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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

Paarl Regional Court case no: PSS189/22

DPP Ref No: 10/2/5/1/3 – 86/24

High Court Case No: A234/24

In the appeal between:

N[...] K[...]

APPELLANT

and

THE STATE

RESPONDENT

Coram: Henney J et Mayosi AJ

Hearing date: 31 January 2025

Delivered on electronically on 20 March 2025

JUDGMENT

MAYOSI AJ

Introduction

- 1 The genesis of this appeal is the most tragic of facts – the murder of six-month-old baby L by her mother, the appellant.
- 2 The State charged the appellant with murder¹ as defined in section 51(1)(a) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (**the Act**) ; i.e., murder when it was planned or premeditated, and relied on the minimum sentence of life imprisonment.^{2 3}
- 3 The appellant admitted the murder of her baby and pleaded guilty, in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (**CPA**), to the charge of murder by stating as follows, in relevant part, in her section 112(2) statement dated 1 February 2024 (**the plea statement**):

6. I plead guilty to a charge of Murder in the form of Dolus Eventualis read with the provisions of section 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act, in that on or about the 7th May 2022 at Covid Camp, Lanquedoc, Paarl in the Regional Division of the Western Cape, I did unlawfully and intentionally cause the death of [L] K[...] a 06-month-old minor female by smothering her.

7. I admit that on the 07th of May 2022, I was present a Covid Camp Lanquedoc, Paarl and area within the regional division of the Western Cape.

¹ The charge of planned or premeditated murder was the second charge. The first charge – child abuse relying on the provisions of section 94 of the Criminal Procedure Act 51 of 1977 - was later withdrawn by the State.

² In terms of section 51(1) of the Act, and subject to section 51(3) and (6), a Regional Court or High Court must impose life imprisonment where a person has been convicted of murder which falls into one or more of the categories of murder identified in paragraphs (a) to (f) in Part 1 of Schedule 2. A murder which is planned or premeditated is one of these, in terms of paragraph (a) of Part 1 of the Schedule 2.

³ Section 51(2)(a) of the Act stipulates that notwithstanding any other law but subject to subsection (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of an offence referred to in Part 2 of Schedule 2, in the case of a first offender, to imprisonment for a period not less than 15 years. Murder, in circumstances other than those referred to in Part 1, is one of these offences.

8. *I admit that on the above-mentioned date, I resided in Paarl with my two minor daughters.*
9. *On the 7th May my youngest daughter was crying; she had been ill for a week and was crying consistently.*
10. *During this time I was alone with my 4-year-old daughter seeking my attention as well, however my youngest would not stop crying.*
11. *I proceed [sic] to take a bottle cap and place it over her mouth and nose until she stopped crying.*
12. *I reasonably foresore [sic] that by holding the bottle cap over her mouth and nose that she would be unable to breathe and might die.*
13. *I admit the identity of the deceased as [L] K[...].*
14. *I admit I acted with dolus eventualis as a form of intent when I caused the death of the deceased.*
15. *I thus admit that I had foreseen that by holding the bottle cup over the mouth and nose of the deceased she could die yet proceeded with my actions and reconciled myself with the possibility.*
16. *I admit that the deceased passed away due to her injuries and admit that medico-legal report conducted by Esme Marianne Erasmus on the 09th of May 2022 with reference WC/09/0173/2022 is correct and pertains to the deceased. I have no objection if this report is accepted as evidence before court.*
17. *I admit that the body of the deceased sustained no further injuries during transport from the scene of death until the post mortem examination was conducted.*

18. I admit that I [acted] unlawfully and intentionally when I committed the said offence.

19. I admit I knew that what I was doing was wrong and that I could be punished for it by a court of law.

- 4 The State rejected the appellant's guilty plea as it contested the form of intent relied upon by the appellant in her plea statement, i.e., *dolus eventualis*. The State contended and sought to prove during the course of the trial, that the appellant had acted with *dolus directus* instead. In the circumstances, the court below – being the Regional Court in Paarl - invoked the provisions of section 113 of the CPA, and altered the appellant's plea of guilty to one of not guilty in order that the parties could call witnesses and lead evidence in this regard, as well as in regard to whether or not premeditation or planning were present.
- 5 The State proceeded to call five witnesses; about whose evidence more is said below in this judgment. None of the evidence led by the State was disputed by the appellant. The appellant elected not to testify and closed her case without calling any witnesses.
- 6 The appellant was ultimately convicted on 1 February 2024 of premeditated murder and on 23 August 2024, she was sentenced to life imprisonment in accordance with the minimum sentence provisions found in section 51(1) of the Act.
- 7 The appellant exercised her right to an automatic appeal to this Court. She appeals against both conviction and sentence.

The State's witnesses

- 8 The State called Mr L[...] P[...] B[...], the appellant's uncle. He was the first person that the appellant went to carrying baby L in the early hours of the morning of 7 May 2022 at approximately 4am. Like the appellant, he too lived in Covid Camp informal settlement.

- 8.1 He testified that the appellant arrived crying at his house that morning carrying L and saying that the baby was not breathing. He told her that they should go to the eldest aunt in the family, who was Ms N[...] B[...]. They then walked to Ms B[...]’s house, with the appellant carrying the baby.
- 8.2 After they entered Ms B[...]’s house, the appellant proceeded to place the baby on a couch, and Ms B[...] indicated that the police must be called in order for them to call the ambulance. When the ambulance staff arrived, they looked at the baby and said that they were going to take the baby, but they did not take the baby because they noticed a ring around the baby’s face.
- 8.3 Mr B[...] testified that he also noticed the same ring shape on the baby’s face, which was on top of the nose and around the baby’s mouth. He asked the appellant for an explanation as to how the baby got that mark. The appellant responded that she had gone to the toilet in the early hours of that morning and left the baby with her four-year-old daughter O, and when she came back, she noticed that the baby was not breathing. According to Mr B[...], it seemed to him that the appellant was suggesting that O was responsible for the mark on the baby’s face, although she did not say so directly. At the time there were no toilets in Covid Camp, and to relieve themselves residents either used a bucket in their homes or they would go outside and relieve themselves in the bushes.
- 9 Ms N[...] B[...] was also called by the State. She testified that at the time of the incident in 2022, the appellant lived in a shack owned by Ms B[...] in Covid Camp, because the appellant did not have a place to stay.
- 9.1 Her evidence regarding what transpired on 7 May 2022 was that at about 5.15am of that the morning, the appellant and Mr B[...] knocked on the window of her house. After she opened the door, the appellant

proceeded to enter and placed the baby on a couch. The appellant said that she does not know what to do with the baby because the baby was making some noises that sounded like grunting.

