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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO: KS 21/2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

THE STATE

and

MABOITSHEGE, BUTIKI SIMON

Accused

Neutral citation: *The State v BS Maboitshege (KS21/2024)*

Coram: Groenewaldt AJ

Date of Judgment: 02 September 2025

Summary: Charge – Murder, read with the provisions of Section 51(1) of Act 105 of 1997, as amended. Domestic violence relationship between accused and deceased. State placed no reliance on direct or DNA evidence. Accused proffered a Section 115 statement – elected not to testify or call any witnesses. Court drew an inference from the evidence led and found accused’s version so improbable that it cannot be reasonably possibly true.

ORDER

1. The accused is found guilty on the charge of murder, read with Section 51(1) of Act 105 of 1997, as amended.
2. The Registrar is directed to provide a copy of this judgment to the Head of the Forensic Science Laboratory in Pretoria to consider the taking of possible disciplinary steps against *Warrant Officer Emmanuel Phiwamandla Gwala*, or any other official responsible for failing to preserve and to keep the evidence in a sealed evidence bag with reference PA5500042662 safe.
3. The Registrar is also directed to provide a copy of this judgment to the Head of the Hartswater Local Criminal Centre (“LCRC”) unit to consider the taking of possible disciplinary steps against *Sergeant Modisaotsile Piet Tshabadira*, or any other official responsible for failing to extract samples from a bloodstained stone and to dispatch it for DNA analysis.

JUDGMENT

INTRODUCTION:

- [1] The accused, Mr Butiki Simon Maboitshege, was initially arraigned on two charges, one being murder read with Section 51(1) of the **CRIMINAL LAW AMENDMENT ACT** 105 of 1997 (*“the CLAA”*), as amended, and the other defeating or obstructing the course of justice. The latter was withdrawn by the prosecutor, Adv Kruger, before the accused could plead thereto.
- [2] At the onset, and before the accused could plead to the remaining charge, I explained to the accused the import and implications of the penal provisions of the CLAA,¹ the competent verdicts to which he could be found guilty on, as well as admissions in terms of Section 220 of the **CRIMINAL PROCEDURE ACT** 57 of 1977 (*“the CPA”*).
- [3] The above legal principles were explained to safeguard the rights of the accused in relation to a fair trial, and furthermore to inform his legal strategy.
- [4] The accused pleaded not guilty to the charge of murder which was put to him as follows:
- “That the accused is charged with murder read with Section 51(1) of Act 105 of 1997 as amended in that the accused on or about 26 or 27 February 2024 and at or near Ikhutseng, Warrenton, in the district of Frances Baard, unlawfully and intentionally killed M[...] N[...], an adult female.”*
- [5] The accused proffered a statement in terms of Section 115 of Act 51 of 1977. The salient facts are captured in paragraphs 6.1 - 6.13 thereof which reads as follows:

¹ Act 105 of 1997

- "1. During the night preceding the day that I was arrested, M[...] N[...] (hereinafter referred to as "the deceased") was in and out of the house, when I was already in bed. The deceased also came to sleep next to me at a later stage. I stood up and locked the door.*
- "2. In the middle of the night, I woke up and the deceased was not there. I went to look for her.*
- "3. At some stage, I was at SASSA and there were two people. I asked them if they had seen a woman.*
- "4. I proceeded in the direction that the woman showed me, and I crossed the N12 and went into the veld.*
- "5. It was dark, and I saw someone. I went closer and saw that it was the deceased. She was trying to stand up and did not have shoes on.*
- "6. I took the deceased, and helped her home, at one stage I carried her.*
- "7. When we arrived home, I put her on the bed, undressed her and wiped the blood with a warm cloth.*
- "8. Even though I used a candle as a source of light, I was able to see that she had blood on her, but I did not see the extent of the injuries that she sustained.*
- "9. I wanted to dress the deceased, but she said no.*
- "10. The deceased slept, and after smoking I also went to lay down next to her and sleep.*
- "11. When I woke up, I talked to the deceased, but she did not respond. I also tried to wake her, but without success.*

“12. I pulled the blanket from her head, and she did not move. I touched her, and I could feel that she was cold.

“13. I went to ask for help, and I also went to the police and informed them that I found my girlfriend in the veld having been assaulted, and that she does not respond.”

[6] The accused in the aforesaid statement also made Section 220 admissions, which were recorded as such. The admissions are as follows:

“1. The body of the deceased was that of M[...] N[...].

2. That the body of the deceased did not sustain any further injuries from the time that she was declared dead until the medico-legal post-mortem examination was conducted by Dr Jill Roman.”

[7] The Section 115 statement was received as evidence and marked **Exhibit A**.

[8] In an attempt to simplify the reading of the judgment, I have divided it into various scenes.

SCENE 1:

[9] The first scene relates to the evidence led in relation to the events that transpired before the fateful event. This scene plays itself out at a tavern called Neo's, and also to events preceding the incident.

[10] The State called **Khotso Chwenyane** (“**Chwenyane**”), an adult male who is resident in Warrenton. Chwenyane testified in chief that he knew both the accused, (also known as Zembe) and the deceased, as they grew up in the same township called Ikhutseng. He recalled seeing M[...], being the nickname

of the deceased, the Monday at Neo's tavern. The witness was working at the tavern on the said night.

[11] According to Chwenyane, the deceased was troublesome and he ended up reprimanding the deceased and the accused, who is also known as Zembe. The witness explained that he reprimanded the deceased and the accused as the deceased was troubling the accused. The accused then moved to another seat and the deceased followed him.

