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

CASE NUMBER: A 66/2024

DPP REF. NUMBER: 12/4

Date: 24 July 2025

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 17/9/2025

SIGNATURE:

In the matter between:

LUCAS VAN DER MERWE

APPELLANT

and

THE STATE

RESPONDENT

This order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by e-mail. This Order is further uploaded to the electronic file of this matter on Case Lines by the Judge or his/her secretary. The date of this Order is deemed to be 17/09/2025.

JUDGMENT

Du Plessis. AJ (With Makhoba J concurring):

1. Introduction and Background

1.1. The appellant, Mr Lucas van der Merwe, was convicted in the Regional Court, Springs, on 15 March 2023 of murder, read with the provisions of section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. He was sentenced on the same day to twelve (12) years' direct imprisonment.

1.2. The charge arose from an incident which occurred on 26 October 2018 at the Selcourt Shopping Centre parking lot, Springs, Gauteng. On that day, the deceased, Mr Vusi Oupa Mgiqwa, was performing his duties as a car guard in the parking lot. The appellant, accompanied by his wife and young daughter, had parked at the centre while they went shopping.

1.3. When the appellant returned to the parking area, a verbal dispute ensued between him and the deceased regarding the parking of his vehicle. The altercation escalated into a physical confrontation, during which the appellant struck the deceased with his fist. The deceased fell backwards, struck his head on the pavement, and later died in hospital from blunt force head trauma.

1.4. The appellant was legally represented at trial by Advocate M. van Wyngaard. He pleaded not guilty to the charge of murder, tendering no plea explanation.

1.5. On conviction and sentence, the appellant applied for leave to appeal. The Regional Magistrate refused leave, but on petition to this Court, in terms of section 309 of the Criminal Procedure Act 51 of 1977, leave was granted to appeal against both conviction and sentence.

1.6. Bail pending appeal was subsequently granted on 4 November 2024.

1.7. The central issues in this appeal are:

1.7.1. Whether the conviction for murder is sustainable on the evidence; and

1.7.2. If not, what the appropriate substituted conviction and sentence should be.

1.8. The state called five witnesses. I shall deal with their evidence separately.

Evidence of Zinhle Matsinye

2.

2.1. Mr Zinhle Matsinye testified that on 26 October 2018, early evening, between 18:30 and 19:00, he was working as a car guard at the Selcourt Shopping Centre

parking lot in Springs. He stated that he observed the altercation between the appellant, Mr van der Merwe, and the deceased, Mr Vusi Oupa Mgiqwa.

2.2. According to Matsinye, after words were exchanged between the appellant and the deceased, the appellant struck the deceased with his fists. He described the blow as forceful and claimed that it was not a single strike but several punches. He testified that the deceased immediately collapsed to the ground, hitting his head on the pavement.

2.3. During cross-examination by counsel for the defence, Matsinye's evidence presented numerous difficulties:

2.3.1. He introduced for the first time the allegation that the appellant was using a knuckle-duster when striking the deceased. This allegation was absent from his initial police statement and was never suggested during examination-in-chief. Importantly, it was inconsistent with the medical evidence presented by Dr Tladl, who expressly ruled out injuries consistent with the use of a weapon.

2.3.2. He was inconsistent about the number of blows. At one stage, he insisted there were two or three punches, while later conceding he was not certain.

2.3.3. He further claimed that he observed the entire incident from beginning to end, yet his presence was placed in doubt by the evidence of another eyewitness, Mr Heyns, who testified that Matsinye was not present in the immediate area when the incident occurred.

2.3.4. At the identification parade, Matsinye failed to identify the appellant as the assailant, a fact that undermined his credibility as an eyewitness.

2.4. On the probabilities, Mr Matsinye did not readily concede obvious limitations in his observation. When pressed on factors such as vantage point, lighting, the movement of the participants during the altercation and intervals where his line-of-sight may have been interrupted, he tended to give categorical answers instead of acknowledging uncertainty. A fair concession on these points would have been consistent with ordinary human perception under stress. His reluctance to concede reduces the weight of his more absolute statements, especially where they purport to exclude reasonable alternatives.

2.5. That said, there are aspects of his evidence that remain reliable: the broad sequence (verbal confrontation escalating into physical force), the relative

positioning of the parties at key moments, and the fact that the deceased ended up prone/disabled before assistance arrived. Those core features were internally consistent and, on their face, aligned with the surrounding objective features (post-incident condition of the deceased; subsequent medical findings).

2.6. These contradictions and omissions seriously compromised his reliability. While his evidence may corroborate the fact that an assault occurred, his embellishments - particularly the introduction of a weapon - cannot be accepted. The court therefore approached his testimony with caution, accepting it only to the limited extent that it confirmed that the appellant struck the deceased, which was consistent with the appellant's own admissions.

