



**IN THE HIGH COURT OF SOUTH AFRICA,  
MPUMALANGA DIVISION, MIDDELBURG  
(LOCAL SEAT)**

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| (1) | REPORTABLE: NO                  |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES                    |

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**CASE NO: CC 17/2020**

In the matter between:

**THE STATE**

**And**

**SIPHAMANDLA NICHOLAS MDLALOSE**

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## JUDGMENT

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### BRAUCKMANN AJ

[1] The accused, Mr Siphamandla Nicholas Mdlalose (*"Mr Mdlalose"*) has been arraigned in the High Court of South Africa, Mpumalanga Division, Middelburg Local Seat on one count of Murder read with the provisions of Section 51(1) (Part 1 of Schedule 2) of Criminal Law Amendment Act 105 of 1997 (*"The Amendment Act"*) in that on or about the 09 September 2013 and at or near Amersfoort in the District of DR Pexley KA Isaka Seme, the accused did unlawfully and intentionally kill Sixolile Lindi Mncube (*"The Deceased"*) an adult female person.

[2] Mr Mdlalose pleaded not guilty and through his legal counsel, Advocate Rasivhaga, provided a plea explanation of self-defence,

in that *"he defended himself against an attack from the deceased which posed a threat to his life"*.

- [3] The following admissions by Mr Mdlalose were noted in terms of Section 220 of the Criminal Procedure Act, Act 51 of 1977 (*"The CPA"*):

[3.1] the post mortem report and the doctor's, qualifications and expertise. (Post mortem report was submitted as *"Exhibit A"* depicting the injuries sustained by the deceased and cause of her death),

[3.2] the identity of the deceased,

[3.3] that no further injuries were inflicted on the corpse from the death to when the doctor held the post mortem,

[3.4] the photo album was handed in by agreement and it became apparent that Mr Mdlalose agreed with the accuracy of the contents during his cross examination.

- [4] During the trial the following facts became common cause between Mr Mdlalose and the state:

[4.1.] that the deceased and Mr Mdlalose were in love relationship,

[4.2.] that on the 09th day of September 2013 during the night deceased was with Mr Mdlalose at his parental home,

[4.3.] an argument ensued between the deceased and Mr Mdlalose which escalated into a fight,

[4.4.] during the fight Mr Mdlalose stabbed the deceased with a Screwdriver several times,

[4.5.] that after the deceased had collapsed inside his room, he attempted to secure medical assistance for the deceased, and

[4.6.] the deceased died as a result of stab wound inflicted by Mr Mdlalose to her head.

[5] The dispute that remained were whether Mr Mdlalose acted in self-defence.

[6] The state called three witnesses and Mr Mdlalose testified in his own defence. I am going to summarise the evidence very briefly.

[7] The first state witness was Miss Nthombenhle Mthethwa ("*Mthethwa*"). She testified that deceased was known to her for a very long time as they grew up together. They attended same school and same class. She regarded the deceased as a close

friend and family member. She testified that she once saw a blue eye on the deceased and the deceased told her that she was assaulted by Mr Mdlalose after he had seen her in the company of a "boyfriend". She testified that it could have happened two months before the deceased passed away. Further that Mr Mdlalose was a jealous person. Her evidence as a whole was unacceptable. The reference to the alleged assault was hearsay evidence that is irrelevant, and the allegation about Mr Mdlalose's "jealousy" was also obtained from the deceased. She never saw for herself that he acted strangely or in a jealous fashion. Ms Mthethwa confirmed that the deceased and Mr Mdlalose had been in a romantic relationship for an extended period of time.

- [8] The second state witness was Ms Beatrice Maseko ("Ms Maseko") testified that on the 09th day of September 2013, around 20h45 she was asleep was at her home at stand no 3074 Daggaskraal, Siqobile D. Mr Mdlalose, her brother, woke her asking for telephone number of an ambulance. She testified that she told him to dial 112 on his cell phone. Although she enquired from the accused what was the problem but he did not tell her, but left her house. She followed him to his room where she found accused holding the deceased in his arms crying and calling the name of the deceased: "Xoli". She further told the court that she used Mr Mdlalose's cell phone and

called the ambulance which eventually arrived and took the deceased together with the accused away. She told the court that she locked the accused room and went back to her house in which was in the same yard as Mr Mdlalose's room. She used to occupy the room and was aware that the door to the room was locked with the Screwdriver from the inside, and with a padlock from the outside.

[9] She further confirmed that she did not note any injuries on the deceased or Mr Mdlalose as there was a power outage at the place of residence at that stage. She also locked Mr Mdlalose's room when he left for the hospital, and opened it again for the police when they returned with Mr Mdlalose in their custody later. As she was not present when Mr Mdlalose struck the deceased with the Screwdriver, her evidence was also of relatively less assistance. She confirmed that the deceased and Mr Mdlalose were in a romantic relationship for at least two years at the time, and that they had their differences from time-to-time.