[12] Chwenyane reported to the owner of the tavern, a certain Neo, what had transpired. The owner went to the deceased, reprimanded her and told her not to return to the tavern the following day. Needless to say that the deceased never returned. The tavern was closed at its normal closing time of 21:00, which was also at around that time that he last saw the deceased.

[13] The witness further testified that it was mostly the deceased who was troublesome. He testified that the interaction between the accused and the deceased would have escalated to a physical level had he not intervened. It was the testimony of Chwenyane that the deceased was mildly drunk and that he saw her consuming alcohol.

[14] Chwenyane testified that the accused also consumed alcohol, but that the accused understood what the witness was saying to him. The witness did not observe any injuries to the deceased.

[15] Under cross-examination, he confirmed that the owner told the deceased not to return to the tavern. The version of the accused was put to the witness which included, amongst others, that the deceased left the tavern before the accused did. The version was also put to him that the accused went back to his home, made food for himself at home, and at some stage he went to sleep and that the accused was in and out of the house. In essence the Section 115 statement

was put to the witness, which response from him was that he does not know anything about the version.

- [16] The next witness was **Neo Desmond Matsha** (“**Matsha**”). The witness testified in chief that he too resides in Warrenton and owns a tavern. Chwenyane is an employee at his tavern. The accused and the deceased (also known as M[...]) are both known to him. On the night of 26 February 2024, the witness encountered both the accused and the deceased at his tavern. The deceased consumed alcohol but was not that drunk. Chwenyane reported to him that the accused and the deceased started again with fighting. The witness’ response was that it was what they were normally up to, and that he intended to chase them away from the tavern. The witness then took them out of the tavern and they left at around 20:00.
- [17] Matsha testified that the deceased was pointing at the accused in the tavern. After some time, the witness went to the home of the accused and the deceased. He encountered the accused (also known as Zembe) in front of the house. He enquired from the accused what was happening, and the response from the accused was that the witness knew how jealous the deceased was. The deceased later arrived there. The witness informed the deceased that she was no longer welcome at his tavern.
- [18] The witness noticed that the left side of the deceased’s face was swollen in the vicinity of the eye. The witness, referred to the deceased’s state of sobriety at the house, as “heavily drunk”.
- [19] During cross-examination, the witness confirmed that Chwenyane told him at the tavern that the deceased was troublesome. When the witness enquired from the deceased why she was troublesome, her response was that he knew how her “man” was. The witness testified that he banned the deceased from his tavern in future, because he observed her pointing at the accused. It was

placed in dispute by the accused's legal representative on behalf of the accused that the witness did not go to the home of the accused and the deceased.

[20] Matsha was confronted with his statement which was handed in as **Exhibit B**, as well as with the evidence of Chwenyane relating to where Matsha had banned the deceased and the accused from attending his tavern, but he stuck to his version. The accused's version of disputing the injury was also disputed by the witness.

[21] The next witness was **Obeth Obakeng Modise** ("**Modise**"). The witness testified in chief that he too resides in Warrenton. He knows the deceased and the accused. Modise, between 21:00 and 22:00 the night of the event, heard the accused swearing at the deceased at the tavern (by saying that the deceased "*is a whore and all men are having sex with her*"). The witness did not see the altercation but only heard it. He also heard somebody saying that the accused must stay away from M[...] (the "**deceased**").

[22] Under cross-examination Modise testified that he heard Chwenyane and Matsha reprimanding the accused not to assault his girlfriend and that the accused swore. It was put to the witness that the owner of the tavern and his employee, Chwenyane, had not testified that they reprimanded the accused. The statement of the witness was received as **Exhibit C**.

[23] This evidence then concluded the first scene of events.

SCENE 2:

[24] This scene relates to the witnesses giving evidence of the events subsequent and also prior to the incident relating to this matter.

- [25] A witness by the name of R[...] M[...] was called by the prosecutor. The deceased is the niece of the witness. The witness testified in chief that the accused came to the home of the witness on a Monday. She observed that the upper right lip of the deceased was swollen but she did not see any visible injuries. This would be the last time that the witness saw the deceased. The next day early the witness learned about the death of the deceased. The deceased had 4 children, ages 17,15,10 and 4 or 5.
- [26] During cross-examination it was put to the witness that the accused does not know anything about an injury to the lip of the deceased.
- [27] A police officer in the employ of the South African Police Services by the name of **Kegomoditswe Emaldah Mongale** ("**Mongale**") was called.
- [28] Mongale testified that she has 19 years' experience in the employ of the South African Police Services. She is currently a Sergeant in the police. On the day in question, being 27 February 2024, the station received a complaint of an assault in B[...] Street. The witness accompanied by a certain constable Van Der Nest went to the scene. There were people standing outside a property which had no fencing.
- [29] A certain lady by the name of A[...] S[...], informed them that she called to lodge the said complaint. The witness testified that on entry to the house, they found a person covered with a blanket laying on the bed. They uncovered the person and she had bruises on her body. The person was naked and the witness observed blood on the forehead of the deceased. The people in the residence at the time were A[...] S[...], constable Van Der Nest and the witness herself. There was also a child between the age of 2 and 3 years sleeping on the bed. According to A[...] S[...], the deceased was the mother of the child.