- 9.2 Ms B[...] then went over to the baby to look at her. She did not like what she saw; she placed her hand on the baby's heart and realised, she said, that she was gone. She called the police in order for them to call the ambulance.
- 9.3 Ms B[...] asked the appellant what had happened to the baby, to which the appellant answered that she had gone outside to the toilet at about 3am and left the baby with O, and when she came back from the toilet the baby was making the grunting noises earlier referred to.
- 9.4 The ambulance thereafter arrived first but before they took the baby away to the hospital, one of the staff members of the ambulance services called Ms B[...] and asked if she noticed the mark on the baby's face. She then noticed the circular mark on the baby's face – around the nose and around the mouth - and was shocked. The ambulance staff member then called the police, who arrived, looked around the scene and took photographs. The police made some enquiries regarding where the baby came from. The appellant eventually took the police to her own shack, after which she returned to Ms B[...]’s house and just sat there.
- 9.5 Ms B[...] then asked the appellant where the baby's feeding bottle was, because she knew what the baby's bottle looked like. When the bottle was ultimately found back in the appellant's shack and brought to Ms B[...]’s house, Ms B[...] was particularly interested in the bottle cap or lid that closes the bottle, and covers and protects its rubber teat. Ms B[...] thought that the bottle cap and the mark on the baby's face looked similar. After she saw the bottle cap, she formed the view that the appellant had smothered L. She then asked the appellant pointedly what had happened to the baby. The appellant said she did not know,

and when Ms B[...] told the appellant that the size of the bottle cap and the ring on the baby's face were the same, the appellant looked down and said nothing. According to Ms B[...], the appellant had never given an explanation for what had occurred. According to Ms B[...], the appellant did not make any accusation to her that O had done something to the baby.

10 Ms Mikaylin Machau, a forensic officer employed at the Paarl Forensic Pathology Service, was the State's next witness. The key performance areas of her job included scene investigation and assisting the pathologist with post-mortems. Primarily she was involved with unnatural deaths.

10.1 She testified that upon arriving at the scene in Covid Camp on 7 May 2022, she found a baby wrapped in a blanket on a couch. She proceeded to uncover the baby and saw a circular impression on the baby's face, including foaming at the nose, together with partial scratch marks in the neck. She formed the view that this was an unnatural death, due to the foaming at the nose which is very uncommon in natural deaths, as well as the circular impression around the nose and mouth.

10.2 Ms Machau completed a form that included notes she compiled - what she referred to as a scene script - of her observations of the baby and the physical scene around her, of which she took photographs including photographs of the baby. This documentation that she compiled was meant for the consumption of the pathologist that was to perform the autopsy. The pathologist who performed the autopsy was Dr Esme Erasmus who, by 27 June 2024 when Ms Machau gave her evidence, had passed away in the previous year.

10.3 Ms Machau was also provided with the medical history of the baby by the appellant, which she recorded in the scene script, to the effect that the baby had been sick with chest problems and was hospitalised in

Stellenbosch Hospital in the period from 22 April until 5 May 2022. The baby was also on medication.

- 10.4 Ms Machau further recorded, based on her observations, that the baby had sustained injuries, and that, based on what she was told by the appellant, it was possibly the four-year-old sister that could have abused the baby at home. In her scene script Ms Machau indicated the word '*strangulation*' in parenthesis followed by a question, indicating that she queried whether or not the baby may have been strangled, due to the fact that she had observed scratch marks on the baby's neck. Under cross examination she explained that the scratch marks she had observed were not the sort that babies inflict when they scratch themselves. These scratch marks were a deeper impression which made it look like someone had pressed or held the baby in the neck area.
- 11 The State's next witness was Ms Balisa Sidlayi, a member of the Western Cape Emergency Medical Services, where she was an Emergency Care Practitioner.
 - 11.1 She testified that she examined baby L on 7 May 2022 at approximately 17 minutes past 6 in the morning. When she checked for the baby's vital signs whilst she lay on the couch, she found none to indicate that the baby was still alive.
 - 11.2 When she checked the baby's face, she saw that there was a round mark around the nose and mouth of the baby. When she asked the appellant what had happened, the appellant told her that she had left the baby with her four-year-old daughter in the house as she went outside to the toilet, and she did not provide any further explanation. It was Ms Sidlayi who called the police.
- 12 The State's final witness was Dr Estevao Bernado Alfonso, a forensic pathologist at the Paarl Forensic Pathology Services. He was called to testify on the contents of the autopsy report dated 9 May 2022, that had been

compiled by his colleague Dr Esme Erasmus, whom he confirmed had passed away in the middle of 2023. Dr Alfonso's evidence focused on the following chief post-mortem findings made by Dr Erasmus on the body of L:

- 12.1 She confirmed that the subject body was that of a female infant.
- 12.2 Dr Erasmus found a circumferential abrasion impression over the nose, mouth and cheeks with blanching of the face on the outer and inner aspect of the abrasion. Dr Alfonso explained that this was a reference to the impression on the baby's face which was over the right cheek, over the bridge of the nose and then coming down to the corner of the left mouth and then across the chin. The blanching referred to was a reference to loss of colour in that area, and paleness of the skin around the circumferential mark. When asked by the Court how much pressure on the baby's face would cause this blanching on the facial area, Dr Alfonso explained that blanching would be a secondary effect of pressure; the circumferential or circular mark would be from the direct pressure from the object pressed to the skin. The blanching would suggest that a moderate to significant amount of force had been applied to said area. The fact that there was an abrasion and the fact that this mark remained on the face for as long as it did, suggested a significant amount of force, because had very light force been used the skin may well have bounced back.
- 12.3 Dr Erasmus recorded that she found froth in the nose. According to Dr Alfonso, this was consistent with an asphyxia death, and the frothing would have occurred whilst the baby was still alive, before death occurred.
- 12.4 Dr Erasmus found petechial haemorrhages in the thymus, the lungs and the heart. Dr Alfonso explained that this was a reference to a very small bleed having been observed in the baby's thymus. He further explained that, like froth, this is one of the indicators of asphyxia, though not exclusively asphyxia.

