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

Case No: SS92/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

DATE: 22 March 2022

In the matter between:

THE STATE

and

THEMBILIZWE MAKHENKE

Accused

JUDGMENT

WILSON AJ:

1 On 28 February 2021, the accused, Mr. Makhenke, poured a quantity of paraffin into a backyard room at [...] Rasberry Street Rondebult Extension 2. He ignited the paraffin and caused a fire that killed two men who were in the room at the time. The first man was Mawande Mafuya, whose twin brother, Wandile, lives in the

main house. The second man was Siphiwe Buthelezi, a friend of Mawande's, who was staying with him at the time.

2 Having started the fire, Mr. Makhenke ran away. Efforts to rescue Mawande and Siphiwe were delayed because the only door to the room was locked or jammed from the inside. By the time the men were rescued, they had been very badly burned. Mawande succumbed to his injuries five days later. He died on 5 March 2021 from severe burns and the complications arising from them. Siphiwe hung on until 11 March 2021, but nonetheless died from the same causes on that day.

3 These facts are undisputed. The question in this case is not whether Mr. Makhenke was responsible for the deaths of Mawande and Siphiwe, but rather the nature of legal culpability that can be ascribed to him.

Mr. Makhenke's story

4 The State indicted Mr. Makhenke on two counts of premeditated murder and one count of arson. When the trial commenced before me, on 8 March 2022, Mr. Makhenke tendered pleas of guilty to all three charges. However, I was not satisfied, based on his written plea explanation, that Mr. Makhenke had admitted that he had planned the murders, and that he genuinely intended to kill both Mawande and Siphiwe.

5 My concerns deepened when I gave Mr. Makhenke an opportunity to amplify his plea explanation in reply to questions I put to him after he was placed under oath. The story Mr. Makhenke told was of an obscenely stupid attempt to attract Mawande's attention by setting fire to his curtains.

6 Mr. Makhenke said that he had gone to Mawande's room to recover a cell phone he had lent to Mawande. Mr. Makhenke was drunk, but not so drunk as to be insensible. He tried to attract Mawande's attention by shouting outside his room and knocking at his door. While he was doing this, he says, someone in the room turned the lights in the room off. Mr. Makhenke developed the impression that Mawande knew that Mr. Makhenke had come to collect the phone but was avoiding him.

7 Mr. Makhenke says that he then walked across to his house, which was just next door, and found the dregs of a container of paraffin. He decided to pour the paraffin on the curtains in Mawande's room, assuming the blaze would make it impossible to ignore Mr. Makhenke's presence. As the curtains caught fire, they billowed into the room and ignited a mattress that was propped up against the wall, and across the bottom half of the window. It was at this point that Mr. Makhenke realised that he had started a life-threatening blaze. He attempted to rescue Mawande, but, because of the jammed door, he could not. He raised the alarm, but soon realised that he would be held responsible by the local community for Mawande's inevitable injuries. He ran away in fear.

8 Critically, Mr. Makhenke says that, at the point he set the fire, he did not know that Siphiwe was in the room at all.

Not Guilty Pleas

9 Both Ms. Mack, who appeared for the State, and Mr. Mavata, who appeared for Mr. Makhenke, accepted that Mr. Makhenke's allocutions could not sustain his guilty pleas on either of the premeditated murder counts. They also accepted, however, that Mr. Makhenke had admitted the offence of arson, for which he had to be convicted.

10 Accordingly, I accepted Mr. Makhenke's guilty plea on the arson charge. However, I exercised my powers under section 113 (1) of the Criminal Procedure Act 51 of 1977 ("the Act") to record a plea of not guilty to each count of premeditated murder on Mr. Makhenke's behalf. I postponed the trial to 14 March 2022 for the State to lead its case.

Wandile Mafuya's story

11 The State led one witness on 14 March 2022. That witness was Mawande's twin brother, Wandile Mafuya. From the outset, Mr. Mafuya struck me as an unreliable witness. He did not appear to be entirely well, but I am unable to say whether this was the result of nerves, grief, or some other cause. He gave the impression that he

had become aware of Mr. Makhenke's version given in court the week before, and was intent on contradicting that version. He was, at times, aggressive in his efforts to do so. He was evasive under cross-examination, and often refused to engage with Mr. Mavata's questions. I was constrained to warn him that he ought not to disparage Mr. Mavata, and should limit himself to engaging with counsel's questions to the best of his recollection.

