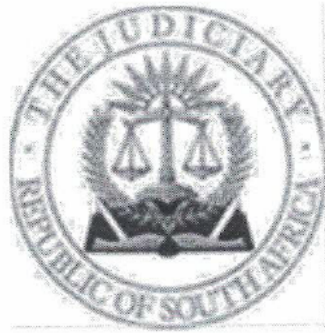




**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: CC18/2024

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
27/08/2028	
DATE	SIGNATURE

In the matter between:

THE STATE

and

JACO WESSELS KEMP

ACCUSED 1

LOUIS COETZEE

ACCUSED 2

GERT FREDERICK VAN DER WESTHUIZEN

ACCUSED 3

JUDGMENT ON SENTENCE

MAKAMU J

[1] The three accused have been tried and found guilty of murder, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.

The accused 1 is 38 years of age, not married, and has no dependents. At the time of his arrest, he was working at the chicken farm in the development of chicken farms. He has extensive experience in various areas of trade.

[2] Accused 2 is also 38 years of age, married, and has one child, now a major, from his previous marriage, and two stepchildren from his current marriage. He was working as a caretaker at the farm where the offence was committed.

[3] Accused 3 is 41 years of age and will turn 42 in November this year. He is divorced and has one child 5 years old. He was employed in different companies and eventually also started his own business.

[4] The deceased was an adult married male with two children, a son and a daughter. The son was already an adult, but the daughter was in grade `12 at the time of the deceased's demise. He was employed at the farm and was a breadwinner supporting his family and extended family. Although he was not earning a lot of money, as per the victim impact report, he was able to share the little that he earned with his family. He was also, according to Lungelo Phakati, planning to start a small business to supplement his income to keep the hunger out of the door.

[5] On the day of his death, he was going to fetch water from the canal that was within the farm where the accused 2 was a caretaker. He was a person who earned his living legally.

[6] The evidence, as per the eyewitness, Ms. Coetzee, came in through the main gate before he could get to the second gate, which is the perimeter of the house. There is a canal where he used to fetch water. She was used to seeing him come and fetch water when there was none on the farm where he stayed.

[7] When the deceased saw accused 1, who was outside at the time, and accused 2, who was preparing to do a braai, he waved the empty 20L container, signalling that he was there to fetch water. He was viciously attacked by accused 1, who head-butted him and fell as a result.

[8] The accused 1 and 3 viciously attacked him for no apparent reason at all, and the real reason for the attack is known only by the accused. They never took the court into confidence to divulge the real reason, leaving the court and family to guess.

[9] The Court has to take into account the personal circumstances of the three accused mentioned in paragraphs 1 to 3 above. The accused 1 has three previous convictions, but acknowledged only one and disputed the other two, claiming that the one he acknowledged was withdrawn. The State suggested that they were too old, and the court may ignore them, as they are also not closely related to the current conviction.

[10] Accused 2 has two prior convictions, which he admitted. He is married to his wife of 8 years and has one adult child and two stepchildren.

[11] In passing sentence, the court should consider the triad as set out in ***S v Zinn 1969 (2) SA 537 (A)***, which consists of the seriousness of the offence, the personal circumstances of the accused, and the interest of society, and add the interest of the victim's family and the impact of the loss.

[12] The deceased was still reasonably young and had plans, as alluded to by his brother Lungelo Phakati. He did absolutely nothing to provoke the kind of attack that brutally robbed him of his life.

[13] The conviction of murder, which is read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, attracts a sentence of life imprisonment. The court must impose life imprisonment unless the accused demonstrates substantial and compelling circumstances that warrant a deviation from the prescribed minimum sentence.

[14] The accused's personal circumstances are not out of the ordinary, and the fact that they have been in custody awaiting trial for two and a half years may not be considered sufficient to warrant a deviation from the prescribed minimum sentence.

[15] The families of the accused will still have an opportunity to see and interact with the accused, even if they are incarcerated, unlike the victims, who will never have the deceased coming home over the festive period, like Christmas and Easter

Holidays, and other important events. He will not be coming home for weddings, funerals, or any other celebrations. He will not occupy the seat that he used to enjoy memorable times with his family.

[16] The accused 1 and 2 did not even show remorse towards the death of the deceased, except accused 3, who said he is remorseful and sorry for the loss, but still distances himself from the death of the deceased.

[17] The deceased was treated with utter cruelty and brutality, and even after his death, he was put at the back of the van with his arms and legs tied with a rope, yet he did not even try to defend himself during the attack. It is very hard to believe otherwise, other than that the offence was racially motivated. When one considers the victim impact statement of Nonhlanhla Phakathi, who said:

"This crime has also changed how I see white people in general. I went from having a problem with them to not trusting them. The lack of regard for a black person's life is something I will never come to understand."