- 12.5 Congestion of the lungs was found and recorded by Dr Erasmus, which Dr Alfonso stated was a reference to the finding of there having been more blood in the lungs than one would normally find. This was an indication of the blood vessels in the lungs having become engorged or filled with blood, which was, in essence, an effect of heart failure because at the time of death and with asphyxia deaths, the heart fails.
- 12.6 With reference to the brain swelling found and recorded by Dr Erasmus, the doctor explained that the baby's brain was found to have been slightly fuller than would be expected for an infant of that age. Though this feature was common in different types of deaths, it was often seen in asphyxia deaths.
- 12.7 As a result of Dr Erasmus's observations, her conclusion was that the cause of death was consistent with asphyxia due to smothering. In this regard, Dr Alfonso explained that asphyxia was a reference to a lack of oxygen in the body, and then smothering in this case was a reference to an obstruction of the external airways, i.e., the nose and the mouth. According to the doctor, it is the exact circular shape on the baby's face which was highly suggestive or indicative of something having been placed over the external airways in order to block them, thereby smothering the baby.
- 13 Dr Alfonso furthermore testified regarding the contents of an affidavit deposed to by Dr Erasmus dated 9 September 2022, made in terms of section 212(4) of the CPA, in response to a request from the State for a further opinion from her regarding some aspects of the case. The significance of a request for a further opinion from Dr Erasmus addressing the aspects sets out below, and to which Dr Alfonso testified, becomes apparent when regard is had to the fact when initially asked by various persons, including some of the first responders, as to what had happened to baby L, the appellant appeared to implicate her four year old daughter O in some form of wrongdoing that led to the condition in

which she said she found the baby when she returned from the toilet in the early hours of the morning of 7 May 2022.

- 13.1 In her affidavit, Dr Erasmus indicated that she had researched the time it may take for a baby to die by suffocation, whether accidental or intentional suffocation. The consensus from the various articles stated that it may take 3 to 5 minutes. Although Dr Erasmus had not referred to the articles which she had relied upon for this conclusion, Dr Alfonso's evidence was nevertheless that he found an article that could support Dr Erasmus's timeframe. The article in question stated that from the onset of suffocation after roughly 70 to 90 seconds infants lose consciousness, and persistent closure of the airways beyond that timeframe, into 2 minutes and beyond was mostly likely to result in irreversible consequences, including death.
- 13.2 When examining the imprint on the face of the infant, Dr Erasmus noted that the imprint showed that there had been no movement of the cup held onto the baby's face, which movement would have caused multiple pressure imprints. The imprint was directly under the baby's right eye, which would have been very uncomfortable and/or painful. One would expect an infant of 5 months to at least try and move her face away from the obstruction. Dr Alfonso in his evidence was not willing to comment on Dr Erasmus's opinion regarding the painfulness referred to as, in his view, this was subjective. His testimony regarding the remainder of Dr Erasmus' opinion in this paragraph, however, was corroborative thereof, in that he explained that her opinion indicated that there was a single application of the cup on the face, and that the pressure was maintained in a single motion. The cup was not placed, pressed, then removed and pressed again or adjusted on the face, because then one would have observed more than one imprint.
- 13.3 In the opinion of Dr Erasmus, it is not possible for a 4-year-old child to keep continuous pressure with a plastic cup over the face of an infant for a period of 3 to 5 minutes without losing interest and moving it away.

A more likely scenario would be for the child to put it on the face, remove it and put it on again. Dr Alfonso concurred with this opinion.

- 13.4 Linked to the abovementioned point, Dr Erasmus further opined that when considering the imprint on the face of the infant, it showed a constant even pressure neatly covering the mouth and nose. It was more likely that this was done by a much older child (teenager) or an adult who has better control and could keep it in place over a specific area. According to Dr Erasmus, this implied intentional, prolonged / sustained, forceful, anterior to posterior directed pressure of the object over the external airways until the asphyxiation led to the death. Dr Alfonso explained that this paragraph was better understood when one had regard to the positioning of the cup on the baby's face; the force needed to hold the cup in place whilst holding the child; and then the interest and being able to maintain that for a significant amount of time.
- 13.5 However, when he was asked directly by the Court, with reference to the last line of Dr Erasmus's opinion, i.e., '*this implies intentional, prolonged /sustained, forceful...*' and the contents of the appellant's plea statement, what his opinion would be regarding the intention of the appellant during commission of the act, Dr Alfonso was not willing to comment on the appellant's intention. He responded that it was not his place to suggest what the appellant's intent might have been.
- 14 The State thereafter closed its case and there were no witnesses called by and on behalf of the appellant.
- 15 There were therefore two issues for determination by the Regional Court relevant to the appellant's conviction:
 - 15.1 First, the type of intent that was attendant upon the offence, particularly whether it was *dolus directus* or *dolus eventualis*, the latter with reference to the appellant's unsuccessful section 112(2) plea.

15.2 Second, whether premeditation was present in the commission of the offence, which if found to be so, would bestow the court a *quo* with the enhanced powers to impose life imprisonment on the accused, in terms of the Act.

16 I address first the finding of the learned magistrate on conviction and the reasons therefor.

The magistrate's finding on conviction

17 In his judgment, the learned magistrate found that the appellant is guilty of murder, based on *dolus directus*, i.e., '*where the will is directed to compassing the death of the deceased*.'⁴

18 It is indeed sometimes said that a person is presumed to intend the reasonable and probable consequences of his / her act, a conclusion that of necessity requires the determination of that which is subjective in nature. In **S v Dlodlo**,⁵ Botha JA set out the following instructive guidelines regarding the factors to consider in determining an accused's state of mind for the purposes of intent:

*The subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and can normally only be inferred from all the circumstances leading up to and surrounding the infliction of that injury. Where, however, the accused's subjective state of mind at the relevant time is sought to be proved by inference, the inference sought to be drawn must be consistent with all the proved facts, and the proved facts should be such that they exclude every other reasonable inference save the one sought to be drawn. If they do not exclude every other reasonable inference, then there must a reasonable doubt whether the inference sought to be drawn is the correct one.*⁶

⁴ S v Sigwahla 1967 (4) SA 566 (A), at 569G-H.

⁵ 1966 (2) SA 401 (AD)

⁶ At 405G-H

19 To arrive at his finding the magistrate placed heavy reliance on the following:

19.1 The fact that in her responses to Mr B[...] and some of the first responders, the appellant appeared to implicate her four-year-old daughter O in the commission of the offence.