12 According to Mr. Mafuya, Mr. Makhenke arrived at the house at around 10pm. Mr. Mafuya was asleep at that time, but he was woken up by Mr. Makhenke's efforts to rouse Mawande. Mr. Mafuya confirmed that Mr. Makhenke had come to collect a phone from Mawande. When Mawande did not come to the door, Mr. Mafuya said that Mr. Makhenke uttered the words "I will burn them" and left the property.

13 An hour later, Mr. Mafuya heard footsteps outside. Mr. Makhenke had returned. He heard Mr. Makhenke utter the words "I will burn them" again. Mr. Mafuya opened the door to his house. Through the burglar bars, Mr. Mafuya could see that Mr. Makhenke had a two-litre soft drink bottle that was half full with what turned out to be paraffin. As Mr. Mafuya was opening the burglar bars and trying to remonstrate with Mr. Makhenke, Mr. Makhenke was throwing paraffin into the open window. The gesture Mr. Mafuya made in court was vigorous. It gave the impression of someone tossing the liquid in the bottle all over the window.

14 Before Mr. Mafuya could reach him, Mr. Makhenke had ignited the paraffin with his lighter. Mr. Mafuya says that Mr. Makhenke made some effort to pat out the flames with his bare hands. Seeing this was futile, Mr. Makhenke turned and ran out of the back gate of the property. The room quickly caught fire. Mr. Mafuya took a 20-litre drum of water and tried to extinguish the fire, but without success. People living in other backyard rooms on the property woke up and tried to rescue the men inside, but Mawande and Sipiwe were only liberated when an ambulance arrived.

15 Under cross-examination, Mr. Mafuya denied that he was present in court when Mr. Makhenke explained his guilty pleas. He was also adamant that he was not told about how Mr. Makhenke explained his pleas. However, Mr. Mafuya's evidence appeared tailored to contradict critical parts of Mr. Makhenke's explanation.

Regrettably, in attempting to do so, Mr. Mafuya ended up contradicting himself. Mr. Mafuya denied that he knew Mr. Makhenke well. Initially, he vehemently denied that Mr. Makhenke, Mawande and he were friends. Yet he admitted occasionally sharing meals with Mr. Makhenke, and was ultimately constrained to accept that Mr. Makhenke was “a family friend” before the incident. Mr. Mafuya had also earlier accepted that Mr. Makhenke and Mawande worked together, with Mawande reporting directly to Mr. Makhenke. He nonetheless refused to agree to Mr. Mavata’s suggestion that Mr. Makhenke and Mawande were “close” in any way.

16 Mr. Mafuya initially said that Sipiwe “lived” with Mawande, and that Mr. Makhenke knew this. He later accepted, however, that Sipiwe did not, in fact, live with Mawande. Sipiwe had his own home elsewhere in the neighbourhood. Mr. Mafuya insisted, however, that Sipiwe stayed “mostly” with Mawande. Mr. Mafuya could not say how Mr. Makhenke would have known that Sipiwe was with Mawande in the room at the time. He nonetheless insisted that Mr. Makhenke had said “I will burn them” (my emphasis) before setting the fire.

17 These difficulties with Mr. Mafuya’s version were compounded when Mr. Mavata put Mr. Mafuya’s statements to the police to him. Mr. Mafuya had testified that Mr. Makhenke was gone for about an hour before he returned and set the fire. However, in a statement to the police given on 13 March 2021, he said that Mr. Makhenke was gone for only ten minutes. In his evidence in chief and under cross-examination, Mr Mafuya had been clear that Mr. Makhenke had uttered the words “I will burn them”. This was something he also emphasised in his first statement to the police. However, he failed to mention it in his second statement to the police on 1 June 2021. In that statement, Mr. Mafuya says that he warned Mr. Makhenke that if he set the fire “he would kill my twin brother”. But he did not say that he warned Mr. Makhenke that there was anyone else in the room.

18 Ultimately, Mr. Mafuya was unable to identify any basis on which Mr. Makhenke could have known that Mawande was not alone. He was also unable to suggest anything that Mr. Makhenke did – other than utter the words “I will burn them” that indicated Mr. Makhenke knew that there were two men in the room.

19 The State closed its case at the end of Mr. Mafuya's evidence. Mr. Makhenke closed his case without leading evidence.

Mr. Makhenke's culpability

20 To convict Mr. Makhenke of premeditated murder, I must be satisfied that Mr. Makhenke planned to kill Mawande and Sipiwe, and that he set the fire at Mawande's room intending to achieve that result. It is not enough, in my view, that Mr. Makhenke obviously planned to set the fire which resulted in Mawande's and Sipiwe's deaths. His plan to set the fire must have encompassed the deaths of both men.