[10] The last witness called by the state was Sergeant Tshimangadzo Ndou ("Ndou"), a police official. He testified that on the 09th day of September 2013 he was on patrolling duty at Amersfoort Police station. He told the court that while so busy working, he received a

complaint that at LC Ballot hospital there was a person who was stabbed and she had since passed away. He then drove to the hospital where, upon his arrival, Dr Msibi took him to casualty ward. He saw a corpse of a female person with some visible injuries one on the head, one on the left hand, one on the right hand, one on the left foot and one on the right foot. He confirmed that he was not aware of the identity of the person that caused the injuries to the deceased at the time, but that he confronted Mr Mdlalose at the hospital who confirmed with him that he stabbed the deceased and thus caused her death. Mr Mdlalose had told him that there was a fight between him and the deceased and that he saw blood on his forehead at the time. He explained accused's rights in terms of the Constitution to him and arrested him.

- [11] He took Mr Mdlalose to the scene of the crime at his home where his sister, Ms Maseko opened the lock in order to gain entrance to the room. There was a power outage at that stage and it was dark in the room. He confirmed that the scene depicted in photographs 2, 3 and 4 was familiar to him as it was taken at the scene of the crime as he found it with Mr Mdlalose. He also identified various photographs in the photo album ("*Exhibit B*") (photos numbers 6; 18; 19 and 20) as photographs depicting the deceased and the wounds on her arms, head, lower-legs and head. He subsequently

handed the scene over to the member of local criminal record centre and he took accused to police station.

[12] Sergeant Ndou could not recall any wounds on Mr Mdlalose's body that night. Not even the injury that is depicted in a photograph (photo 20). He also did not see the injuries on the ring-finger and top of Mr Mdlalose's head. He testified that if Mr Mdlalose had such injuries at the time, he would have noted it. Under cross examination he conceded that he never asked Mr Mdlalose whether he had suffered any injuries. It was further confirmed that Mr Mdlalose told him that there was a fight between the deceased and himself earlier that evening. After this evidence the state closed its case.

[13] The evidence by the state witnesses was very sparse and did not assist the Court, as it should have. What the state's evidence did was to confirm the version by Mr Mdlalose to a large extent. More about it later and in the course of the judgment.

[14] Mr Mdlalose testified that on the morning of the 09th day of September 2013 he went to the farms with his friend as he was requested by one of his friend to assist him and after he came back we went to "*Kamagogo tavern*" to play pool. Whilst playing pool



one Mfanakona informed him that the deceased was outside of the tavern and that she wanted to see him. He went out of the tavern and met with the deceased who informed him that she was going to buy electricity for her parental home. After that she will bring him a jersey and they will proceed to his parental home.

[15] The deceased returned to fetch him and they proceeded to his parental home. It was dark in his room as there was a power outage, a fact confirmed by Ms Maseko and Sergeant Ndou. He offered the deceased food but she told him that she was full, and after eating he proceeded to the bed to sleep.

[16] Mr Mdlalose testified that while they were on the bed the deceased enquired from him as to why did he ignored her when she called him early that morning. He told her that he was at the farms as he was not around. A dispute arose between them that was the start of the tragic events that would end in a young lady's untimely death. He told the court that he requested her that they should go to the tavern to ask his friends but she refused saying his friend will defend him. He told her to go alone, but she was apparently not satisfied with the reply either. I accepted that this matter would be thoroughly traversed during cross examination, which sadly did not happen.

[17] While he was sleeping, the deceased suddenly slapped him with open hands on his right side of the face. He woke up, got dressed, and told her he would take her home and see her the next morning. He went to the dining room where he sat on the couch, but the deceased followed him and continued to assault him. He stood up and went back to bedroom from where he saw the deceased holding a screwdriver as the door was slightly open after she had removed the screwdriver from the door, and the moon shone into the room and onto the deceased. She then pushed him and he fell on the other side of the bed. He got up and tried to hold the deceased's hands and the screwdriver fell on the floor. He picked the screwdriver up and the deceased picked a broken vase which she used to hit him on his hands where he was cut on left ring finger and on his head, leaving an injury on his head.

[18] Meanwhile, the deceased was assaulting him with any item that she could lay her hands on in the dark, and he was fending her off with the screwdriver in stabbing actions as indicated by him. He was hoping that she will stop, but it did not happen. He even fell down and kicked by the deceased. He told the Court that he stabbed the deceased in self-defence as she was overpowering him, an important fact that was never disputed by the state during cross

examination. The deceased fell on the floor, and he tried to wake her up, but she was not responding. That is when he decided to go to his sister to ask for telephone of an ambulance. She was taken by ambulance to the hospital. He also left with the ambulance. She passed away at the hospital. Mr Mdlalose closed his case without calling any witnesses.