19.2 The fact that in her statement made to Captain Vuyani Baroyi dated 10 May 2022, there too the appellant appeared to implicate O, stating that when she returned from the toilet in the early hours of the morning she found baby L unstable on the bed, shaking as if she were epileptic and when she asked O, with whom she had left baby L, what she had done to the baby, O responded that she had not done anything and that they had only been playing. She furthermore denied having killed her baby and stated that she had no reason to do so.

19.3 The opinion expressed by Dr Erasmus in her section 212(4) affidavit wherein she opined, with reference to the imprint on the baby's face which she said was indicative of constant pressure by an older child or adult, that: *'This implies intentional, prolonged/sustained, forceful, anterior to posterior directed pressure of the object over the external airways until the asphyxiation lead to the death.'*

20 I have a different interpretation to this sentence in Dr Erasmus' affidavit than that of the learned magistrate, in particular the import therein of the word *'intentional.'* The magistrate's interpretation of this sentence was that it supported the conclusion that the appellant had acted with direct intention when she killed baby L. In my view, in particular when regard is had to the content of the entire paragraph in which this sentence is to be found, it is apparent that the word *'intentional'* refers more to the manner of the application of pressure over the child's external airways than the appellant's direct intention to kill L. The statement rather describes the appellant's physical actions during the commission of the offence, and is accordingly neutral in that it supports neither *dolus directus* nor *dolus eventualis*. Dr Alfonso was correct therefore to

refuse to comment when invited to do so by the court a *quo*, on the intent of the appellant during the incident.

- 21 This difference of opinion between this Court and the learned magistrate, however, is of no moment and is not necessarily an indication of a misdirection on the part of the magistrate when he concluded that the appellant acted with *dolus directus*, as there can be no question that the deceased died in consequence of an injury intentionally inflicted upon her by the appellant; and further given the fact that the court a *quo* also relied on the following undisputed facts and events during the trial, which this Court cannot gainsay: (a) the appellant did not dispute the contents of the autopsy report; (b) the appellant did not give any evidence in regard to her subjective state of mind other than what she stated in her plea statement; and (c) the fact that the appellant had lied on five previous occasions, one of which was under oath to Captain Baroyi, implicating her four-year-old daughter in the death of baby L. For all these reasons the magistrate denounced the appellant's version, including the form of intent relied upon, as a lie and found her to be unreliable. The learned magistrate then found that she had intended to kill her baby, and rejected her version that she had acted as she did merely to stop the baby from crying. Given these factors, this Court has no reason to interfere with the conclusion of the learned magistrate that the appellant acted with *dolus directus* when she killed baby L.
- 22 The question of the presence of premeditation or planning, however, is a different one. It is on this score, *inter alia*, that this Court parts ways with the learned magistrate's findings.

The appeal on conviction

- 23 The question of whether it was *dolus directus* or *dolus eventualis* with which the appellant acted is in any event not pertinently before this Court in the present appeal. The question that is at the heart of this appeal on conviction, and this was made clear by counsel for the appellant during argument, is the following: regardless of whether or not the appellant acted with *dolus directus* or *dolus*

eventualis, was the learned magistrate correct in his finding that the murder was premediated by the appellant? The appellant contends that the magistrate erred when he found that the murder was premediated, which finding led him to the imposition of the obligatory minimum sentence of life imprisonment in terms of the Act.

- 24 Before turning to the legal principles applicable to premeditation and planning, it is perhaps apposite to frame the discussion with reference to how the magistrate arrived at the finding of premeditation. He found as follows in the last paragraph of his judgement on conviction:

‘And she is found guilty of murder, with direct intention. And, this is also as indicated in the charge, should have been pre-meditated, at the time of the incident.’⁷

- 25 In my view, the learned magistrate, in coming to this finding regarding the presence of premeditation, erred in the following respects: (a) he conflated the presence of the intention to kill with premeditation; and (b) he failed to have regard to the significance of the factor of timing, before the murder rather than during⁸ it, in the determination of whether or not premeditation had been present when a murder was committed.

- 26 The fact that direct intention and premeditation are not synonymous concepts was stated with clarity in **S v Jordaan**⁹ where Binns-Ward J was contending with, *inter alia*, an indictment that relied on section 51(1) of the Act with respect to one of the charges faced by the accused, and held that: *‘The import of the term ‘planned or Premeditated’ is inherently imprecise...It is unlikely that the legislature could have intended that the term should be construed as synonymous with ‘direct intention’, and it is clear in any event that the crime can*

⁷ My emphasis.

⁸ Emphasis mine

⁹ 2018 (1) SACR 522

*be committed with direct intention without the involvement of any prior process of planning.*¹⁰

- 27 In the judgment of Bozalek J, writing for a Full Bench of this Division, in **S v Raath**,¹¹ oft-cited and relied upon as a seminal judgment in regard to the proper approach to be adopted by courts when enquiring as whether or not the statutorily undefined concepts of planning or premeditation are present in any case of murder where section 51(1) of the Act is invoked, the learned judge held as follows:

*The Concise Oxford dictionary 10 ed, revised, gives the meaning of premeditate as 'to think out, 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 murder was 'planned or premeditated.'*¹²

¹⁰ Para [123]

¹¹ 2009 (2) SACR 46

¹² Para [16]

- 28 From the Raath decision, and many others thereafter (including, but not limited to, Satchwell J's Full Bench judgment in **S v Taunyane**¹³) which all adopted and to some extent refined the *ratio* in Raath, it is patently clear that intention to kill and the execution of that intention are two different concepts that engage two separate legal inquiries. In paragraph [13] of the judgment in **S v Kekana**,¹⁴ the Supreme Court of Appeal (SCA) held that: "*It is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.*" This decision further makes it clear that planning or premeditation are to be determined with reference to what occurred before the murder, rather than during it, a principle confirmed in the majority judgement of the SCA in **S v Peloele**¹⁵ when it held in paragraph [9] that though the perpetrator in his state of mind may have both the intent and premeditation to commit the crime, the intent has to be present *during* the commission of the crime, while premeditation is, as a matter of logic, limited only to the state of mind *before* the commission of the crime.¹⁶
- 29 In **S v Montsho**¹⁷, the SCA, per Petse JA said that the presence or absence of planning or premeditation '*can properly be determined on a case-by-case basis.*'¹⁸ This did not occur in this case, in the Paarl Regional Court whose judgment is appealed against. More pertinently, the State led no evidence as to the appellant's state of mind prior to her taking the bottle cap and pressing it onto the baby's face, in order to allow the court a *quo* to arrive at a conclusion as to whether or not the murder was planned or premeditated. To be clear, the onus rested on the State to establish, beyond a reasonable doubt, that the murder was premeditated. It failed to discharge this onus, and accordingly the magistrate erred in his finding that the murder was premeditated.