[18] Based on sentiments raised by the victim's sister, I would refer to the judgment of Mavundla J, sitting with Van Der Byl AJ and Maumela AJ, as he then was, in **S v Botes 2011** under the headnote, stated:

*"Racially motivated offences, committed by whoever, offend against the ethos and aspirations of the peoples of this nascent democracy. The further we move away from 1996 (when the Constitution was enacted), the greater the need to deepen and strengthen the Constitution's ethos. There is equally a duty on the courts to impose harsher sentences in racially motivated crimes, because there is no room for racist bigotry in this democracy. Racist bigotry should be tolerated, regardless of the age of the perpetrator. With regard to the youth, because they are the future of this country, the courts must not hesitate to impose long sentences to ensure that this evil is not carried into the future"*¹.

[19] Mavundla J further stated that:

¹ S v Botes 2011 10 SACR 438 (GNP), p439.

*"The gravity of the offences committed by the appellant and his socii criminis does not lie only in the killing of an innocent person, and/or the severity and the brutality in the commission thereof, but more in the motive which propelled them to commit it-racism. Racially motivated offences, committed by whomever, offend against the ethos and aspirations of the peoples of this nascent democracy. The evil of racism is that it has the potential to plunge this country into the abyss of pre-1994, and opens the healing wounds of the past, and further divides the citizenry along racial lines."*²

[20] I found the connotation from the actions of the accused, as no reason whatsoever was raised as the cause of the attack. Accused 3 insinuated that he found a dagger at the back of the deceased, but there is no way it was proved that the deceased indeed carried a dagger and threatened the accused persons or any other person, let alone to have the dagger as part of the evidence.

[21] Accused 3, the only one of the three, stated in his evidence in mitigation of sentence that he has remorse towards the death of the deceased. In **S v Matyityi 2011**, Ponnann JA stated:

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. The genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the accused's surrounding actions rather than to what he says in court that one should look. For the remorse to be a valid consideration, the penitence must be sincere, and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia, what motivated the accused to commit the

² S v Botes 2011 10 SACR 438 (GNP), p444 at para 22.

deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.”³

[22] The above sentiments have never been demonstrated by the accused 3, except that he is just paying lip service to the word remorse.

[23] Accused 2's evidence of his actual participation in inflicting injuries on the deceased is not very clear. His wife Ms Coetzee is not a compellable witness to testify and incriminate her husband. However, he was a caretaker of the property where the deceased was killed. He witnessed the assault and later assisted the accused n`1 to carry the lifeless body of the deceased into the light delivery van loaded with rubbish to try and hide the body and to transport the body with an aim to dispose of it.

[24] The accused were charged with the doctrine of furtherance of common purpose. He associated himself with the actions of the accused 1 and 3, and later he played his role in trying to dispose of the body, and as such he was found guilty, like the other co-accused.

[25] It will not be advisable to treat him differently from the accused 1 and 3. As I already mentioned, the conviction is in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997; the offence attracts a sentence of life imprisonment unless there are substantial and compelling circumstances that would cause the court to deviate from imposing the prescribed sentence.

[26] The case of ***S v Malgas 2001 (1) SACR 469 (SCA)*** was quoted with approval by the Constitutional Court in ***S v Dodo 2001***, where Ackermann J cited:

³ *S v Matyityi* [2011] 2 ALL SA 424 (SCA), p431 at para 13.

*"Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts..."*⁴

[27] The circumstances as tendered by the accused 1 and 2 from the bar by their legal Counsels and the testimony of accused 3 in mitigation of sentence do not satisfy the requirements as fully tabled in ***S v Malgas 2001 (1) SACR 469 (SCA)*** apart from the fact that they are ordinary.

[28] I found it extremely difficult to find any circumstances that could make me deviate from the prescribed minimum sentence.

⁴ *S v Dodo 2001 (1) SACR 594*, p603 at para 11.

ORDER

I hereby make the following order:

1. Accused 1, 2, and 3 are sentenced to life imprisonment

In terms of section 103 of the Firearms Control Act 60 of 2000, I make no order; as such, the accused remains unfit to possess a firearm.

In terms of section 104 (1) (a) of the Firearms Controls Act, all competency certificates, licences, authorisations, and permits issued in terms of this Act to the accused persons cease to be valid.

2. The accused should surrender to the investigation officer within 24 hours:
 - (a) all the competency certificates, licences, authorisations, and permits issued to him in terms of this Act.
 - (b) all firearms in his possession and,
 - (c) all ammunition in his possession.




M S MAKAMU

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA