**FREE STATE HIGH COURT, BLOEMFONTEIN**
**REPUBLIC OF SOUTH AFRICA**

Appeal No. : A284/2012

In the matter between:-

**MOJALEFA MACDONALD MOLOLO** Appellant

*versus*

**THE STATE** Respondent

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**CORAM:** MOLEMELA, J *et* MHLAMBI, AJ

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**HEARD ON:** 4 FEBRUARY 2013

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**JUDGMENT BY:** MHLAMBI, AJ

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**DELIVERED:** 7 MARCH 2013

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[1] This is an appeal against sentence by the appellant, leave to appeal having been refused and a petition granted on 18 October 2012 against sentence only.

[2] The appellant stood arraigned on a charge of murder and was sentenced by the learned Regional Court Magistrate to 15 (fifteen) years imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977. The court had found that no substantial and compelling circumstances existed to justify the imposition of a lesser sentence than one prescribed by legislation.

[3] The appellant, as at the time of sentence, was 45 years old, married, a holder of a University Degree in Education and had worked for the Department of Education's office in Bloemfontein for 21 years. He earned a salary of R10 000.00 per month. He has a 17 year old daughter for whom he paid maintenance in the amount of R300.00 and paid R1 000.00 towards her grocery. He also cared for his sister's two children for whom he paid University fees.

[4] He had one previous conviction of reckless and negligent driving which the court did not take into consideration and, for all intents and purposes, regarded him as a first offender. The court found that he had caused the two fatal stab wounds to the deceased when he stabbed him from the front. Thereafter, he had stabbed the deceased in the back when the latter turned around to flee.

[5] The learned magistrate makes the following observation:

> "Wat wesenlik van belang is is dat hierdie nie 'n beplande moord is nie, dit is nie 'n beplande optrede nie, dit was nie vooraf deur u beplan om uitgevoer te word nie. Dit is 'n ongelukkige voorval wat nooit moet gebeur het nie."

See lines 14 – 17 of the record.

[6] Relying on **S v Malgas** 2001 (1) SACR 469 (SCA), Mr Van Rensburg, on behalf of the appellant, contends that the trial

court misdirected itself in finding that no substantial and compelling circumstances existed in terms of section 51 of the Criminal Code and that the sentence is unjust and disproportionate to the triad of the crime, the criminal and the interests of society.

[7] He contended furthermore that the trial court understated the influence of intoxicating liquor and provocation. He conceded however that the crime is serious and that the imposition a term of imprisonment is not an inappropriate sentence. He asked the court to impose a lesser sentence, a portion of which should be suspended.

[8] Mr Steyn, on behalf of the State, contended that the appeal should fail on the following grounds:

8.1 The trial court exercised its discretion properly and never misdirected itself;

8.2 It was correct in finding that in this case no substantial and compelling circumstances existed;

8.3 The appellant committed a serious crime and the court had to take into account the prevalence of violent crimes in its area of jurisdiction;

8.4 The appellant cold-bloodedly stabbed an unarmed and defenceless victim three times with a knife;

8.5 The appellant is not remorseful;

8.6 The trial court was correct in finding that the prescribed minimum sentence had to be imposed.

[9] The facts that led to the appellant's prosecution are briefly as follows:

The deceased was quite displeased with the behaviour and attitude of the lady who had alighted from the appellant's car. He had approached the appellant, who was at the time seated in the driver's seat to register his displeasure. An altercation then ensued between the appellant and the deceased as blows were exchanged. The appellant got out of his motor vehicle, pursued the deceased and stabbed the deceased twice. The deceased sustained fatal injuries in the process.

[10] The cardinal issue in this appeal then is whether, given the facts of this case, the trial court was correct in its conclusion that substantial and compelling circumstances were non-existent and therefore precluded from departing from the sentences laid down by the legislature.

[11] Counsel for the appellant referred to **S v Maleka** 2001 (2) SACR 366 (SCA), arguing for a partially suspended sentence. The appellant in that case, a 30 year old teacher was convicted in a Regional Court of murder and was sentenced to ten years imprisonment. The following factors constituted mitigating factors in that case:

- The appellant was a first offender;
- The appellant is a useful member of society and occupies a responsible position as a science teacher holding a senior teaching diploma;

- The appellant supports his mother as the sole breadwinner;
- The appellant acted under extreme provocation;
- The crime was not premeditated and was committed almost on the spur of the moment;
- The conviction and imprisonment of the appellant is likely to render it extremely difficult for him to be re-employed as a teacher. See paragraph f – j and a – b on pages 367 and 368.

On appeal the sentence was reduced to ten years imprisonment of which five years was suspended for three years.