¹³ 2018 (1) SACR 163 (GJ), in para [28].

¹⁴ [2014] ZASCA 158

¹⁵ 2022 (2) SACR 349 (SCA)

¹⁶ The SCA in this paragraph of its judgment was seized with a contention by the appellant that the High Court had conflated 'intent' with 'premeditation', a contention which the majority did not uphold.

¹⁷ [2015] ZASCA 187

¹⁸ Para [14]

30 What can be gleaned from the appellant's plea statement is, at best, her motive when she reached for the bottle cap and pressed it over baby L's face; i.e., the desire to stop baby L's consistent crying in circumstances where her four-year-old daughter was also demanding her attention. However, in **Taunyane**, Satchwell J noted the following points, *inter alia*, that are germane to the present appeal, and are further demonstrative of the learned magistrate's errors on conviction:

30.1 'Motive....alone' is insufficient to constitute premeditation.¹⁹

30.2 That firing four shots into the body of the deceased whilst he was lying on the ground, as had occurred in that case, demonstrated *dolus directus* and not premeditation.²⁰

31 Relying on some of the guidelines identified in **Raath**, Satchwell J formulated the following broad test at para [30]:

In deciding whether or not appellant killed the deceased in circumstances where such killing was planned or premeditated, the test is not whether or not there was an intention to kill. That had already been dealt with in finding that the killing was an act of murder. The question now is whether or not the appellant "weighed-up" his proposed conduct either on a thought-out basis or an arranged-in-advance basis,²¹ or whether or not appellant "rationally consider[ed] the timing or method" of the killing or prepared a "scheme or design" in advance for achieving his goal of killing the deceased.²²

32 The above excerpt from the Full Bench's decision in **Taunyane** underscores two vital principles, i.e., that intention to kill and premeditation are separate concepts; and premeditation can only be determined upon an examination of all

¹⁹ Para [31(b)]

²⁰ Para [30]

²¹ Citing **Raath**, para [16]

²² Citing **S v PM 2014 (2) SACR 481 (GP)**, at para [27]

the circumstances surrounding any particular murder, including (but not only) the appellant's state of mind before the murder. As stated before, the magistrate misdirected himself in two separate instances regarding these principles:

32.1 By conflating direct intention to kill with premeditation.

32.2 By finding that the murder was premeditated in the absence of any evidence regarding, *inter alia*, the appellant's state of mind prior to the murder, which could have allowed him to arrive at that conclusion.

33 That there was no evidence led at the trial upon which a finding could be made of premeditation is demonstrated by the nature of the evidence of all witnesses that were called by the State in support of its case – the evidence of all five State witnesses related to events that occurred after the murder. Dr Alfonso was able to shed light on what was happening during the murder, i.e., how the murder occurred, but this had no bearing on whether or not premeditation or planning were present before the murder.

34 During argument of the appeal on 31 January 2025, counsel for the State conceded that there was no evidence upon which a finding of premeditation could have been made by the court *a quo*. This concession well-made, given the Full Bench decision in **Taunyane**, to the effect that facts activating the minimum sentence provisions must be proved by the State beyond reasonable doubt; and this requirement must be addressed by the trial court at the conviction stage.²³ This simply did not occur in this case in the court below, and accordingly it was accepted by counsel for both parties that the jurisdictional fact triggering the imposition of life imprisonment, i.e., premeditation, was absent.

35 It was accepted by both parties, however, and this Court that the offence committed was of a serious enough nature to attract a custodial sentence. The

²³ Supra, at [13]

Court then requested the parties to make further written submissions to it regarding the Regional Court's sentencing jurisdiction in the circumstances of this case, given that the minimum sentence of life imprisonment was not applicable; and further address in those written submissions what the appropriate approach should be to sentencing in circumstances such as the present which involved infanticide²⁴ and/or filicide²⁵.

The appeal on sentence

- 36 In the supplementary submissions invited by this Court, it was submitted on behalf of the appellant that the ordinary jurisdiction of the Regional Court is applicable in this matter, and not the provisions of section 51(2) of the Act mandating the court to impose a minimum sentence of 15 years in circumstances where, as in the present case, murder by a first offender had been found and there was no premeditation. The basis for this contention is the argument that the State did not indicate at any stage that it would seek the minimum sentence of 15 years in the event that premeditation was not proved.
- 37 Such a contention would hold merit in the context of an accompanying submission or argument (which was not advanced on behalf of the appellant) that the appellant's fair trial rights, which include the procedures applied during the sentencing phase as set out in section 35(3)(a) to (o) of the Constitution, have been infringed as a result of the State's failure to inform the appellant of the charge she faced with sufficient detail to enable her to respond to it.
- 38 In **S v MT**²⁶ it was held that the question whether this right was infringed by the failure to include the relevant section on minimum section legislation in the charge-sheet was a constitutional matter and therefore an issue within the jurisdiction of the Constitutional Court.²⁷ However, Dlodlo AJ – writing for a unanimous Constitutional Court – confirmed the importance of making a careful

²⁴ Oxford Dictionary definition: "1. The crime of killing a child within a year of its birth; 2. When a person kills an infant, especially their own child."

²⁵ Oxford Dictionary definition: The killing of one's son or daughter.

²⁶ 2018 (2) SACR 592 (CC)

²⁷ Para [35]

assessment of the factual context in determining the presence or absence of unfairness in the trial as follows:

It is indeed desirable that the charge-sheet refer to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case has to be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge-sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because, even though there may no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's 35(3) right to a fair trial was not in fact infringed.²⁸

39 Upon an assessment of the individual circumstances of this case, this Court cannot agree with the submission made on behalf of the appellant in this regard. This is because, whilst it is apparent from the indictment that the State was heavily reliant on a charge of premeditated murder, the indictment nevertheless further charged that the appellant is guilty of the crime of murder, read with the provisions of, *inter alia*, section 51(2) of the Act. In the view of this Court the appellant was therefore advised adequately in the charge-sheet of the intention to apply section 51(2)(a)(i) of the Act. To hold otherwise would amount to the elevation of form over substance which Koen J (as he then was), writing for the majority, warned against in paragraphs [73] to [76] of **S v Mabaso**.²⁹

40 The minimum sentence stipulated in section 51(2)(a)(i) is clearly then applicable to this case. The section provides that notwithstanding any other law but subject to subsections (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of an offence referred to in

²⁸ Para [40]

²⁹ 2014 (1) SACR 299 (KZP)

Part II of Schedule 2, to imprisonment for a period of 15 years in the case of a first offender.