- [30] Whilst surveying the area, Mongale found a heap of ash at the back of the house. The ash was still warm. A piece of material was visible in the ash which was partly burned. The heap of ash is captured in the photo album which was received as **Exhibit H**. The photograph depicts a yellow burned piece of material. The heap of ash was only a few metres away from the residence where the body of the deceased was found. Mongale asked the detective on standby at the scene to contact the Local Criminal Centre for the taking of the photographs. On a question from the Court, the witness could not elaborate on whether the said home where the deceased was found had an electricity connection or not. The witness was not cross-examined.
- [31] A further witness by the name of **Cecilia Bamphitile** ("**Bamphitile**") was called. On the night of the 27th, the exact month which escaped the witness, she went with her boyfriend to the SASSA offices. It was around 24:00 and they arrived early as the queue could turn out to be very long at the SASSA offices. While they were standing at the offices, two people arrived there. The two people were standing at the corner of the SASSA offices that was approximately 7 metres from the said offices according to Bamphitile. She did not know who the people were at the time.
- [32] The unknown man left the woman at the corner and came to where Bamphitile and her boyfriend were standing. The female was left standing at the corner. The area was not well lit as there was no light and it was overcast and dark. The unknown man asked them whether they were queuing for SASSA and when they looked at the corner, the woman was gone. The next morning the unknown man came with the police to the SASSA offices. The witness identified the unknown man as the accused.
- [33] The accused said to the police that he approached them in the evening and asked them if they were standing in the queue and the witness confirmed it. The Section 115 statement was put to Bamphitile by the prosecutor that stated

that the accused said that he approached two people at SASSA and asked them if they had seen a woman. Bamphitile's response was that the accused approached them and asked them whether they were queuing for SASSA. The witness confirmed that the accused and the woman came together but they did not leave together.

[34] Under cross-examination Bamphitile testified that she did not consume alcohol on the day she testified about. She also confirmed that the visibility was not good. The version of the accused that was put to the witness was that the accused was looking for his girlfriend and that the witness was one of the two people he came across.

[35] It was further put to Bamphitile that she had told the accused that the witness saw someone but that she did not know whether it was a female. Bamphitile was adamant that she does not agree with it. The version of the accused was further put to her that the accused went in the direction the witness showed him where his girlfriend went. She denied the version of the accused that he had asked them if they had seen a woman.

[36] In re-examination she eventually explained why she said the woman who was with the accused was a female. She testified that the said individual had breasts and for this reason the woman was female.

[37] The State prosecutor also called a witness by the name of Winnie Van Wyk. In chief she testified that she is a 42-year-old individual. That on 27 February 2024 she arrived at her home at approximately past 06:00 am after being with her boyfriend. At some point the accused came to their house and asked her mother for cigarettes, whereafter the mother gave the accused money to purchase cigarettes. Her mother's name is Susan Van Wyk. The witness did not see the accused at their home as she was busy dressing herself. She then asked her mother what had happened as her mother was not a person who

wakes up early and leave. Her mother informed her that she went to call a certain C[...] S[], the aunt of the deceased. C[...]’s father and the grandmother of the witness are brother and sister.

[38] Under cross-examination the version of the accused was put to her that he never asked for any cigarettes but merely went to her to seek assistance for what had happened with the deceased. Her response was that the accused was looking for assistance that morning but also requested cigarettes. She was also confronted with why the issue of the cigarettes was not mentioned to the police.

[39] A witness by the name of **Susan Van Wyk** (“**Susan**”) was also called. She testified in chief that she is a 65-year-old woman who resides at 5[...] B[...] Street, Warrenton and that her daughter is Winnie Van Wyk. That on the 27th, she could not recall the month, she was sleeping when she heard M[...] (the deceased) calling her “*Oh Danny, Oh Danny*”. She recognised the voice as she knows the voice of the deceased. The deceased also lives in front of her home across the street. The witness testified that Danny is her “huis naam” or house name.

[40] She did not go out of her house because it was late. She estimated it was around 22:00 to 23:00 when she heard the deceased calling her. The witness fell asleep and the next morning the accused came to her home and requested assistance as the deceased was not saying anything. The accused told Susan that he had found the deceased in the veld being assaulted and bleeding. Susan then went to C[...] S[], the aunt of the deceased to tell her what had happened. At the time the accused was sitting on his front porch.

[41] She further testified that the emotional state of the accused was the normal Zembe (accused), like he was known. The accused did not tell her when he

had found the deceased in the veld. The screaming incident was her last recollection of the deceased.

[42] Under cross-examination it was put to the witness that the accused did not sit on the porch on the morning in dispute and that he went to his place with his sister. The calling out of "*Oh Danny, Oh Danny*" was however not disputed by the accused.

[43] The next witness to this scene was **A[...]** **S[...]** ("**S[...]**"). She testified in chief that she is 63 years of age and that she is residing in Warrenton as well. The deceased is the niece of S[...] and that she had deposed to a statement regarding what had happened. On the 27th February 2024, S[...] was sleeping between the hours of 06:00am and 07:00am when Winnie Van Wyk (also known as Lucky) arrived at her home. Lucky then took her to the home of the deceased. When she entered the premises of the deceased, the accused ran from the head of the deceased to her feet.

[44] There was no lighting in the house but it was bright as it was sunrise. The deceased was covered with a blanket and when the accused uncovered her the deceased was lying on her back with her hands crossing each other. The deceased was not moving and the witness asked the accused to call the police. S[...] did not notice any injuries on the deceased. The accused told her that he went looking for the deceased at SASSA and he found her assaulted in the veld. The accused did not provide a time when the above occurred. That was all the accused told S[...]. S[...] testified that she was confused when she entered the house. She then sat outside with Susan and Winnie Van Wyk waiting for the police.