2.7. Considering that Van der Merwe was found guilty of murder, the status of his intent is relevant. The parts of Mr Matsinye's evidence that may illuminate the accused's state of mind may be sought in the description of the force applied or continuing after the deceased was already down or otherwise incapacitated, or any contemporaneous utterances, tone, or purposeful targeting of vulnerable areas (e.g., head/upper body). No evidence was tendered that could be probative of a subjective appreciation of risk and a decision to persist regardless. The state did not safely establish the persisting- force aspect partly due to the observational limitations Matsinye refused to concede. In the absence thereof, the inference to intent weakens and the analysis tends toward negligence rather than purpose.

2.8. In sum, Mr Matsinye's unwillingness to make fair concessions where appropriate detracts from the certainty of his more definitive claims. These factors rendered his testimony unreliable. It was approached with caution and could only be accepted in part - namely, that an assault occurred, a fact consistent with the appellant's own admissions.

Evidence of Mr Ryan John Heyns

3.

3.1. Mr Ryan John Heyns also gave evidence as an eyewitness. On 26 October 2018, he was seated in his motor vehicle in the Selcourt Shopping Centre parking lot, waiting for his girlfriend who was shopping inside. From his vantage point, he was able to observe the confrontation between the appellant and the deceased.

3.2. Heyns testified that he saw the appellant deliver what he believed to be two punches to the deceased's face. As a result, the deceased fell backwards and struck the back of his head on the pavement.

3.3. Under cross-examination, Heyns made certain concessions which diminished the reliability of his evidence in some respects:

3.3.1. He acknowledged that his attention was not fixed on the appellant and deceased throughout the altercation, as he was intermittently distracted by events inside the shopping centre and by his own cell phone.

3.3.2. He conceded that although he initially insisted there were two punches, it was possible that only one blow was struck. This concession brought his version more in line with that of the appellant and the pathology evidence.

3.3.3. He further admitted that before the physical confrontation there had been an exchange of words, thereby acknowledging the role of provocation.

3.3.4. He vacillated on whether the deceased fell straight backwards or to the side, reflecting uncertainty about some of the finer details of the fall.

3.4. Despite these uncertainties, Heyns remained consistent on the critical issue: the appellant struck the deceased, who fell and sustained a head injury upon impact with the pavement. His testimony, while not flawless, was more coherent and credible than that of Matsinye and is of greater probative value.

3.5. Mr Heyns likewise tended not to concede ordinary limitations that inevitably attend dynamic, short-lived incidents. Where it would have been reasonable to acknowledge that distance, angle, movement, and momentary obstructions could affect precision (e.g., exact number of strikes, precise sequencing at split seconds), he maintained a degree of certainty that is difficult to reconcile with the conditions he described elsewhere. That resistance to obvious concessions affects reliability at the margins-particularly on fine-grained counts (how many blows; precise order).

3.6. Reliability remains stronger on higher-level features that multiple sources support: an altercation occurred; the accused applied physical force; the deceased's condition deteriorated thereafter; and assistance was eventually sought. Those aspects, in Mr Heyns' account, were coherent and broadly consistent.

3.7. On intent: Mr Heyns' evidence does not indicate that the accused re-engaged after the deceased fell or that he escalated force after the deceased was down, or that he aimed at especially vulnerable areas despite the deceased's visible

incapacity. This is relevant to a finding or not that the accused foresaw a serious risk and reconciled himself to it.

3.8. In sum, much like Mr Matsinye, Mr Heyns's testimony is most reliable at the level of general sequence and least reliable where it relies on absolute precision that he declined to temper with fair concessions.

Evidence of Sergeant Morife

4.

4.1. Seargant Morife testified as a police officer involved in the investigation of the incident of 26 October 2018 at the Selcourt Shopping Centre parking lot, Springs.

4.2. His role was primarily administrative and investigative rather than as an eyewitness. He was tasked with arranging the identification parade at which witnesses were asked to point out the alleged perpetrator.

4.3. Morife confirmed that the identification parade was conducted in accordance with procedure, and that Mr Matsinye was among the participants. He recorded that Matsinye, who had claimed to be an eyewitness, failed to identify the appellant at the parade.

4.4. His testimony therefore served to highlight the weakness and unreliability of Matsinye's evidence.

Evidence of Sergeant Baloyi

5.

5.1. Sergeant Baloyi of the South African Police Service testified that he was one of the officers who attended the scene of the altercation on 26 October 2018.

5.2. Upon arrival at the Selcourt Shopping Centre, he found that the victim, Mr Vusi Oupa Mgiqwa, had already been removed from the scene and transported to hospital.