- 41 The appellant is a first offender. She pleaded guilty to murder in circumstances where this court finds, and it is now common cause, that there was no premeditation and accordingly the circumstance are other than those referred in Part I, as required by Part II of Schedule 2.
- 42 Section 51(3) provides, in relevant part, that if any court referred to in subsection (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in that subsection, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.³⁰
- 43 The State, in its supplementary submissions, and having conceded that the minimum sentence of life imprisonment was not applicable, contended that the minimum sentence of 15 years if applicable to this case as the appellant was advised of the State's intention to reliance on this minimum sentence.
- 44 I turn now to address the various aspects in which the learned magistrate misdirected himself on sentence.

Failure to permit or call for any pre-sentence report

- 45 In **S v EN**,³¹ the SCA, per Shongwe JA, held as follows:

Trial courts take months, in some instances years, dealing with evidence and principles of law to establish the guilt or innocence of an accused person. However, my observation is that when it comes to sentencing stage, that process usually happens very quickly and often immediately after conviction. Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary

³⁰ The proviso in section 51(3) is of no application in these proceedings.

³¹ 2014 (1) SACR 198 (SCA)

*information to put them in a position to exercise their sentencing discretion properly...This is especially so in cases where it is clear that life imprisonment is being considered to be an appropriate sentence. Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence.*³²

46 In **S v Mokgara**,³³ De Vos J said:

A presiding officer often has to deal with a situation where an accused, whether he is defended or appearing on his own, decided not to give evidence under oath in mitigation of sentence. In cases where a legal representative is present, a presiding officer can only rely on what defence counsel places before him. The presiding officer is not entitled to question the accused directly...That brings me to the issue of what should be done by a presiding officer if and when an accused's legal representative fails to prove substantial and compelling circumstances, whether it is due to the accused's refusal to give proper instructions as it may jeopardise the chances on appeal on the merits, and/or lack of taking proper instructions, and/or lack of experience, or for various reasons...The law is clear and cannot be faulted. In such instances the legal duty remains on the presiding officer to ensure that all available facts are properly enquired into before a decision is made that the ultimate prescribed sentence of life imprisonment can be imposed.

47 And finally in **S v Selli**,³⁴ Boseilo JA pointed out that section 51(3) of the Act calls for a '*purposeful enquiry by a sentencing court*' into the presence or absence of substantial and compelling circumstances:

Self-evidently, this is intended to avoid visiting an accused with the severest sentence except in circumstances where there are no weighty

³² Para [14]

³³ 2015 (1) SACR 634 (GP) at [19] – [20]

³⁴ [2015] ZASCA 173 (SCA case no 220/2015, 26 November 2015)

*or cogent facts which call for a less severe sentence. A failure by a sentencing officer to be diligent, conscientious and punctilious in his or her search for substantial and compelling circumstances might result in a sentence which is disturbingly inappropriate and amounts to an injustice. Undoubtedly, such a failure amounts to a serious misdirection. This is what happened in this case. Justice and fairness require that this matter be referred back to the court below so that an appropriate enquiry into the existence of substantial and compelling circumstances can be launched.*³⁵

- 48 In this particular case, the magistrate handed down his judgment on conviction, whereafter the State informed the court that the appellant had no previous convictions. The following, admittedly sketchy-in-places, interaction then ensued between the legal representative for the appellant, Ms Diedricks, and the learned magistrate:

Ms Diedricks: *[Indistinct] respond to the probation officer.*

Court: *That is denied.*

Ms Diedricks: *Officer is recalled, Your Worship. That is the mother of minor children....[indistinct / intervenes]*

Court: *No, that is denied, that is denied, it is not applicable, this charges (sic).*

Ms Diedricks: *As it pleases the Court, can the matter then stand down for me to consult, Your Worship, for sentence.*

- 49 This interaction suggests that the issue of a probation officer was raised on behalf of the appellant before the court a *quo* proceeded to sentencing, but that the learned magistrate denied the request on the basis that such was not applicable due to the nature of the charges. In this regard, the magistrate misdirected himself by failing to allow for the evidence of a probation officer.

³⁵ Para [13]

- 50 Even if this Court is wrong in its interpretation of the above interaction (due to the sketchy record), the circumstances of this case cried out for the magistrate to have called, *mero motu*, for a probation officer's or other relevant pre-sentence report to properly and fully inform him for the purposes of sentencing the appellant.
- 51 In **S v Samuels**,³⁶ Ponnann JA cited with approval the following from **S v Siebert**³⁷:

Sentencing is a judicial function sui generis. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.

- 52 In the present case, the learned magistrate's refusal to permit, or his failure to call for the relevant pre-sentence reports amounted a serious misdirection in that he:
- 52.1 Failed in his duty to ensure that all available facts were properly enquired into before he could make a decision that the ultimate prescribed minimum sentence was called for.
- 52.2 Failed to act with the required diligence in his search for substantial and compelling circumstances to ensure that he imposed an appropriate, fair and just sentence for the appellant.
- 52.3 Failed to have regard to the fact that he was sentencing the mother of a minor child, O of whom the appellant was the primary care giver. In this regard, the learned was bound by what the SCA held in paragraph [24]

³⁶ 2011 (1) SACR 9 (SCA)

³⁷ 1988 (1) SACR 554 (SCA) 558j – 559a

of its judgment in **S v Pillay**,³⁸ that in order for a court to arrive at an informed decision concerning an appropriate sentence for an accused who is a mother of minor children, the information set out in the dicta from **S v M**³⁹ and **MS v S**⁴⁰ was required. A court having all that information before it might still decide, as was done in **Ms v S**⁴¹ and **S v Howells**,⁴² that incarceration is called for. Even if it does so, it might, with the information at hand, be able to fashion an order that will ensure the continued well-being of the children, albeit in trying circumstances. On the other hand, a sentencing court might, having all that information at hand, decide against incarceration. The point, though – the SCA continued – is that the evidence upon which a proper decision is to be made has to be obtained and all the actors must play their part, including the appellant’s legal representatives and the State, using such State resources as may be available to it. Citing **S v Siebert**,⁴³ the SCA further held that as far as sentencing is concerned, a judicial officer is not supposed to be passive.