[45] Under cross-examination it was put to S[...] that the accused went to the police station to report the incident. Her response was that she instructed the accused to go to the police.

- [46] The last witness to this scene was **Lorato More** ("**More**"). Her testimony in chief was that she resides at 2[...] B[...] Street, Warrenton. The accused and the deceased were known to her as they were her neighbours for about a year. Their home is next door to hers. On the night before the morning she heard about the death of the deceased, the accused and the deceased had an altercation at approximately 20:00. She testified that she heard the voices of both the accused and the deceased. At one stage, the deceased was calling for help by saying, "*Danny he has started*". She could hear the accused and the deceased moving around outside because their voices were clearer at times than at others. The accused was also swearing at the deceased.
- [47] As the altercation was prolonging, the deceased addressed the accused as daddy. **More** testified that she did not go outside as the accused and deceased were always fighting. The voices of the accused and the deceased are known to the witness. The altercation went on for some time and after a while it ended and the witness could not hear anything and fell asleep.
- [48] The next morning **More** heard what had happened. She did nothing when she heard the altercation as it was the norm between the accused and the deceased and the next day the parties would pretend that nothing happened.
- [49] Under cross-examination reference to the deceased saying "*Danny, sorry*" was brought to the attention of **More** who testified that the reference was captured incorrect and should have been "*Danny he had started*". So too was the contradiction between the testimony of the witness and that of Susan Van Wyk in reference to the swearing of the accused brought to her attention. The witness was also confronted with the fact that the swearing was not mentioned in the statement. The statement was received as **Exhibit G**. The version of the accused that he denied the altercation was also put to the witness. **More** stood by her version.

SCENE 3:

[50] The next scene relates to the photographs taken of the scene. The witness that was called in relation to the above was **Modisaotsile Piet Tshabadira** ("**Tshabadira**"). He testified in chief that he is a Sergeant employed as a crime scene investigator. He is responsible for the taking of photographs and where exhibits are recovered it is his duty to package it and send it for analysis.

[51] He has 14 years' experience in the South African Police Services with twelve years thereof serving as draughtsman and photographer. He took photographs depicting the crime scene in this matter and various exhibits and items as were found. The said album and the key thereto were entered into evidence as **Exhibit H**.

[52] The scene where the photographs were taken and exhibits collated, is not far from the house where the deceased was found. A stone that appears to have blood stains on it was photographed and forms part of the album as photo 47. No samples of the stone were, however, taken by Tshabadira and it was booked into the store room of the police known as SAP13.

[53] This case is a classic example of mediocre, shoddy and ineffectual police investigation by an ostensibly experienced police official. It boggles my mind how no samples of such an important exhibit could not have been taken for analysis. It will be remiss of me not to direct that this judgment be delivered to the direct superiors of the official(s) responsible for the collation and dispatching of evidence for analysis so that disciplinary steps be considered.

[54] On that regretful note, this scene is closed.

SCENE 4:

- [55] The last scene deals with medical and forensic evidence. Before the evidence were led, the State prosecutor brought an application in terms of Section 158(2)(a) of the **CRIMINAL PROCEDURE ACT** 51 of 1977 for the tendering of evidence via electronic media.
- [56] The essence of the application was that it would be convenient to tender the evidence virtually as all three the witnesses were stationed outside of Kimberley and more specifically in Cape Town and Pretoria. Furthermore, the pathologist, Dr Roman, was booked off sick and would only have been available on 1 September 2025. A further delay in this matter would not have been in the interest of justice. It was also brought to my attention that the forensic analyst, Dereshen Chetty, was unable to travel due to medical reasons. The other analyst also appeared to have some medical reason which could hamper his physical presence at Court.
- [57] The aforesaid application was not opposed by the accused. I found that it would be expedient, practical and convenient to tender the evidence of the pathologist and the two forensic analysts by means of electronic media and granted the application made in terms of Section 158(2)(a) of Act 51 of 1977 in respect of all three witnesses.
- [58] The State prosecutor called Dr Jill Roman ("**Roman**"), the forensic pathologist, who conducted the medico-legal post-mortem examination on the deceased. She is currently employed at the Department of Health in Cape Town. She was previously stationed at the Kimberley Forensic Department. Roman has a Bachelor's degree in Medicine and Surgery obtained in 2007, a diploma in Forensic Pathology and a Master's degree in Forensic Pathology in 2021. She has been working as a forensic pathologist since 2014 and has done approximately 2 500 autopsies in the past 11 years.