5.3. His evidence was confirmatory: he established that a confrontation had taken place and that the deceased had suffered injuries leading to hospitalisation. Baloyi's role was limited to securing the scene and gathering information. His testimony corroborated the fact that an incident had occurred but provided no direct evidence of how the altercation unfolded.

Evidence of Dr Tsa Tladi (Pathologist)

6.

6.1. Dr Tladi conducted the post-mortem examination on 28 October 2018, two days after the incident. He confirmed that the deceased died in hospital later on 26 October 2018.

6.2. His findings included:

6.2.1. A sutured laceration at the back of the head;

6.2.2. A sub-aponeurotic haematoma;

6.2.3. A subdural haemorrhage; and

6.2.4. Contusion of the frontal lobe.

6.3. He concluded that the cause of death was blunt force trauma to the head consistent with the deceased striking the pavement after a fall.

6.4. He expressly excluded multiple blows or use of a weapon such as a knuckle-duster.

6.5. His medical opinion aligned with the appellant's account of a single blow and contradicted the embellished version advanced by Matsinye.

Evidence of The Appellant

7.

The defence called only the appellant.

7.1. The appellant, Mr Lucas van der Merwe, testified about the events of 26 October 2018 at the Selcourt Shopping Centre parking lot, Springs. In his evidence-in-chief, he described how he, his wife, and young daughter were returning to their vehicle when an altercation occurred with the deceased, Mr Vusi Oupa Mgiqwa, a car guard.

7.2. He stated that the incident began as a verbal exchange. He attempted to walk away but claimed that the deceased advanced aggressively, with one hand behind his back. Believing that his own safety and that of his daughter were under imminent threat, he struck the deceased once with his fist and simultaneously pushed him away to create distance.

7.3. The deceased fell backwards, struck his head on the pavement, and collapsed. The appellant explained that he did not continue the confrontation and immediately left the scene with his family. He emphasised that he never intended to kill the deceased and that his actions were impulsive, motivated by fear and a protective instinct.

7.4. Under cross-examination, certain shortcomings emerged:

7.4.1. He arguably exaggerated the deceased's threatening posture, as no weapon was observed by any witness nor recovered at the scene.

7.4.2. He failed to offer a convincing explanation for why he did not simply retreat to his vehicle or remove his daughter from the confrontation.

7.4.3. His insistence that he struck only one blow conflicted with Mr Heyns's impression of two blows, though Heyns later conceded it could have been only one.

7.4.4. His immediate departure from the scene was raised as indicative of indifference to the deceased's condition, though he explained this as concern for his daughter and the shock of the moment.

7.5. Despite these criticisms, his version was not demolished in cross-examination. He remained consistent on the core elements of his defence: that only one blow was struck; that no weapon was used, that he did not foresee death, and that he ceased all aggression once the deceased fell.

7.6. Significantly, his version aligns with the medical evidence of Dr Tladi, who confirmed that the injuries were consistent with a single fall after a strike and inconsistent with multiple blows or use of a knuckle-duster.

7.7. The Court therefore finds that while the appellant's evidence diminished the strength of his self-defence justification, it nevertheless established that he did not act with intent to kill. His actions were negligent rather than intentional, amounting to a lapse of judgment in the heat of a provoked confrontation, but not proof of *dolus eventualis*.

Argument before Conviction (16 May 2023)

8.

8.1. **Private defense:** Counsel argued that van der Merwe acted to protect himself and his family when the deceased advanced aggressively, with a hand behind his back as if reaching for a weapon. The blow and push were defensive reactions to an imminent threat. Counsel stressed that the State had not proved beyond reasonable doubt that Van der Merwe did not act in lawful self-defense.

8.2. **Putative private defense:** Alternatively, even if the objective facts did not justify private defence, Counsel submitted that Van der Merwe honestly believed he

and his daughter were under threat. Such a *bona fide* but mistaken belief should exclude intention to kill.

8.3. **On murder:** Counsel argued that the magistrate could not convict of murder, even on *dolus eventualis*, because van der Merwe never foresaw the possibility of death. The act - one fist strike and a push - was not ordinarily lethal. Dr Tladi confirmed that such conduct would not normally result in death. Reliance was placed on *S v Van As* 1976 (2) SA 921 (A), where a single slap leading to an unforeseeable fatal fall was held insufficient for murder. At most, negligence was proved.

The Regional Magistrate's Judgement

9.

9.1. In her judgment, the learned Regional Magistrate rejected all of the appellant's defences - private defence, putative private defence, and culpable homicide. She reasoned that the requirements for lawful private defence were not satisfied, since the deceased was not engaged in an unlawful attack at the time of the assault. She further dismissed putative private defence, finding that the appellant's claim of fearing for his daughter's safety was a fabrication.