[12] In terms of section 274(1) of the Criminal Procedure Act 51 of 1977, a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

[13] Section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997 reads as follows:

> "(3) *(a)* If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence."

[14] In the seminal judgment of **S v Malgas** 2001 (1) SACR 469 (SCA) at 477 paragraphs d – f it was emphasised that:

> "The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders... and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances... But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders."

[15] **Malgas**, *supra*, was followed in **S v Matyityi** 2011 (1) SACR 40 (SCA). See also **S v Serabo** 2002 (1) SACR 391 (E) at 397 D – F.

The main purposes of punishment are deterrent, preventive, reformative and retributive – **R v Swanepoel** 1945 (AD) 444 at 451.

One should guard against allowing the heinousness of the crime to exclude all other relevant considerations. What is needed is a balanced and judicial assessment of all the factors. See **S v Rabie** 1975 (4) SA 855 (A) at 863 A – D. See also **S v Du Toit** 1979 (3) SA 846 (a) at 857 H – 858 B; **S v Khumalo** 1984 (3) SA 327 (A) at 330 – 331 G.

[16] In **S v De Kock** 1997 (2) SACR 171 (T) it was stressed that the three factors of the Zinn triad have to be considered in conjunction with one another and that each should be afforded a certain weight depending on the facts of the case, taking into account the purposes of punishment.

[17] In the present appeal there are a number of mitigating factors, *viz*:

17.1 The appellant is a first offender;

17.2 The crime was not premeditated and committed almost on the spur of the moment;

17.3 The deceased initiated the quarrel;

17.4 The appellant is a useful member of society who occupied a responsible position in the Department of Education;

17.5 The appellant was the breadwinner of his family and the next-of-kin;

17.6 The appellant acted under provocation;

17.7 The probability of his re-employment in the Educational field is probably zero as a result of his conviction and imprisonment.

[18] On reading the record on sentence, it would appear that the learned magistrate did not put sufficient weight to these factors. Mr Van Rensburg's contention that appellant's personal factors were under-emphasised, does not appear to be misplaced. On indicating that the appellant was neither remorseful nor played

open cards with the court, the learned magistrate says:

> "U weet u het 'n dogter van 17 wat versorging nodig het, u sorg vir u suster se kinders op universiteit, u weet as gevolg van 'n optrede soos hierdie is dit merendeel en grotendeels u familie wat gestraf word, u familie word swaarder gestraf as u, want hier praat ons van verpligte vonnisstraf, dit was aan die saak aan u verduidelik. U is nou self verantwoordelik vir dit wat u op die hals gaan haal. U weet die Hof moet u persoonlike omstandighede in aanmerking neem, maar soos wat Mnr Wiegand uitgewys het daar is niks snaaks aan nie, elke mens wat na die Hof kom het daardie omstandighede, u is nou net beter daaraan toe, u is meer geskoold, meer geleerd, u is beter opgevoed met respek gesê en ons verwag van u 'n anderste optrede as wat u doen. U weet u kom nie eers na die Hof en betoon berou nie, u kom nie eers na die Hof en sê vir die Hof wat het werklik die dg of die aand in u gedagtes omgegaan nie, u kom nie na die Hof en sê hoekom u gedoen het wat u gedoen het nie, u doen dit nie. Deur die hele verhoor toon u egter 'n houding teenoor die Hof en die Hof sien dit raak en het dit raakgesien dat u onaantasbaar is, 'n tipe van 'n arrogante houding, u val tot u prokureur aan."

[19] Besides, it is apparent that the trial court did not consider the particular circumstances of this case in the light of the well-known triad of factors relevant to sentence and impose what is considered as a just and appropriate sentence. See **S v Malgas**, *supra*, on page 478. The court therefore felt itself bound to comply with the prescription of the minimum sentence legislation. This constitutes a misdirection. In my view, the appellant's mitigating circumstances, cumulatively viewed,

constitute substantial and compelling circumstances that warrant deviation from the prescribed sentence.

[20] I am therefore of the considered view that this court is justified in interfering with the sentence imposed by the trial court and that an appropriate order is the following:

[21] 21.1 The appeal succeeds.

21.2 The sentence of 15 (fifteen) years imprisonment is set aside and there is substituted for it a sentence of imprisonment for 10 (ten) years. The sentence is antedated to 11 April 2012 being the date upon which the 15 (fifteen) years imprisonment was imposed.

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**J.J. MHLAMBI, AJ**

I concur.

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**M.B. MOLEMELA, J**

On behalf of appellant: Adv T.B. van Rensburg
Instructed by:
Jacques Groenewald Attorneys
KROONSTAD

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| On behalf of respondent: | Adv C.F. Steyn<br>Instructed by:<br>Director of Public Prosecutions<br>BLOEMFONTEIN |

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