- 53 A probation officer’s or other relevant pre-sentence report would no doubt have assisted the magistrate in providing a better insight into the appellant’s social and personal circumstances, as well her psychological state, for the purposes of sentencing. Ultimately such a report was called for, for the purposes of assisting the sentencing court to make a fully informed decision about what sentence was appropriate and just.

Failure to consider the best interests of the child when sentencing a primary care giver

- 54 Section 28(2) of the Constitution requires that a child’s best interests have paramount importance in every matter concerning the child. It has been held by the SCA that a reading of section 28(1) together with section 28(2) of the

³⁸ 2011 (2) SACR 409 , at para [24]

³⁹ S v M (centre for Child Law as Amicus Curiae) 2007 (2) SACR 539 (CC)

⁴⁰ MS v S (Centre for Child Law as Amicus Curiae) 2011 (2) SACR 88 (CC)

⁴¹ *Supra*

⁴² 1999 (1) SACR 675 (C)

⁴³ *Supra*, at 558g-559a

Constitution requires that when a custodial sentence of a primary caregiver is an issue, the court has four responsibilities: to establish whether there would be an impact on the child; to consider independently the child's best interests; to attach appropriate weight to those interests; and to ensure that the child would be taken care of if the primary care giver were sent to prison.⁴⁴ The learned magistrate in this matter failed to undertake this enquiry in relation to the minor child O, of whom the appellant was the primary care giver. This constitutes a serious misdirection on his part.

55 In **S v M (Centre for Child Law as Amicus Curiae)**,⁴⁵ one of the issues addressed by the Constitutional Court was what the duties are of the sentencing court in the light of section 28(2) of the Constitution and any relevant statutory provisions when the person being sentenced is the primary caregiver.

56 Sachs J, writing for the majority, noted that '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.'⁴⁶ Sachs J was also careful to point out that the issue was not whether parents should be allowed to rely on the best-interests principle to avoid the otherwise just consequences of their own criminal behaviour.⁴⁷ At paragraph [35] he observed that:

Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to

⁴⁴ S v De Villiers 2016 (1) SACR 148, at para [31]

⁴⁵ 2007 (2) SACR 539 (CC)

⁴⁶ Para [27]

⁴⁷ Para [34]

protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.’

- 57 In this case, it was not disputed that the appellant gave birth to three children. Her eldest, an 11-year-old boy lived with his father and her two youngest daughters – four-year-old O and baby L – lived with the appellant, and she was their primary caregiver. After the incident she remained O’s primary caregiver until her arrest on 31 July 2022. As at the date of sentencing, O was six years.
- 58 As stated above, the learned magistrate misdirected himself when, having established from the evidence that the appellant was the primary caregiver of O and in circumstances where a custodial sentence was viewed as required by the circumstances, he did not apply his mind at all during sentence, to the question whether it was essential that steps be taken to ensure that O would be adequately cared for if the primary caregiver was imprisoned. The fact that there was a minor child who would be impacted by a custodial sentence further emphasised the necessity and importance of the relevant pre-sentence reports serving before the magistrate to guide him on an appropriate sentence. A report from the family advocate may also have been used.⁴⁸

Failure to attach significant or any weight to the appellant’s personal circumstances

- 59 The now trite **Zinn**⁴⁹ triad requires a court, in sentencing to have regard to and seek to balance the crime, the offender and the interests of society.
- 60 The crime of infanticide or filicide admitted by the appellant is abhorrent, and the needs of society demand that she be punished and that such punishment be sufficient to deter others, and thereby ultimately protect potential victims. It is also important that punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.⁵⁰

⁴⁸ See s v De Villiers 2016 (1) SACR 148 (SCA) at [11]

⁴⁹ S v Zinn 1969 (2) SA 537 (A) 540G-H

⁵⁰ S v Rabie 1975 (4) SA 855 at 862G

- 61 There is an aspect of the triad however to which the learned magistrate paid insufficient or no regard during sentence. And that is the offender and, coupled with that, the nature of the crime she had committed. It is fair to say that no parent wakes up on any given day and proceeds to murder their vulnerable defenceless 6-month-old baby. The circumstances of this case therefore called for the magistrate to seek to acquire a deeper understanding of the factors that drive a parent to this unfortunate path, in general, but also the circumstances that led to this particular accused to do so.
- 62 The appellant gave evidence in mitigation of sentence of how she lost her mother and her grandmother in the same year – 2007 – when she was ten years old whilst living in the village of Willowvale in the Eastern, after which she dropped out of school in Grade 5. Thereafter, her life was one of survival and from one day to the next rather than actually thriving. She testified as to how she moved with an aunt from relative to relative, first in the Eastern Cape, and thereafter in Cape Town. The relatives who were willing to help them by housing them would ultimately ask them to leave, citing the financial burden of carrying them. At some point, after her arrival in Cape Town, she was to be married off to an older man. She saved herself from this eventuality by running away. She had her first child at 15 years; at 20 years she had O and at 24 years old she had baby L.
- 63 Unfortunately, in our South African context there are far too many people who live and grow up in the same or similar circumstances as the appellant than should be the case anywhere, let alone a society such as ours which subscribes to the constitutional values of human dignity and the advancement of human rights. Some manage to triumph over these crushing social circumstances, and others remain in them. It can safely be said, however, that the majority of those who, like the appellant, remain in those circumstances, do not murder their babies, and so in that sense the circumstances in which the appellant grew up are, unfortunately themselves not unique in our society and accordingly cannot, on their own and without more, serve as a rationale for why one parent in these circumstances murders their baby in the deep of night,

whilst another parent in the same circumstances does not. It is against this background that the importance of judging its case by its own peculiar circumstances becomes stark, for it is in those peculiar facts where the uniqueness lies.

64 To be clear, murder of any sort is horrendous; and when the murderer is a parent, and the victim is their child it acquires the additional feature of being unnatural. It would seem, however, from the research which both counsel assisted this Court with in relation to the sentencing approach adopted by our courts in infanticide cases, that there is a particular stigma and special opprobrium in all strata of society including, sadly, sentencing courts, that is reserved for females who murder their offspring.