9.2. In support of her reasoning, she relied on *Mthetheleni Pardon Nene v The State* (AR 65/2017, KZP), where the court carefully distinguished between genuine private defence, putative private defence, and the culpability that arises when a mistaken belief is advanced but excluded on the facts. She also referred to *S v Ntuli* 1975 (1) SA 429 (A), in which the Appellate Division stressed that the enquiry must be conducted robustly, without seeking "to measure with nice intellectual calipers" the precise bounds of legitimate self-defence. The test is an objective one. The magistrate was correct in identifying these cases as setting out the relevant principles. However, the difficulty lies in her application of those principles to the facts before her.

9.3. Instead of properly separating the objective requirements of private defence from the subjective state of mind relevant to putative private defence, she conflated the two and concluded that because the appellant "should have known" of the risk of death, intention was proved. This formulation substituted an objective negligence-based test for the subjective foresight required for *dolus eventualis*, thereby misapplying the authorities she herself cited.

9.4. In *Mthetheleni Pardon Nene v The State* ((AR65/2017) [2018] ZAKZPHC 46 (4 May 2018) referred to by the magistrate the leading authority which sets out the test to distinguish between private defence and putative private defence are referred to in par 30 "... in *S v De Oliveira* 1993 (2) SA SACR 59 (A) at 63h-64a, Smalberger JA deals with the difference as follows: *'From a juristic point of view the difference between these two defences is significant. A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective - would a reasonable man in the position of the accused have acted in the same way (S v Ntuli 1975 (1) SA 429 (A) at 436 (E)). In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude dolus in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.'*

Assessment

10.

10.1. The distinction between murder and culpable homicide lies in the form of fault:

10.1.1. Murder requires proof of intention (*dolus directus* or *dolus eventualis*).

10.1.2. Culpable homicide requires only negligence.

10.2. In **S v Sigwahla 1967 (4) SA 566 (A)** at 570B-C, the Appellate Division made clear that:

"The fact that objectively the accused ought to have foreseen the possibility of resultant death is not sufficient. The subjective foresight must be proved."

10.3. This authority emphasises that an accused cannot be convicted of murder unless it is shown beyond reasonable doubt that he actually foresaw the possibility of death and reconciled himself to that outcome.

10.4. The test for *dolus eventualis* was reiterated in **S v Chabalala 2003 (1) SACR 134 (SCA)** and **S v Humphreys 2013 (2) SACR 1 (SCA)**.

Two elements must be satisfied:

10.4.1. The accused subjectively foresaw the possibility of the prohibited consequence (death); and

10.4.2. He reconciled himself with that possibility.

10.5. Mere foreseeability, however strong, is insufficient if reconciliation with the fatal outcome is not proved.

10.6. In contrast, culpable homicide is established where the accused failed to meet the standard of a reasonable person. In **S v Bernardus 1965 (3) SA 287 (A)** the Appellate Division held that culpable homicide rests on whether a reasonable person in the position of the accused would have foreseen the possibility of death and guarded against it.

10.7. Applying these authorities to the present matter, it is apparent that the Magistrate acknowledged that the blow itself was a single act but concluded that the surrounding circumstances required a finding that the appellant appreciated the risk of death and nevertheless continued with his conduct.

10.8. In reaching this conclusion, she referred to several authorities, including *Mthetheleni Pardon Nene v The State and Ntuli*. The Magistrate was correct in identifying these cases as laying down the applicable legal principles. However, the difficulty arises in the application of those principles to the facts of this matter.

10.9. The learned magistrate convicted the appellant of murder on the basis of *dolus eventualis*. In her reasoning, she stated that the appellant "*should have known that when you hit a person with a fist and the person fell to the pavement, that person can die.*" This formulation imports an objective test of what a reasonable person ought to have foreseen. The law is clear that such an objective approach establishes negligence (*culpa*), not *dolus eventualis*. The correct enquiry is whether the appellant himself subjectively foresaw death and reconciled himself to that outcome.

10.10. The Magistrate cited the principle that the State must prove intention, but then concluded intent on the basis of "*should have known*". By finding that the appellant "*should have known*," the magistrate overlooked this requirement of subjective foresight and effectively displaced the onus by relying on negligence to infer intent.

10.11. In **Sigwahla**, the Appellate Division warned against conflating what an accused ought to have foreseen (negligence) with what he actually foresaw (intention). By reasoning that the appellant "*must have foreseen*" death from his actions, the Magistrate impermissibly imported an objective standard into the enquiry.

10.12. **Chabalala** emphasised that the State must prove the accused's guilt beyond reasonable doubt and that the accused's version must be rejected as false before a conviction can follow. In this matter, the appellant's version - that he struck one blow in the face of perceived aggression - was not shown to be false and was consistent with the medical evidence of Dr Tladi. The Magistrate's dismissal of that version was therefore unwarranted.

