



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

Case No: **A36/2024**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
	 SIGNATURE 29 MAY 2025 DATE

In the matter between:

BAFANA SOLOMON MSIZA

Appellant

and

THE STATE

Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be May 2025.

JUDGMENT

RETIEF J (DOMINGO AJ CONCURRING)**INTRODUCTION**

[1] The appellant, Mr B.S. Msiza exercises his automatic right of appeal to this Court against his conviction on a charge of murder, a sentence of life imprisonment and being found unfit to possess a firearm. The sentence was duly imposed by the Presiding Magistrate, Mr G. Wacht in the Regional Court at Nigel on the 7 December 2023 [Court *a quo*].

[2] The appellant was charged with murder read with the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997, as amended by Act 38 of 2007, whilst acting in the furtherance of the execution of a common purpose, in that the appellant on the 2 November 2018 and near Duduza in the Regional Division of Gauteng, wrongfully and intentionally killed Mr Katlego Makua [the deceased], an adult male. The appellant pleaded not guilty to the charge put to him.

[3] At the relevant time, the appellant was legally represented by Legal Aid and was tried together with Mr Mxolisi Gibson Ndum-Ndum [accused 1] in the execution of the common purpose to kill the deceased. The appellant was referred to as accused 3. The State withdrew charges against an Nhlanhla Gama, accused 2. The appellant was tried together with accused 1 and they were both found guilty as charged and were both sentenced to life imprisonment. Accused 1, although represented, did not file a notice of appeal. In consequence, this Court sits as a Court of appeal in respect of accused 3 only.

[4] According to the record, the appellant provided both a plea explanation by admitting that he was present on the scene when the deceased was assaulted by accused 1. He too, during the course of the trial and, only after the State's eye witnesses had been cross-examined, made and confirmed admissions in terms of section 220 of the Criminal Procedure Act, 51 of 1977. The section 220 admissions made by the appellant were exactly the same as those admissions made and read into the record on behalf of accused 1. The appellant's section 220 admissions were

reduced to writing and received into the record as Exhibit "B." The admissions he made were:

"Accused 3 – He admits that the identity of the deceased as being that of Katlego Makua, a male person, adult person that the aforementioned deceased sustained injuries on the 2 November 2018 as a result of which he was hospitalised at the Pholosong on the same day. The deceased passed away as a result of the injuries sustained on the 2 November 2018 on the 13 November 2018 at Pholosong Hospital. The deceased was conveyed from the crime scene to Pholosong Hospital on the 2 November 2018. During this process the deceased did not sustain any further injuries. The body of the deceased was conveyed from the Pholosong Hospital to Forensic Pathologist Services in Springs on the 19 November 2018 and did not sustain any further injuries during the process. Dr F. Bekhia conducted the postmortem on the deceased on the 26 November 2018 and the cause of death is noted as a head injury. That no actus interveniens occurred during the commission, that admission of the deceased at Pholosong Hospital on the 2 November 2018 until his demise on the 13 November 2018."

[5] Other than the admissions and his own testimony, the appellant did not call any further witnesses to testify on his behalf. In short, the appellant testified that he was at the scene but that it was accused 1 who assaulted the deceased. Accused 1 in turn testified that he too was on the scene but that it was the appellant who assaulted the deceased. The State relied on the evidence of two independent eyewitnesses, Mr Lesiba David Legodi [Mr Legodi] and Mrs Jasmine Inakmadu Legodi [Mrs Legodi].

[6] Before dealing with the grounds raised in the appellant's filed notice of appeal, this Court considers the evidence.

THE EVIDENCE

[7] According to the *viva voce* evidence lead by the State, Mr and Mrs Legodi, were married to each other and lived next door to the appellant at Zimue Street, Duduza. On the 2 November 2018, and at the material time, both Mr and Mrs Legodi were at home and were watching television when the assault of the deceased occurred. It is common cause that the assault of the deceased commenced in the appellant's yard next to Mr and Mrs Legodi's home before, it then continued in the street just outside the appellant's yard.