65 In her work entitled *“Judging Gender: The Sentencing of South African Mothers who Murder their Children”*,⁵¹ Associate Professor Amanda Spies made this observation:

Women who murder their children are not only judged for their infraction but also for their compliance/deviation from the stereotypical role of motherhood. Motherhood is interpreted through a specific set of socio-cultural norms, with mothers needing to be loving, warm, selfless, and protective at all times. The expectations of motherhood encompass not just being a mother but also being a “good mother” placing the wellbeing of children before “everything, anything and anyone else”. The “motherhood mandate” is further rooted in class, race, and gender ideals with a “good” mother seen as white, middle-class, married, heterosexual, and able-bodied with the exclusive responsibility of mothering their biological children....filicidal women who transgress this mandate without any apparent justification, such as mental instability, are viewed as doubly deviant not only in breaking the law but, also transgressing “their own female nature and their primary

⁵¹ Associate Professor Amanda Spies, Department of Public Law, Faculty of Law, Nelson Mandela University, Gqeberha. Published in Criminal Law Forum (2024); <https://doi.org/10.1007/s10609-024-09485-z>

*social identity as a mother” – the bad mother. The narrative that emerges in criminal trials is that “bad” filicidal women are demoted from their status of mother and effectively woman, to a monster lacking in humanity.*⁵²

66 The learned magistrate appears to have shared the same sentiments as those in the underlined portion of the excerpt cited above, which is evident by the following statement made by him in his sentencing judgement: *“In terms of natural law, the accused was the primary caregiver of this baby, as the mother, she was supposed to give her motherly love and care, not to turn around and be a monster...a monster responsible for her horrendous death.”* It would appear then from his judgment that it is this deep moral revulsion for the appellant and her conduct, and the need to punish her above all else,⁵³ that caused the learned magistrate to commit the following errors on sentence, some of which have already been referred to above:

66.1 Not to call for pre-sentence reports, as he was obliged to do in the circumstances, in order to enable him to gain a comprehensive image of the social, personal and psychological background of the appellant for the purposes of imposing an appropriate sentence.⁵⁴

66.2 To turn a blind eye to the best interests of the minor child as already stated above.

66.3 To take no cognisance of the fact that there was no evidence led to the effect that the appellant posed a danger to society deserving of being incarcerated for the remainder of her young life.

66.4 To be dismissive of the fact that as at 23 August 2024 when the appellant was sentenced, the appellant had been in detention for more than two years, which error on the part of the learned magistrate was

⁵² Para 2.2, page 230. My emphasis.

⁵³ My emphasis.

⁵⁴ See Thulare AJ in *S v Bo; S v KP* (WCC case nos 181000 and 181002, 2 November 2018), at para [17].

rendered more serious by the fact that the appellant was then the primary caregiver of a minor child. In **S v Mqabhi**,⁵⁵ Spilg J, in addressing the impact of pre-sentence detention on the assessment of substantial and compelling circumstances, referred to four SCA decisions⁵⁶ on the basis of which he concluded as follows:⁵⁷

66.4.1 Pre-sentence detention is a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances for the purposes of section 51.

66.4.2 Such period of detention is not to be isolated as a substantial and compelling circumstance. It must be weighed as a mitigating factor with all the other mitigating and aggravating factors, in determining whether the effective minimum period of imprisonment to be imposed is justified in the sense of it being proportionate to the crime committed. If it is not, then the want of proportionality constitutes the substantial and compelling circumstances required under section 51(3) of the Act.

66.4.3 The reason for the prolonged period of detention is a factor.

66.4.4 There is mechanical formula or rule of thumb to determine the period by which sentence is to be reduced. The specific circumstances of the offender are to be assessed in each case when determining the extent to which the proposed sentence shall be reduced.

66.4.5 Where only one serious offence is committed, and assuming the offender has not been responsible for unduly delaying the trial, then a court may more readily reduce the sentence by the actual period spent in detention.

⁵⁵ 2015 (1) SACR 508 (GJ)

⁵⁶ S v Dlamini 2012 (2) SACR 1 (SCA); S v Vilakazi 2009 (1) SACR 552 (SCA); s v Kruger 2012 (1) SACR 369 (SCA) and S v Radebe & another 2013 (2) SACR 165 (SCA)

⁵⁷ In para [38]

- 66.5 Not to attach any weight to the evidence given by the appellant regarding her personal circumstances immediately before she committed the offence, including the lack of any meaningful supportive net in her life, about which evidence more is said below.
- 67 The appellant testified of her lack of support in her life in general, especially immediately before the murder of baby L. Baby L had been hospitalised shortly before her death at Stellenbosch Hospital as a result of malnutrition, which itself speaks of a grave situation in which there was no one that could be relied upon even to assist with feeding her children. Following baby L's hospitalisation, the appellant was awaiting assistance from the local clinic with food and supplies for the baby. The baby's father had recently given her R300 for the baby; but he generally only gave her money whenever he felt like it. She had secured a job in Hout Bay, working two days a week in return for between R500 and R600 in wages.
- 68 Instead, in his assessment of this evidence, the magistrate found that the appellant did in fact have support in the form of Mr L[...] B[...] and Ms N[...] B[...] who had testified for the State. This was wrong. There was no evidence led as to the supportive role these individuals played in the appellant's life before the incident. Their evidence related to their appearance on the scene after the incident. Such evidence as there was, in relation to the appellant's own living conditions suggested that there was an appalling lack of any meaningful support in her life, and that the appellant sorely needed it.
- 69 In his balancing of the Zinn triad imperatives, the learned magistrate misdirected himself by disregarding the appellant's interests and those of her minor child. He mischaracterised the appellant's evidence, and did not attach any weight to the evidence of her personal circumstances.

Conclusion

70 In the circumstances, I consider that the crime of murder committed by the appellant is such that a custodial sentence is required. Society must be assured that those who take the lives the young and vulnerable whom they are meant to protect are not allowed to walk free. At the same time, taking into account the interests of the appellant's very young child, the period of imprisonment should not be unduly lengthy and should furthermore take into account the period for which she has been incarcerated from 1 August 2022 to date.

71 Accordingly:

71.1 The appeal is upheld.

71.2 The order of the court *a quo* is set aside and replaced with the following:

71.2.1 The appeal is upheld.

71.2.2 The sentence imposed by the trial court is set aside and the following sentence is imposed:

The appellant is sentenced to 12 years' imprisonment .

71.3 The sentence shall take effect from 1 August 2022.

N MAYOSI
Acting Judge of the High Court

HENNEY J
Judge of the High Court