10.13. Moreover, the Magistrate did not adequately evaluate the contradictions in the State's evidence:

10.13.1. Mr **Matsinye** claimed multiple blows and the use of a knuckle-duster, yet this was contradicted by his own statement, undermined by his failure to identify the appellant at the ID parade arranged by Constable Morife, and ruled out by Dr Tladi's medical findings.

10.13.2. Mr **Heyns**, though more reliable, conceded uncertainty as to the number of blows (possibly one), the direction of the fall, and admitted he was distracted. His concessions undermined the strength of the State's case while lending partial support to the appellant's version.

10.14. Taken together, the State's case did not establish subjective foresight of death beyond reasonable doubt. At best, it proved that the appellant was negligent in striking the deceased without foreseeing that such an impulsive act might cause him to fall and sustain fatal injuries.

10.15. Accordingly, the Regional Magistrate's reliance on these cases does not support the conviction of murder. Instead, they illustrate why the conviction should have been for culpable homicide.

10.16. In her judgment, the magistrate rejected both private defence and putative private defence. In respect of private defence, that conclusion was correct. The evidence of the two eyewitnesses established that the deceased was not attacking the accused at the time he was struck. The deceased had produced no weapon, made no physical assault, and there was no imminent unlawful attack to repel. The requirements for lawful private defence were therefore absent, and the magistrate's rejection of that ground was justified.

10.17. The difficulty lies in her rejection of putative private defence. The magistrate treated the accused's reliance on fear for his daughter's safety as fabricated and therefore dismissed any possibility that he genuinely, though mistakenly, believed himself and his family to be under threat. In doing so, she conflated actual private

defence, which requires objective imminence, with putative private defence, which is concerned only with the accused's subjective belief. The sudden altercation, the heated words exchanged, and the proximity of the accused's wife and daughter all create at least a possibility that he acted under a mistaken impression of danger. That possibility was not excluded beyond reasonable doubt.

10.18. Moreover, the magistrate misapplied the test for *dolus eventualis*. She reasoned that because "he should have known" that a person might die if struck and fell, he therefore foresaw death. That is an objective negligence-based standard, not the subjective foresight required for intention. As explained in *S v Sigwahla 1967 (4) SA 566 (A) at 570 B-C*, it is not sufficient that the accused ought to have foreseen death; it must be proved that he in fact foresaw the possibility and reconciled himself with it. On the medical evidence, this was a single impulsive blow resulting in an unexpected fatal fall. There is no proof beyond a reasonable doubt that the accused subjectively foresaw death and reconciled himself to it.

10.19. Once the defense of private defense is excluded, the accused remains guilty of an unlawful assault. Once intention is excluded- whether by reason of putative private defense or by the misapplication of *dolus eventualis*-the correct verdict is culpable homicide. The unlawful act caused the deceased's death, but it was committed negligently rather than intentionally.

10.20. Accordingly, the Regional Magistrate's reliance on these cases does not support the conviction of murder. Instead, they illustrate why the conviction should have been for culpable homicide.

Sentence

11.

(A) Interference with Original Sentence

11.1. The Regional Court imposed a sentence of 12 years' direct imprisonment for murder, having already deviated from the minimum prescribed 15 years in terms of the Criminal Law Amendment Act 105 of 1997.

11.2. It is trite that sentencing falls primarily within the discretion of the trial court (**S v Rabie** 1975 (4) SA 855 (A) at 857; **S v Bogaards** 2013 (1) SACR 1 (CC)). An appeal court will only interfere where:

- 11.2.1. the trial court committed a material misdirection;
- 11.2.2. the sentence is vitiated by irregularity; or
- 11.2.3. the sentence is disturbingly inappropriate or induces a sense of shock (**S v Pieters** 1987 (3) SA 717 (A)).

11.3. Here, the sentence of direct imprisonment was premised on a conviction of murder with *dolus eventualis*. As I intend altering the conviction to culpable homicide, the underpinning for the original sentence falls away. This constitutes a material change in the factual and legal basis for sentence. The appeal court is therefore entitled to interfere and impose sentence afresh (**S v Malgas** 2001 (1) SACR 469 (SCA)).

(B) Proportionality in Sentencing

11.4. In **S v Van As** 1976 (2) SA 921 (A), the Appellate Division emphasised that where an assault unintentionally causes death, punishment must reflect the absence of *dolus*.

11.5. In **S v Zinn** 1969 (2) SA 537 (A) at 540G, the court laid down the triad:

"What has to be considered is the crime, the offender, and the interests of society."

11.6. In **S v Mashaba** CC 29/2021(2022) ZAMPMBHC 92(7 December 2022) the Court emphasised the same balancing act:

"The acknowledged objects and purposes of punishment are deterrent, preventive, reformative and retributive. The elements of the triad contain an equilibrium and a tension, and a court should strive to accomplish a judicious counterbalance between these factors in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others."