[8] Mr Legodi testified first and according to the evidence, on the 2 November 2018, between 23h05 and 23h10 while watching television with his wife, he heard dogs barking and a person screaming. He went to the bathroom and opened the window to peep through it to see where the noise was coming from and why the dogs were barking. Whilst peering out of the window, he noticed that an unknown male person was being attacked next door in his neighbour's yard. The appellant lived next door to them. To get a closer look he opened the door and went outside, he stood in the dark. Although he was standing in the dark, he could see clearly as the attack was occurring in close proximity, about 6 (six) paces away from him, and it was occurring under a source of light which was coming from an Apollo light. Although he could not identify the deceased he identified both the appellant and accused 1 as being the persons who both assaulted the deceased. Both the appellant and accused 1 were known to him, both residing in his neighbourhood. He testified that the assault initially occurred in the appellant's yard when both the appellant and accused 1 kicked and hit the deceased with a bottle. After which, the appellant and accused 1 carried the deceased outside the yard into the street. At the time he testified to the presence of the appellant's girlfriend and another older lady referred to as a "gogo" who observed the assault.

[9] Whilst outside, the deceased stood up at a stage and began to walk, staggering forward. Whilst staggering, he indicated that he wanted to go to the police station to lay charges. It was at that moment, that the appellant then slapped the accused with his open hand and the deceased fell to the floor. Accused 1 then went back into the yard to fetch a brick. The brick was referred to as a 'block steen',

namely the double-sized block. He testified seeing both the appellant and accused 1 hitting the deceased on the head repeatedly, each taking turns and exchanging blows, until the brick broke into pieces until there was no sign of movement. Mr Legodi phoned the police and in the meantime the deceased was conveyed to Pholosong Hospital by ambulance.

[10] The appellant's case was put to Mr Legodi being that it was accused 1 who assaulted the deceased, which assault the appellant tried to break up. The appellant saw accused 1 follow the deceased, picked up a brick and hit him from behind on the head. This caused the deceased to fall down. Whilst on the ground accused 1 continued to hit the deceased several times with the brick. After accused 1 had finished assaulting the deceased, the appellant went together with Sifiso, accused 1's brother, to fetch an ambulance for the deceased at the fire station.

[11] Accused 1's case was put to Mr Legodi being that he found the appellant and the deceased hitting each other. The fight arose as the appellant thought the deceased was trespassing or was trying to housebreak. That he merely observed the assault and did not do anything. He didn't even help the appellant carry the deceased into the street.

[12] Mr Legodi's testimony remained the same that both the appellant and accused 1 had assaulted the deceased and, that both, *inter alia*, assaulted him with using a brick, repeatedly until the deceased became motionless. The appellant nor accused 1 called Sifiso nor the appellant's girlfriend to testify.

[13] Mrs Legodi's testimony corroborated the evidence of Mr Legodi's in material respects. Such were that both the appellant and accused 1 assaulted the deceased in the yard, that they both carried the deceased into the street. That the deceased then stood up and began to stagger at which point he made it known that he wanted to call the police. It was at this point that accused 1 left the deceased to fetch a brick. The appellant hit the deceased to the ground. When accused 1 returned with a brick both he and the appellant hit the deceased repeatedly with the brick, each taking turns until the brick broke. After which, they both continued the assault of the

deceased by hitting him, including on the head with the pieces of bricks until the deceased became motionless.

[14] The evidence of both eye witnesses was not disturbed in material respects during cross-examination after which, both the appellant and accused 1 recorded their respective section 220 admissions into the record. The admissions settled causation and the need for the State to call Dr F. Bekhia, the medical practitioner who conducted the postmortem on the deceased on the 26 November 2018, to testify as to the cause of death, being a head injury.