- [59] Roman testified that she examined the body of a coloured female on 28 February 2024. Her findings were captured in her report which was received as **Exhibit D**. The contents of the medico legal report were read into the record. She captured the cause of death in the report as multiple unnatural blunt force injuries to the head and body. The deceased suffered amongst other injuries, multiple point abrasions across the front of the forehead and a partially collapsed left lung. The accused was not big in stature, weighing approximately 50 kilograms and being 1.54 metres in height.
- [60] Most of the injuries of the deceased were abrasions and bruises. The injuries would not cause excessive bleeding but moderate amount of bleeding. In her own words the bleeding would not be "*blood soaked*".
- [61] The pathologist testified that the body of the deceased was dragged on a hard-rough surface, either a gravel or tar road. If any debris or gravel had been found on the body, she would have noted it. According to her it is difficult to pronounce on what type of object could have been used that caused the circular and semi-circular injuries on the body of the deceased. She further testified that she has not seen as many ring-like injuries as those on one body.
- [62] The injury to the brain was evidence of significant blunt force impact to the head according to the pathologist. She testified that 10 ribs of the deceased were fractured and because of the rib fractures the chest cavity did not expand which caused the left lung to collapse. Considerable force was applied to exert injuries of this nature.
- [63] The cause of death in layman's terms was a combination of multiple blunt force injuries to the head and body which culminated in the ultimate death of the deceased. So too did the rib fractures and abrasions and bruises contribute to the eventual death of the deceased. Though she initially contended that the injuries of the deceased are not consistent with that caused by a motor vehicle,

she conceded in cross-examination that a motor vehicle cannot be excluded. She testified further that the injuries the deceased sustained were all fresh injuries.

[64] Under cross-examination, she testified that bruises do not have a friction element but that it could be caused when the body makes contact with a hard object. The pathologist confirmed that the dura mater of the deceased which is a sack like structure that encloses the brain, was intact. No swelling of the brain occurred as not enough time had elapsed from time of injury to death.

[65] Roman testified that the mechanism of death in the present matter was a combination of multiple blunt force injuries. She elaborated that the combination of injuries to the head, the severe chest injuries and the severe soft tissue injuries resulted in the death of the deceased.

[66] In closing and in re-examination, she estimated the time of death as being 2 hours after the injuries were sustained. I gave Mr Steynberg, acting for the accused, an opportunity to examine further on this topic. In response to the questioning, the witness said her opinion on the time of death is informed on her experience and the fact of the severity of the injuries.

[67] The State prosecutor, Adv Kruger, called a second virtual witness. Warrant Officer Dereshen Chetty ("**Chetty**") testified that he is attached to the biology section of the Forensic Laboratory Science department of the South African Police Services in Arcadia. He possesses a Bachelor of Technology degree majoring in Bio Technology, obtained at the Durban University of Technology. As part of the above-mentioned course is Molecular and Cellular biology which is relevant to DNA.

[68] Since being attached to the Biology Section of the Forensic Science Laboratory from 1 February 2013, he received training in serological and DNA techniques

which has afforded him the knowledge and skills needed for forensic biological analyses. In total he has approximately 19 years' experience in Biological Science.

- [69] As an introduction, Chetty testified that the acronym DNA stands for Deoxyribonucleic Acid. Each person's DNA is the same in all of their cells and it is unique, except for identical twins. This basically means that the DNA found in your skin cells, are the same as the DNA found in your saliva cells which are the same as found in your hair cells.
- [70] For analysis the laboratory uses a kit that examines the DNA strand at 15 unique places and a gender marker. It is the combination of all these points of analysis plus the gender marker that makes the DNA profile unique. He referred to a DNA analysis system captured in table format and referred to as Table 1. The table shows the sample of analysis on the left-hand side, next to it the gender marker. Where the table shows the letters X:Y it indicates a male profile and where it depicts the letters X:X it depicts a female profile. Following on that are the 15 different points of analysis. In the table one would find the DNA result for the belt. There was blood found on this belt. What was found from the sample was a mixture profile.
- [71] From the results on the table, one is able to read in the reference sample of the accused and the reference sample of the deceased into the DNA mixture result obtained from the blood found on the belt. The statistical probability of finding this profile again is 1 in 5.4 million people. Because it was a mixture profile, the blood does not belong to 1 profile but to multiple ones.
- [72] Chetty testified that he cannot say with certainty that the DNA came from both the deceased and the accused.

- [73] The next sample analysed was the pair of trousers. The profile is an exact replica from the profile received from the deceased.
- [74] The next item for analysis was the t-shirt which tested positive for presumable blood. This profile matched the reference sample received of the deceased except at D16. This profile is classified as a low-level mixture. What caused the low-level mixture, there could be a transfer or handling of the item.
- [75] Then there were analysis done on hand swabs, swabs, t-shirt and pair of jeans. The hand swabs, swabs, t-shirt and the pair of jeans contains the DNA of the deceased. No DNA was obtained from 10 exhibits as listed in Chetty's report which was received as **Exhibit E**.
- [76] Chetty was questioned as to how the exhibits reaches him as analyst. He testified that the exhibits are normally received by the case reception from the investigating officer or person who delivers it. The exhibits are then transferred to an evidence recovery analyst, which individual does the presumptive testing. The exhibits that are tested positive are submitted into the DNA analysis process. When it is submitted each sample is given a unique identifier relating to the station and CAS number of the case.
- [77] Using that identifier station and CAS number, the analysts are able to draw all DNA profiles that are relevant to the case. The analysts then work with the details of the covering minute to match the DNA profile with reference samples that were received. The analyst receives processed data and does not have any evidence bag or sample when he/she does the analysis.
- [78] In this case an admin clerk by the name of Sharinda received the exhibit bags. It is then relayed to the evidence recovery analysts. The evidence recovery analysts breaks the seals of the sealed evidence bags. The evidence recovery

analyst in this case was Warrant Officer **Emmanuel Phiwamandla Gwala** ("**Gwala**").

[79] Chetty testified further on the additional statement he made that the analysis taken on the exhibit bag relating to a burnt piece of material likely from a t-shirt was not analysed.