11.7. Applying these principles:

11.7.1. **The offence** is serious, for a life was lost, but lacking intent and resulting from a single impulsive blow, not sustained violence.

11.7.2. **The offender** is a first offender in practical terms, employed, a breadwinner, with stable family support, remorseful, and assessed as a low risk of re-offending.

11.7.3. **The interests of society** demand accountability and deterrence, but also recognise that rehabilitation and reintegration can be achieved without imprisonment.

11.8. In this court it was suggested that direct imprisonment is disproportionate. Mr Van Wyngaard for the accused suggested that correctional supervision could be considered as a suitable sentencing option. The State, on the other hand, argued that correctional supervision might amount to too lenient a sentence, given that a life was lost and that the interests of society demand adequate retribution.

11.9. It is now an accepted principle that a structured correctional supervision order, which is punitive, restrictive, and rehabilitative and achieves proportionality may be appropriate, but cannot be determined in isolation - a correctional supervision report is required before such an option could responsibly be entertained. To consider correctional supervision as a sentencing option we requested a report to be submitted within three weeks from the date of the appeal.

(C) Appropriateness of Correctional Supervision

11.10. In **S v Potgieter** 1994 (1) SACR 61 (A), the Appellate Division held that correctional supervision is justified where the offender is not inherently criminal, has rehabilitative prospects, and imprisonment would serve little purpose.

11.11. Similarly, in **S v R** 1993 (1) SA 476 (A), the Court stressed:

"Correctional supervision is not a soft option. It is a form of punishment in its own right, demanding and exacting."

11.12. In **Samuels v S** 2011(1) SACR 9 (SCA) at par 9-10, Ponnar JA held that sentencing courts must differentiate between those offenders who ought to be removed from society and those who although deserving of punishment should not be removed. With appropriate conditions correctional supervision can be made a suitably severe punishment even for persons convicted of serious offences.

11.13. **S v Mashaba** is particularly instructive because, despite a conviction of murder, correctional supervision was imposed. At para 46 the Court submitted:

"Correctional supervision has been recognised as a severe and exacting form of punishment, and when structured with strict conditions, can serve all the legitimate purposes of sentencing without the destructive consequences of imprisonment for offenders who are not inherently criminal."

11.14. These passages in **Mashaba** confirm that even where the offence is serious, correctional supervision is appropriate for an offender such as the appellant: remorseful, employed, with dependants, and with rehabilitative potential.

11.15. I now proceed to consider the Correctional Supervision report.

(D) Correctional Supervision Report - Evaluation and Assessment

11.16. A Correctional Supervision Report was compiled by Ms Jeanette Molokomme a senior social worker with the Department of Correctional Services, dated 6 August 2025. Ms Molokomme is a duly appointed correctional supervision officer authorised in terms of Section 276A of the Criminal Procedure Act 51 of 1977, to conduct such assessments and make recommendations to the court.

11.17. In preparing her report, Ms Molokomme investigated the personal circumstances of the appellant, his family background, employment situation, criminal history, attitude to the offence, and prospects for rehabilitation.

11.18. The report records that the appellant:

- 11.18.1. accepts responsibility and has expressed remorse;
- 11.18.2. is steadily employed and the sole breadwinner for his dependents;
- 11.18.3. has no prior convictions for violent offences;
- 11.18.4. enjoys strong family support; and
- 11.18.5. presents a low risk of re-offending.

11.19. Ms Molokomme expressly considered whether the appellant was an appropriate candidate for correctional supervision, and concluded that he is suitable for such a sentence. She recommended that the court impose correctional supervision in terms of section 276(1)(h) of the Correctional Services Act 1998, No. 111 of 1998, subject to the detailed conditions set out in paragraph 2.2 of her report.

11.20. The background assessment of Ms Molokomme should be considered together with the evidence of the Appellant, Mr van der Merwe regarding his personal circumstances and the evidence of Ms Mgiqwa (Family of the Deceased), submitted on 15 June 2023. Mr Van der Merwe submitted:

- 11.20.1. He was 44 years old, married and the father of two minor children.
- 11.20.2. He was gainfully employed and the sole breadwinner for his family.
- 11.20.3. He expressed remorse for the events that led to the death of the deceased.

11.20.4. He emphasised that his actions were not premeditated, but rather a single impulsive strike delivered in the context of a heated verbal confrontation.

11.20.5. He explained his motivation as protective instinct towards his daughter, who was present during the altercation, and described that he immediately disengaged once the deceased fell.

11.21. In mitigation, this evidence highlighted the appellant's rehabilitative potential, his strong family responsibilities, his status as a first offender, and the absence of inherent criminality. It underscored that incarceration would have a disproportionate impact on his dependants and may not serve society's interests.