[15] The appellant testified in his own defence testifying to the version put to the both the eye witnesses. During cross-examination he could not explain why, after witnessing the assault he did not report it or make a statement to the police. When asked why he did not make a statement nor report it, his answer was: *"That is because I was under the impression (own emphasis) that I was not the one that did it."* When asked why accused 1 would incriminate him, the appellant's answer was: *"Which means he did not see clearly."* When asked why, not only accused 1, but the two eyewitnesses incriminated him by testifying that he had assaulted the deceased, and why then he persists in denying it, his answer was: *"No, I don't know."*

[16] The appellant could have called Sifiso, accused 1's brother to corroborate, albeit in part his version, or his girlfriend to disturb the veracity of Mr Legodi's observations but he elected not to do so. He testified, made his section 220 admissions and then simply closed his case.

COURT A QUO'S FINDINGS

[17] The Court *a quo* accepted the evidence of the two eyewitnesses and confirmed that they were credible, honest and that their observations were reliable because of their close proximity to the scene when they observed the assault. Furthermore, that both of them had the time to make proper observations placing both accused 1 and the appellant who were well known to them, at the scene. The

Court *a quo* found no improbabilities nor material contradictions with their testimony which would disturb the acceptance of their testimony.

[18] The Court *a quo* having regard to the testimony by the eye witnesses, found that both accused 1 and the appellant had acted with a common purpose. The common purpose apparent in that both the appellant and accused 1 actions demonstrated an intent to silence the deceased after he made it known that he wished to report the assault to the police. Both having other options at their disposal at that time. They could have gone with the deceased to the police or could have taken the deceased to the police themselves to allow all of them to explain to the police what in fact had transpired and the reasons therefore, but both rather elected to continue the assault and silence the deceased. They took to silence the deceased by hitting him together causing his injuries, which were fatal, this demonstrated their intent – in this case intent to silence.

[19] The appellant's evidence was rejected as being improbable and beyond a reasonable doubt false. During arguments for sentencing, the Court *a quo* considered the appellant's personal circumstances including the probation officer's report. It was submitted on behalf of the appellant that his conduct was out of character as he was a first offender without a violent history. The Court *a quo* was asked to consider the appellant's relatively youthful age in respect of the possibility of his rehabilitation. No other factors were raised.

[20] In exercising its sentence discretion the Court *a quo* considered and applied the reasoning by the Supreme Court of Appeal [SCA] in the S v Vilakazi¹ matter by stating that at times, the seriousness of the crime and the interest of society overshadows personal circumstances of the appellant. Considering the appellant's personal circumstances the Court *a quo* reiterated that the seriousness of the crime overshadowed it. The seriousness lay in the fact that the deceased was killed in a vicious and brutal manner by the appellant and accused 1, at a time when he and accused 1 merely perceived, this is without proof, that the deceased was committing an offence. This act demonstrated what lengths the appellant would go to once he decided to take the law into his own hands. Furthermore, that the deceased was

¹ 2008 (4) All SA 396 (SCA) at 19.

beaten to death when he was in a defenceless state wanting to seek help by going to the police. Such considerations of seriousness constituted highly aggravating circumstances which overshadowed the appellant's personal circumstances.

[21] The Court *a quo* in exercising its discretion further had regard to the fact that the appellant was a first time offender but stated that of significance was that the first offence the appellant elected to commit was to take a human life. Having regard to all the mitigation factors before it the Court *a quo* had regard to the S v Matyityi matter² in which the SCA borrowing from *S v Malgas*³ stated that Courts all too frequently demonstrate a willingness to deviate from minimum sentences prescribed by the Legislature for the flimsiest of reasons that would not survive scrutiny such as vague ill-designed concepts such as relative youthfulness or other ill-founded hypothesis that appear to fit a particular sentencing officer's personal notion. The SCA thus warns that Courts are obliged to implement the prescribed sentences.

[22] Considering all the evidence and argued circumstances, the Court *a quo* exercised its discretion and could not find substantial and compelling circumstances.