[80] Under cross-examination he was referred to the table of analysis and particularly to the D16 column of the t-shirt where reference was made to the fact that the accused has a number eleven in his allele at D16. Chetty conceded that it does not necessarily mean that the DNA that is found on the t-shirt was that of the deceased. He further testified that there are multiple people with a number eleven allele at D16.

[81] The final witness relating to forensic analysis was that of **Emmanuel Phiwamandla Gwala** ("**Gwala**"). Gwala testified that he is a forensic analyst attached to the biology section of the forensic science laboratory in Pretoria. He is part of the evidence recovery unit with the rank of Warrant Officer. He has 19 years' experience in the biological sciences.

[82] Gwala testified that he was the evidence recovery analyst. He received the exhibits in sealed bags, which seals he broke before the testing commenced.

[83] In relation to the exhibit which contained the t-shirt, he testified that the seal was not opened. Gwala confirmed that the t-shirt was misplaced and therefore was lost. He does not know what happened to the evidence bag relating to the t-shirt, despite it being under his control.

[84] Under cross-examination Gwala's attention was drawn to his contradiction on whether he had broken the seal on the exhibit bag or not. In his statement Gwala mentions that he broke the seal on the said exhibit bag and in his

testimony under oath he stated that he had not broken the seal on the said exhibit bag. On being pressed on the lost evidence bag, he refers to the missing exhibit as a “*slight mistake*”.

[85] DNA evidence is a vital cog in criminal investigations. DNA evidence collected from a crime scene can be linked to a suspect or can eliminate a suspect from suspicion. It plays an important function in the administration of justice.

[86] DNA evidence is the voice of the voiceless and speaks on behalf of those who are unable to tell their story. The collection and preservation of DNA evidence requires scientific precision and where that evidence is dealt with in a negligent fashion, it can hardly be referred to as a “slight mistake”. It will be remiss of me not to refer this “slight mistake” for consideration for possible steps to be taken.

[87] After the tendering of evidence led from scene 1 to scene 4, Adv Kruger closed the State’s case and Mr Steynberg on behalf of the defence followed suit. The prosecutor argued for a conviction, and the defence for an acquittal. The State further argued that it would not place any reliance on DNA evidence for a conviction.

ANALYSIS:

[88] The onus of proof in a criminal trial rests on the State. That means the State has to discharge its onus beyond reasonable doubt. There is no onus on an accused to prove his or her innocence or convince the court of the truthfulness of any explanation that he or she gives. In ***S v Jochems*** 1991(1) SACR (A) at 211 E-G, the court stated the legal position as follows:

“Where the onus is clearly on the State, the suggestion that the accused were obliged to convince the court or persuade the trial court of anything is misplaced.”

[89] It is also not enough to reject an accused's version on the basis that it is improbable only. An accused's version can only be rejected once the court has found that on credible evidence, it is false beyond reasonable doubt.

[90] In instances where the State has made out a case which calls for an answer from the accused and the accused elects not to testify, he does so at his own peril. The right to silence was dealt with eloquently in **S v Boesak** 2001(1) SACR (CC) in which it was stated that:

"The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence."

What is stated above is consistent with the remarks of Madala J, writing for the Court in **Osman and Another v Attorney-General, Transvaal**, when he said the following:

"Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An

accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."

- [91] The accused opted to provide a Section 115 statement setting out the basis of his defence. In ***S v Malebo and Others*** 1979(2) SA 636 B it was found that exculpatory statements in plea explanations should, as a general rule, be repeated under oath in the witness stand for it to have any value in favour of the accused. The jurisprudence on this point can also be found in ***S v Mkhize*** 1978(2) SA 249 (N) at 251 B where it is stated that:

"It follows that any statements made by an accused or any answer to questions put to him in terms of Section 115 has no evidential value."

- [92] The evidence of Chwenyane and Matsha paints a picture of the events at the tavern earlier on the night of 26 February 2024. This was a picture of the accused and the deceased having an altercation. The contradiction relating to where Matsha had banned the aforesaid individuals from entering his tavern in future, is not material. The witnesses corroborate each other to the extent that an altercation took place earlier on that night. The accused led no evidence to rebut this evidence. There is no reason for this Court not to accept the evidence of the aforesaid individuals as credible. The contradictions are insignificant, and they actually militate against any conspiracy between the witnesses.

- [93] The evidence of Modise corroborates the above witnesses to the extent that the said witness heard an altercation between the accused and the deceased at the tavern. The words relayed by the witness were to the effect that somebody told the accused that he must stay away from the deceased. The witness also

testified that he heard the accused swearing at the deceased. The contradiction between this witness and Chwenyane and Matsha regarding the fact that the latter two did not testify that they had reprimanded the accused not to assault the deceased, does not erase the fact that there was some kind of altercation between the accused and the deceased. The contradiction as to who had said exactly what does not negate the fact that an altercation occurred.

[94] The evidence of the neighbour, **More**, was that she heard the accused and the deceased being involved in an altercation at around 20:00, the exact time which had escaped her. The witness testified that the accused was also swearing at the deceased and at one point she heard the deceased calling to a certain “*Danny*” for help with the words, “*Danny, he has started*”. The contradiction that the witness had not mentioned anything about the swearing in her statement and also to the contradiction that the deceased had said “*Danny, sorry*” in her statement and “*Danny, he had started*” under oath was argued by the defence as material. The witness explained that the reference to “*Danny, sorry*” was incorrect and must have been lost in translation.