11.22. The testimony of Ms Mgiqwa, a close relative of the deceased (the record indicates she is either his sister or a near family member), described the consequences of the deceased's death on the family:

11.22.1. The deceased had been a provider for his family, and his death left his dependents destitute.

11.22.2. The family experienced significant emotional trauma and grief, particularly given the sudden and violent circumstances of his death.

11.22.3. His children were deprived of their father's guidance and financial support, creating long-term hardship.

11.23. This evidence served as a victim impact statement, emphasising the seriousness of the offence and its devastating consequences for the family of the deceased. It underscored the constitutional value of the right to life, which had been violated, and supported society's call for accountability.

11.24. The court was therefore required to balance two competing sets of evidence:

11.24.1. The mitigating factors advanced by the appellant, portraying him as a remorseful first offender whose actions arose from negligence and impulsivity, with strong prospects for rehabilitation; and

11.24.2. The aggravating factors advanced by Ms Mgiqwa, underscoring the seriousness of the offence, the irreparable loss suffered by the deceased's family, and the societal interest in deterrence.

11.25. Had the conviction of murder stood, the aggravating evidence would have weighed heavily in favour of a lengthy custodial sentence. However, with the conviction altered to culpable homicide, the mitigating evidence gained greater weight.

11.26. The evidence of Ms Mgiqwa could not be ignored; it compelled the court to recognise the seriousness of the loss of life and to ensure that any substituted sentence was not perceived as trivialising the offence. It therefore justified the imposition of a structured and onerous correctional supervision order with strict conditions, rather than a wholly suspended sentence or mere fine.

11.27. In the end, I am satisfied that a period of imprisonment wholly suspended on condition, coupled with correctional supervision under strict statutory conditions reflects the balancing of both sets of evidence.

I now turn to the Conditions of Correctional Supervision as suggested in the report para 2.2.

12.

12.1. Two categories of conditions are recommended in paragraph 2.2 of the Correctional Supervision Report, **Mandatory recommendations** (like house arrest, community service, weekly reporting), and **Discretionary or conditional measures** (like electronic monitoring, psychotherapy, or additional skills training) which the officer says may be imposed if the court or Correctional Services finds it necessary.

12.2. These conditions are authorised under Section 52 of the Correctional Services Act 1998: No. 111 of 1998 and are in my view appropriate in this particular matter:

12.3. **(a) House Arrest (s 52(1)(a))**

The appellant is to remain confined to his residence except for hours authorised for employment, religious observance, medical needs, or as approved by the Correctional Supervision Officer. This is a punitive restriction of liberty, directly comparable to imprisonment, but without the destructive impact of incarceration. It is especially suitable here because the offence occurred in a public setting after a heated altercation; house arrest reduces opportunities for such impulsive conflict.

12.4. **(b) Community Service (s 52(1)(b))**

The appellant must perform a minimum of 16 hours of community service per month throughout the period of the sentence. Community service ensures accountability, exacts personal sacrifice, and symbolically restores the balance disrupted by the offence. In this matter, where the appellant is gainfully employed and supports dependants, community service is an effective form of punishment that does not destabilise his employment but still exacts a tangible sanction.

12.5. (c) Attendance at Programmes (s 52(1)(c))

The appellant must attend and complete anger management and conflict resolution programmes, as well as life skills training. This condition directly addresses the impulsivity and poor conflict management that lay at the root of the fatal incident. Rehabilitative programmes are essential to reduce the risk of recurrence and are preventative in nature.

12.6. (d) Prohibition on Alcohol Abuse (s 52(1)(d))

The appellant is to refrain from alcohol abuse and may be subjected to monitoring or testing. While alcohol was not the prime cause of the incident, the social context of the altercation involved a setting where alcohol was present. Preventing abuse ensures that the appellant's judgment is not impaired in future high-stress or confrontational situations.

12.7. (e) Compulsory Reporting (s 52(1)(e))

The appellant must report in person to the Correctional Supervision Office in Springs on a weekly basis. Weekly reporting ensures structured monitoring and accountability. It also maintains direct contact with correctional officials, ensuring compliance and enabling intervention if problems arise.

12.8. (f) Monitoring and Visits (s 52(1)(f))

The appellant must permit unannounced visits at home- and workplace by the Correctional Supervision Officer. This ensures that house arrest and other conditions are not evaded, while also reinforcing that correctional supervision is a strict and enforceable sanction.

12.9. (g) Restriction on Leaving Jurisdiction (s 52(1)(g))

The appellant may not leave the Springs district without prior written consent. This restriction is proportionate to ensuring close monitoring and preventing flight risk, while still permitting limited mobility under controlled circumstances.