GROUND OF APPEAL

[23] The grounds raised by the appellant in his notice of appeal was, to say the least generic. Such grounds were expanded in both written and oral argument, and are the following;

23.1 The Court erred in finding that the evidence by the two eye witnesses were reliable in that certain inconsistencies were present. Two inconsistencies were raised and argued. The first related to the testimony of Ms Legodi who testified that the appellant used a sjambok in the commission of the assault, a fact not testified to by Mr Legodi. The remaining inconsistency was that Mr Legodi testified that the appellant's girlfriend and

² (695/09) [2010] ZASCA 127; 2011 (1) SACR 40 SCA at 23.

³ 2001 (1) SACR 469.

an older woman were present at the scene when the assault took place, a fact not testified to by Ms Legodi.

23.2 The Court erred in not accepting the appellant's version which was reasonably possibly true and as such, he had no intent to murder the deceased.

23.3 The Court erred in not finding that the appellant's personal circumstances and the 2 years he spent incarcerated whilst awaiting trial constituted substantial and compelling circumstances justifying a deviation of the prescribed minimum sentence of life imprisonment.

[24] As to the first ground, unfortunately both inconsistencies as raised, are futile absent disturbing the evidence that the appellant assaulted the deceased with a brick by hitting him on the head together with accused 1. Therefore, the use of a sjambok or not as an object in the commission of the assault does not take the material facts any further. As far as the number of persons present at the scene is concerned this too is of no moment as the evidence does not implicate any other persons other than the appellant and accused 1 in the commission of the crime. Furthermore, of material significance was the appellant's failure to call his own girlfriend to testify to the veracity of Mr Legodi's observations. The appellant did not do so. This ground must fail.

[25] Having regard to the appellant's evidence as against the undisturbed material evidence given by the two eye witnesses the appellant's legal representative could not advance an argument why the Court should accept the appellant's version. In consequence and as a result of such failure, a finding of intent must follow. However, in a final attempt to convince this Court that the appellant had no intent, the appellant's attorney tried to remind this Court that the evidence was that accused 1 inflicted the fatal blow with the brick. The legal practitioner soon withdrew the submission when this Court directed him to the record which clearly recorded that both the appellant and accused 1 repeatedly inflicted blows to the deceased's head with a brick. This ground must fail. As raised and argued.

[26] In respect of sentence the Court *a quo*, indeed considered all the appellant's personal circumstances and absent any other misdirection on how the Court exercised its discretion, this ground must fail unless this Court finds that the Court *a quo* failed to exercise it judicially. This is not the case here and this Court will not interfere with such discretion and as such this ground must fail.

[27] The appellant's attorney furthermore raised that, on a conviction of murder, a life sentence instilled a sense of shock. This was done without reliance on any other case or facts present in this case which set it apart. In consequence, a conviction of murder if confirmed, as it is, is a serious offence. This Court finds that submission at odds with the applicable law which illustrates that a serious crime attracts a serious sentence. Having regard to Act 105 of 1997, premeditated murder in terms of section 51(1) is prescribed, such being a life sentence. It is trite that such prescribed sentence must be imposed unless the Court finds compelling and substantial circumstances. The Court *a quo* did not find circumstances and accepted the sentence as harsh stating that *"although harsh it is appropriate because it gives and underlying credence to the value of Mr Katlego Makua's life that the right to life is the most important right."*

[28] Furthermore, no other facts were raised before the Court *a quo* which were germane to the matter and that were not considered other than the fact now raised by the appellant that he spent 2 years' incarceration awaiting trial. Considering all the facts, and the argument, this Court does not find this fact to constitute a compelling and substantial fact warranting a deviation. The appellant can still be considered for parole

[29] The following order:

1. The Appeal is dismissed.



L.A. RETIEF

Judge of the High Court
Gauteng Division

I agree:



W. DOMINGO

Acting Judge of the High Court
Gauteng Division

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