[95] **More** testified that the exact words were not recorded correctly by the police who took her statement. The reference to the calling to “*Danny*” was confirmed by Susan Van Wyk. To expect witnesses to relay words spoken verbatim is to hold human recollection to unrealistic expectations. **More** was a witness who gave a calm, assured and credible recollection of the events on the night in question. The contradictions were not material in the determination of the matter.

[96] Credibility cannot be affected by every error made by a witness, and there is no rule of thumb for assessing credibility.² The contradictions are insignificant and are to be expected from an honest, but imperfect recollection, observation and reconstruction of the evidence. **More** simply testified on what she heard,

² **S v Oosthuizen** 1982 (3) TPD p576 para G

and never extended her testimony beyond what she had heard. **More** created a good impression on the Court and she is henceforth found to be a credible witness. The accused did not rebut the evidence of **More** with credible evidence. The dispute of the altercation in the form of a version put to the witness without testimony under oath, provides no evidential value at all.

[97] In addition to the testimony of **More**, was the evidence of Susan Van Wyk who corroborates the call the deceased made to her in the form of "*Oh Danny, Oh Danny*" at approximately 22:00 or 23:00. She testified that she did not look at the exact time. The accused did not dispute to the witness that these words were uttered neither did he tender evidence to counter this. The evidence of Susan Van Wyk in relation to the "*Oh Danny*" call is uncontested. The said witness gave a calm recollection of events and stood firm on her version. She created a good impression on the Court and I find her to be a credible witness.

[98] The defence argued that after Matsha had left the home of the accused and the deceased, that the fighting had been concluded. According to the defence the fighting that **More** testified about had concluded when Matsha left the accused's home, which was at about 21:00, and that between the hours of 21:00 to 24:00, there were no further altercations between the accused and the deceased. I fail to see how reliance on an inaccurate and estimated timeline can lend credence to the submissions that the accused did not cause the demise of the deceased. The neighbour (**More**) and Susan Van Wyk gave no exact time of when exactly they heard the call of "*Danny, Oh Danny*". Both their time frames were estimates. Susan Van Wyk testified that she heard the said "*Oh Danny*" call around 21:00 to 23:00. Susan Van Wyk specifically testified that she was not looking at the time. **More** testified that she had heard the distress call at around eight o'clock (20:00).

[99] What is significant is not the exact time when the "*Oh Danny*" call was made, but the fact that the call to "*Oh Danny*" was indeed made. **More** testified that

the deceased and the accused were moving around whilst having the altercation, which supports the State's submission that the deceased was assaulted in the veld nearby to the home of the deceased and the accused. The point in dispute is not that the deceased was assaulted, but who assaulted the deceased.

[100] The defence also argued that the Court should draw a negative inference from the State's decision not to call the boyfriend of Bamphitile. The argument was that Bamphitile had testified that her boyfriend knows the accused and the deceased and could have confirmed whether the woman who was with the accused that night was the deceased or not. Accordingly, the defence argued that the inference can be drawn that the boyfriend could have exonerated the accused. The State argued that the inference the defence requested to be drawn is not the only inference, as another inference could be that the boyfriend would not have been able to confirm the woman's identity, because it was dark and the area was not well lit, according to Bamphitile. According to the State, the aforesaid could also be the reason why the witness was not called.

[101] I am satisfied that Bamphitile was a reliable and trustworthy witness. She negates the version of the accused that he went to the SASSA office looking for the deceased. Bamphitile's evidence on its own is not sufficient to secure a conviction, but it adds weight to the evidence led in its entirety and it should not be assessed in isolation.

[102] Moving to the Section 115 statement of the deceased, the evidence of Bamphitile plays a significant role in this matter. It was put to the aforesaid witness by the accused's legal practitioner that it was his instructions that the said witness was one of the two individuals in the Section 115 statement who the accused had asked if they had not seen a woman. Bamphitile stood her ground by testifying that the accused had asked her if she and her boyfriend were queuing for SASSA and not if they had seen the accused's girlfriend. The

witness was consistent in her testimony and I find her to be a credible witness. Bamphitile negates the version of the accused regarding the fact that he was looking for his girlfriend. The accused led no credible evidence to rebut the version of the aforesaid witness. The defence argued that Bamphitile is a single witness. Her evidence should not be considered in isolation, but in tandem with the other witnesses. There were no contradictions and improbabilities in her evidence.

[103] Furthermore, the version of the accused lends itself to various improbabilities. The accused's version is that he had found the deceased in the veld being assaulted. No details are provided as to whether the accused had asked the deceased who had assaulted her. Any reasonable person who stumbles upon a loved one in distress would have asked, "who did this to you?". This conduct is not consistent with that of a reasonable man, and it is accordingly found to be improbable.

[104] The said version of the accused is silent as to whether the assault on the deceased by whosoever was reported to the police at all. Surely, an assault should be reported to the authorities without delay so that the perpetrators can be brought to book. This conduct too is highly improbable, especially if the person who assaulted is still at large, and also if you were not to blame for the assault.

[105] In addition, by the accused's own admission he had to carry the deceased at some stage and even dried blood from her body with a warm cloth. Having regard to the extent of the injuries suffered by the deceased which injuries were described as severe by the pathologist, one would have expected the reasonable man to have rushed to the nearest medical facility for assistance. Alternatively, the reasonable man would have asked for assistance from his neighbours especially because he was not the cause of the injuries according to him. The accused is silent as to why medical assistance was not sought when

his partner was clearly in distress and discomfort. The fact that the accused portrays himself as a caring partner who got up at night as a concerned partner to look for her when she was not in her bed made his conduct for not seeking medical help even more improbable.