12.10. (h) Restriction on Association (s 52(1)(h))

The appellant may not associate with persons or groups deemed undesirable by the Officer. Although this minimises risks of negative influences and situational triggers, it is not an appropriate measure in this particular matter.

12.11. (i) Restriction on Places (s 52(1)(i))

The appellant may not visit taverns, shebeens, or other inappropriate venues. This minimises environmental risk factors, especially where alcohol may fuel

confrontation. This is regarded as appropriate despite no evidence of alcohol playing a role in this matter.

12.12. (j) Employment Conditions (s 52(1)(j))

The appellant must remain employed or actively seek employment if circumstances change. Employment provides stability, accountability, and supports dependants, while reinforcing rehabilitation. This condition is particularly important here, as the appellant is the sole breadwinner.

12.13. (k) Skills Development (s 52(1)(k))

The appellant must attend vocational or skills development programmes if directed. This supports long-term rehabilitation and enhances prospects of reintegration. Although he is already employed, additional training ensures constructive focus during supervision.

12.14. (l) Financial Obligations (s 52(1)(l))

The appellant must continue to support his dependants and inform the Officer of any changes in income. This protects his family's welfare, while reinforcing responsibility and accountability.

12.15. (n) Electronic Monitoring (s 52(1)(n))

The Officer did not deem it necessary.

12.16. (o) Restriction on Weapons (s 52(1)(o))

The appellant may not possess firearms or dangerous weapons. This is crucial in a matter arising from a physical confrontation and minimises risks of escalation in future disputes. The accused is in any event, in terms of section 103(1)(g) of the Firearms Control Act 60 of 2000, declared unfit to possess a firearm.

12.17. (p) Regular Assessments (s 52(1)(p))

The appellant must undergo regular progress assessments. This condition provides ongoing review of compliance, ensuring that correctional supervision remains tailored and effective.

12.18. (g) Counselling or Social Work Interventions (s 52(1)(g))

The appellant must attend counselling or group therapy sessions if directed. This ensures that any underlying psychological or social issues contributing to impulsivity are addressed.

12.19. (s) General Compliance (s 52(1)(s))

The appellant must comply with all lawful instructions of the Officer. This general clause ensures flexibility and allows the Officer to adapt conditions to changing circumstances.

12.20. Collectively, these conditions form a strict and comprehensive sentence. They impose significant punitive, rehabilitative, and supervisory obligations. They are individually appropriate to address the risk factors in this case and collectively ensure proportionality, deterrence, and rehabilitation.

Order

13.

Having given due consideration to the evidence, the submissions of counsel, the correctional supervision report, and the principles of sentencing, the following order is made:

13.1. The conviction of murder is set aside and replaced with a conviction of **culpable homicide**.

13.2. The sentence of twelve years' direct imprisonment is set aside and substituted with:

13.2.1. Ten (10) years' imprisonment, suspended for a period of **three (3) years**, on condition that the accused is not convicted of any offence involving violence committed during the period of suspension and to which he is sentenced to a period of imprisonment without the option of a fine.

13.3. In addition, the accused is sentenced to **three(3) years' correctional supervision** in terms of Section 276(1)(h) of the Criminal Procedure Act 51 of 1977, subject to the following conditions (as previously listed and adapted to two years):

13.3.1. The appellant is placed under **house arrest**, save for hours authorised for employment, religious observance, medical care, or other purposes approved by the Correctional Supervision Officer.

He shall perform **not less than 16 hours of community service per month** throughout the **3-year period**, at places and times designated by the Correctional Supervision Officer.

13.3.3. He shall attend and complete **anger management and conflict resolution programmes**, and any other rehabilitative programmes directed.

13.3.4. He shall refrain from the abuse of alcohol and submit to monitoring or testing as directed.

13.3.5. He shall **report weekly**, every Friday between 08h00 and 16h00, to the Correctional Supervision Office in Springs, 1[...] F[...] Street, Springs, Tel: (011) 815-4312, or as otherwise instructed.

13.3.6. He shall permit **home and workplace visits** by the Correctional Supervision Officer at any reasonable time.

13.3.7. He shall **not leave the district of Springs** without prior written permission of the Correctional Supervision Officer.

13.3.8. He shall **comply fully with all further lawful instructions** of the Correctional Supervision Officer.

13.4. The appellant must report to the Correctional Supervision Office, Springs, **within 48 hours** of this order to commence supervision.

13.5. In terms of Section 103(1)(g) of the Firearms Control Act 60 of 2000, the appellant is declared unfit to possess a firearm. The Assistant Registrar is directed to inform the Registrar: Central Firearms Control Register accordingly.

DU PLESSIS AJ

MAKHOB A J

I agree

Date of Judgment – 17/9/2025

Appearances

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