and it seems to me that that is where the difference between them lies.*”

[37] The Section 112(2) statement and the evidence establishes clearly that Mr Mdluli's criminal liability must be diminished due to factors such as distress, jealousy and provocation. Added to this is the fact that he was first confronted by danger whether real or subjective when the deceased approached him with the knife. I also take into account a number of cases where diminished responsibility was considered for purposes of sentence. These are: *S v Smith* 1990 (1) SACR 130 (A) where it was ruled that when restraint and self-control was substantially reduced, though highly relevant to the question of sentence, cannot affect criminal liability. See: *S v Shapiro* 1994 (1) SACR 112 (A) where it was found that right-thinking members of the community would not demand condign punishment in a case where the accused had acted with substantially reduced criminal responsibility; *DPP Transvaal v Venter* [2008] ZASCA 76; 2009 (1) SACR 165 (SCA); *DPP v Mngoma supra*.

[38] I find that Mr Mdluli's diminished criminal responsibility constitutes a compelling circumstance. Besides Mr Mdluli's diminished responsibility I also take into account that, according to the accepted evidence, the deceased, at first, was the aggressor and that the murder was a crime of passion which are further circumstances to be taken into account in mitigation.

[39] Mr Jongbluth referred me to *S v Makatu* (245/05) [2006] ZASCA 72; [2007] 1 All SA 470 (SCA). In paragraph 27 of the judgment, the following is said:

“Section 51(2), read with part II of Schedule 2 of the Act, renders the appellant (as a

first offender) liable to a sentence of 15 years' imprisonment unless 'substantial and compelling circumstances exist which justify the imposition of a lesser sentence'. The meaning of the term 'substantial and compelling circumstances' justifying the imposition of a lesser sentence was set out by this court in S v Malgas. In brief, the court 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 include those factors traditionally taken into account in sentencing – mitigating factors. Of course these must be weighed together with aggravating factors."

I also rely on the principles in *Makatu* for an appropriate sentence.

[40] It is for this Court to consider an appropriate sentence despite the minimum sentence provisions. In particular, whether or not the minimum sentence prescriptions must be departed from because it is for the court imposing sentence to decide whether the particular circumstances of the case warrant the imposition of a sentence lesser than the prescribed sentence or not. In this process, factors that are traditionally taken into account for purposes of determining an appropriate sentence are considered – See: *Shawn Palmer v The State* (599/2016) [2017] ZASCA 107 (13 September 2017); *S v Mohomotsa* 2002 (2) SACR 435 (SCA); *S v Sikhipha* 2006 (2) SACR 439 (SCA).

[41] Factors that count in Mr Mdluli's favour are that: Mr Mdluli is a first offender; he pleaded guilty; has shown some remorse during the proceedings; he will in all likelihood never have a normal father-and-son relationship with his children (especially, his boy) and that Mr Mdluli reported the murder himself. I am not convinced that Mr Mdluli has shown remorse immediately after the murder because I reject Mr Mdluli's version that he attempted to commit suicide. I reject the version because the version is so improbable that it is in all likely hood false. I can simply not accept that Mr Mdluli has stabbed himself in the manner he described but that this was not observed by the medical practitioner treating him within hours of the murder. Mr Mdluli mentioned nothing of the alleged suicide when he was examined by the doctor. As a matter of fact, he told the doctor that he sustained the injuries through violence committed by the deceased. In Mr Mdluli's testimony he says that he attempted to

commit suicide two more times, first taking all of the antiviral medication and by using the knife with the red handle while the emergency personnel were on the scene. Nothing of this is mentioned in his Section 112(2) statement and it was only disclosed when he was questioned by this Court.

[42] Aggravating circumstances are: the violence committed against the deceased; the unthinkable distress and anguish the deceased must have suffered before she passed away – she was stabbed nine times before she died; the fact that the young boy had to see his diseased mother the way he did and the nature of the crime.

[43] The aggravating factors in this matter outweigh the mitigating factors.

[44] I am mindful of the solitary principle that the punishment must fit the accused. Nevertheless, I also considered various other cases concerning diminished criminal responsibility, passion crimes and circumstances comparable to the circumstances in this matter that went on appeal as guidance. I came to the conclusion that direct imprisonment would be the only appropriate sentence. I considered suspending part of the sentence. I decided not to do so because, although the suspension of a sentence is in itself considered a punishment, such a sentence would not fit the crime, it would be wholly inappropriate and would not serve the interests of society. Another factor weighing against the imposition of a suspended sentence is that this appears to be a once-off incident committed by Mr Mdluli as he has no previous convictions and no evidence was presented that he has a propensity to violence.

[45] In conclusion I need to say this. I have serious reservations over Mr Mdluli's version of the events of the night the deceased lost her life. This is so because, from the photographs of the scene many aspects do not make sense if Mr Mdluli's version is considered. What was the bedsheet doing immediately outside of the room? What caused the damage to the bedsheet? Why was a pants lying next tot the bedsheet? Why was there no blood in the passage leading to the living room? How were the kind of wounds inflicted on the deceased when the deceased and Mr Mdluli stayed close to each other from the time the struggle over the knife started to the time the deceased lay dead on the living room floor? Well, despite these concerns, I am bound to what was presented to me. The State charged Mr Mdluli with premeditated murder and

continues to press for this finding until the end. Yet the State accepted Mr Mdluli's plea without ado. There was no obligation upon the State to do so. The State could have refused to accept the plea and could have proceeded to prove pre-meditation. The State did not do so. This is unfortunate.

In the premises, the following order is made:

The accused is sentenced to 10 (TEN) years imprisonment.

JH Roelofse
Acting Judge of the High Court

APPEARANCES

FOR THE STATE: ADV MPOLWENI

FOR THE ACCUSED: MR M JONGBLUTH

DATE OF HEARING: 12 TO 14 MARCH 2018

DATE OF JUDGMENT: 15 MARCH 2018