[106] The accused elected not to explain what happened to the deceased that fateful night even though the uncontested evidence is that the accused was the last person who had seen the deceased alive and before her death, and also after her lifeless body was found lying next to the accused in his bed. In essence, the deceased died in the presence of the accused from unnatural causes.

[107] What this Court considered was what a reasonable man or partner would have done when he comes across his loved one who had been assaulted so viciously that it left her frail in the middle of the veld that she could barely walk and navigate herself back to her home, who had sustained multiple point abrasions across the front of the forehead, who would in all likelihood have had difficulty in breathing or shortness of breath because of a partially collapsed left lung, who were in considerable discomfort, having suffered 10 fractured ribs, had blood escaping from her body, who had to be carried home and obviously experiencing excruciating pain. Having come to his loved one's rescue according to the accused, he does nothing to rescue her but to wipe the blood with a warm cloth. The reasonable man would have either rushed his loved one to the nearest medical facility or called for help in the community, and would also have reported the unnatural event to the police. The accused did neither.

[108] I am mindful in light of **S v V** 2000(1) SACR 453 (SCA) at 455 B that an accused's version cannot be rejected only on the basis of being improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond reasonable doubt.

[109] The conduct of the accused as alluded to above and in terms of his Section 115 statement are not consistent with that of a reasonable man and is highly improbable. The various pieces of evidence called for an explanation from the accused. The accused has a right to remain silent as enshrined in the Constitution of the Republic of South Africa, Act 108 of 1996, but that right has to be exercised conscious of the consequences thereof.

[110] The evidence in its totality invites this Court to draw an inference from the facts presented at the trial. The two cardinal orders for the drawing of inferences as set out in our jurisprudence and more particularly in **R v Blom** 1939 AD 188 are as follows:

“(a) The inference sought to be drawn must be consistent with all the proven facts.

(b) The proven facts should be such that they exclude any reasonable inference from them save for the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference to be drawn is correct.”

[111] The only reasonable inference this Court can draw from the facts in its totality, which includes the improbable and illogical version of the accused, is that the accused was the person who inflicted the serious injuries on the deceased which caused her death. The inference is irresistible that the accused intentionally and unlawfully killed M[...] N[...]. The facts proven, including the highly improbable version of the accused excluded any other hypothesis. The version of the accused is rejected on the strength of the State’s case, and I also find it to be so improbable that it cannot be reasonably possibly true.

[112] I have accordingly concluded that the evidence led is sufficient to prove the guilt of the accused beyond reasonable doubt. The amount of force inflicted, the

totality of the injuries, the fact that alcohol played a minimal role in the incident, and the accused's failure to seek medical intervention have resulted in this Court finding that the accused acted with *dolus directus*.

[113] I am also satisfied that the death of the victim resulted from physical abuse as contemplated in paragraphs (a) and (b) of the definition of "domestic violence" in Section 1 of the **DOMESTIC VIOLENCE ACT** 116 of 1998 by the accused who was in a domestic relationship as defined in Section 1 of the aforesaid Act with the victim. To this end, the accused and the deceased lived together in a relationship in the nature of the marriage, although they were not, they are the parents of a child or they are persons in a close relationship that share or shared the same residence.

[114] I have adopted a holistic approach in evaluating the evidence. I have weighed up all the elements which points towards the guilt of the accused against all those which could be indicative of his innocence, taking proper account of the inherent strengths and weaknesses, probabilities and improbabilities on both sides, and having done so, I have found that the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.³

ORDER:

[115] I therefore make the following order:

- A. THE ACCUSED IS FOUND GUILTY ON THE CHARGE OF MURDER, READ WITH SECTION 51(1) OF ACT 105 OF 1997, AS AMENDED.**
- B. THE REGISTRAR IS DIRECTED TO PROVIDE A COPY OF THIS JUDGMENT TO THE HEAD OF THE FORENSIC SCIENCE**

³ **S v Chabalala** 2003 (1) SACR 134 (SCA) para 15

LABORATORY IN PRETORIA TO CONSIDER THE TAKING OF POSSIBLE DISCIPLINARY STEPS AGAINST *WARRANT OFFICER EMMANUEL PHIWAMANDLA GWALA*, OR ANY OTHER OFFICIAL RESPONSIBLE FOR FAILING TO PRESERVE AND TO KEEP THE EVIDENCE IN A SEALED EVIDENCE BAG WITH REFERENCE PA5500042662 SAFE.

- C. THE REGISTRAR IS ALSO DIRECTED TO PROVIDE A COPY OF THIS JUDGMENT TO THE HEAD OF THE HARTSWATER LOCAL CRIMINAL CENTRE (“LCRC”) UNIT TO CONSIDER THE TAKING OF POSSIBLE DISCIPLINARY STEPS AGAINST *SERGEANT MODISAOTSILE PIET TSHABADIRA*, OR ANY OTHER OFFICIAL RESPONSIBLE FOR FAILING TO EXTRACT SAMPLES FROM A BLOODSTAINED STONE AND TO DISPATCH IT FOR DNA ANALYSIS.

GROENEWALDT AJ
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY

APPEARANCES:

For The State: **ADV E KRUGER**
Instructed By: **Office of the Director of Public Prosecutions**
 Kimberley

For The Accused: **MR H STEYNBERG**
Instructed By: **Legal Aid South Africa, Kimberley**