21 I must be satisfied of these facts beyond reasonable doubt. In other words, I must be able to exclude the possibility that Mr. Makhenke was telling the truth when he said that his purpose was simply to attract Mawande's attention, in an admittedly very stupid way that went horribly wrong.

22 It is true that Mr. Makhenke was not cross-examined on his plea explanation, but that does not mean that I can ignore it. It is probative material that must be taken into account (*S v Mjoli* 1981 (3) SA 1233 (A) 1247H to 1248C). In *Mjoli*, the question was whether an admission made in a plea explanation can help confirm the veracity of an informally recorded confession. The Appellate Division held, by a majority, that it could. If that is so, I see no reason why the State's version may not be tested against a statement made in a plea explanation. In a proper case, the State may be required to lead evidence that excludes the reasonable possibility that what is said in the statement is true. That is, after all, part of the purpose of any plea explanation: to identify the basis on which the accused pleads as they do, and to put the State on notice of the facts it may have to address when it presents its case.

23 This is also surely the corollary of what the Supreme Court of Appeal found in *S v Mazina* [2017] ZASCA 22 (24 March 2017) at paragraph 11: that facts not formally admitted by an accused in their explanation of plea must be proved by the State. If that is so, then it seems to me that the State's evidence ought to exclude the

reasonable possibility that exculpatory statements in a plea explanation might be true, whether or not the accused ultimately testifies under oath.

24 In *S v Phuravhatha* 1992 (2) SACR 544 (V) 554A–B it was held that a trial court “cannot close its eyes to a plea explanation given by an accused in terms of s 115 . . . when considering an application for the discharge of that accused under s 174”. By the same token, when considering whether the State has met its burden in showing that Mr. Makhenke is guilty of premeditated murder, I cannot disregard the explanation Mr. Makhenke gave when he tendered his guilty plea. If parts of that explanation suggest the absence of premeditation, it is, in my view, permissible to test the State’s version against them.

25 The question is accordingly whether the State’s evidence excluded Mr. Makhenke’s version that he did not plan or directly intend to kill Mawande, and that he did not know that Sippiwe was in the room.

26 It seems to me that the State’s evidence did not meet that standard. Mr. Mafuya was a single witness to the facts he asserted. To accept his evidence I have to be satisfied that it is clear and satisfactory in every material respect (see section 208 of the Act). I am not so satisfied. For the reasons I gave above, the State’s lone witness was dogmatic, self-contradictory and unreliable. I cannot accept, on Mr. Mafuya’s testimony, that Mr. Makhenke uttered the words “I will burn them” or that Mr. Makhenke knew that Sippiwe was in the room at the time he set the fire. I cannot be satisfied, beyond reasonable doubt, that Mr. Makhenke’s planning to set the fire encompassed the deaths of either man.

27 It follows that Mr. Makhenke must be acquitted on the charges of premeditated murder. The arson was premediated, but the State has not excluded the possibility that the fire was set as part of a spectacularly stupid effort to rouse Mawande.

28 A premediated plan to kill Mawande also sits uncomfortably with the admissions made in Mr. Mafuya’s testimony that Mr. Makhenke tried, however ineptly, to put the fire out with his bare hands and that Mr. Makhenke was a family

friend at the time of the incident. Mr. Mafuya also advanced no explanation of why a family friend would suddenly form a plan to kill Mawande over a cell phone.

29 It is equally clear, though, that when he set the fire Mr. Makhenke must have foreseen the possibility of the death or serious injury to anyone who was in the room. He must also have reconciled himself to that possibility. He plainly knew that Mawande was in the room at the time, and accordingly accepted that he would likely kill or seriously injure Mawande if the fire spread into the room. Mr. Makhenke is accordingly guilty of murdering Mawande, even though that was not his plan.

30 As far as Sipiwe is concerned, it was at least foreseeable that Mawande was not alone in the room when Mr. Makhenke set the fire. Not knowing that Mawande was in fact with Sipiwe, Mr. Makhenke could not have reconciled himself to Sipiwe's death. He recklessly caused it, however, and for that reason is guilty of Sipiwe's culpable homicide.

31 For all these reasons, I formally record the following verdicts –

31.1 The accused is GUILTY of the murder of Mawande Mafuya.

31.2 The accused is GUILTY of the culpable homicide of Sipiwe Chris Buthelezi.

31.3 The accused is GUILTY of arson.

S D J WILSON

Acting Judge of the High Court

HEARD ON: 8 and 14 March 2022

DECIDED ON: 22 March 2022

For the State: Ms. Mack

Instructed by National Prosecuting Authority

For the Accused: Mr. Mavata

Instructed by Legal Aid SA