[19] As stated by Brand AJA in *S v Schackell*<sup>1</sup>:

*"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond a reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the Accused's version is reasonably true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probability but it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities. But if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step." [Own emphasis]*

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<sup>1</sup> 2001 (4) SA 1 (SCA) para 30.

[20] Proof of the guilt of an accused beyond reasonable doubt and the question of whether his / her version is reasonably possibly true are not separate and independent tests<sup>2</sup>. As was held by Nugent J in S v Van der Meyden<sup>3</sup>:

*"These are not separate and independent tests, but the expression of the same test when viewed from the opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond a reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it is reasonably possible that it might be true."*

[21] The court does not have to believe accused's version, nor does it need to reject the State's case in order to acquit him. Instead I am bound to acquit accused if there exists a *reasonable possibility that his evidence may be true*. A holistic approach to all the evidence

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<sup>2</sup> Nene v S (AR65/2017) [2018] ZAKZPHC 46 (4 May 2018), par 24.

<sup>3</sup> 1999 (1) SACR 447 (W) at 488 F to I, and S v Van Aswegen 2001 (2) SACR 97 (SCA) at 101 A to E..

is required as opposed to a fragmented and compartmentalised approach to the evidence.<sup>4</sup>

[22] Murder is defined as:

The unlawful and intentional causing of the death of another human being, whereas culpable homicide is the unlawful negligent causing of the death of another human being.<sup>5</sup> The difference in the two offences lies in the form of culpability, negligence being required for culpable homicide and intention for murder. Self-defence or private defence is where a person uses force to repel an unlawful attack which has commenced or is imminently threatening upon their life, bodily integrity, property or other interest which deserves to be protected, provided that the act is necessary to protect the person or interest from the attacker and is reasonably proportionate to the attack. Putative private defence implies rational but mistaken thought – it relates to the mental state of an accused person.<sup>6</sup>

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<sup>4</sup> S v Kubeka 1982 (1) SA 534 (W) at 537 F–G; R v Dhlumayo & another 1948 (2) SA 677 (A) at p 701; S v Robinson & others 1968 (1) SA 666 (A) at p 675 G–H; S v Heslop 2007 (4) SA 38 (SCA) at p 47C; and S v Scott-Crossley 2008 (1) SACR 223 (SCA) at para 10.

<sup>5</sup>Snyman Criminal Law 6 edition (2014) at 437 and 442.

<sup>6</sup> Nene, *supra*, paragraph 29.

[23] In *S v De Oliveira*<sup>7</sup> in which 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 436E). 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."*

[24] Mr Mdlalose's defence is that of self-defence. CR Snyman in the well-known academic work, *Criminal Law* <sup>8</sup>defines private defence as follows:

*"A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity,*

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<sup>7</sup> 1993 (2) SACR 59 (A) at p 63 H to 64n A.

<sup>8</sup> 6<sup>th</sup> edition, (2014) at page 102.

*property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack.'[Own emphasis]*

[25] Insofar as the requirements of the attack are concerned, according to Snyman, the attack must be unlawful, the attack must be directed at an interest which legally deserves to be protected and the attack must be imminent but not yet completed. The requirements for the defence of private defence are the following:

- (a) It must be directed against the attacker.
- (b) The defensive act must be necessary. Here one considers whether there is a duty to flee and the defensive act must be the only way in which the attacked party can avert the threat to his/her rights or interest.
- (c) There must be a reasonable relationship between the attack and the defensive act. Here it is not necessary that there be a proportional relationship between the nature of the interest threatened and the nature of the interest impaired.

- (d) The attacked person must be aware of the fact that he/she is acting in private defence.

[26] The test is an objective one and our courts have emphasised that one should not judge the events like an armchair critic, but rather place oneself in the shoes of the attacked person at the critical moment and bear in mind that at such point in time the attacked person only has a few seconds in which to make a decision. The court should then ask whether a reasonable person would have acted in the same way in those circumstances. A person who suffers a sudden attack cannot always be expected to weigh up all the advantages and disadvantages of his/her defensive act and to act calmly.<sup>9</sup>

[26] In S v Ntuli<sup>10</sup> the court noted the following:

*"In applying these formulations to the flesh and blood facts, the Court adopts a robust approach, not seeking to measure with nice intellectual calipers (sic) the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death."*

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<sup>9</sup> Nene, *supra*, paragraphs 12 & 13.

<sup>10</sup> 1975 (1) SA 429 (A) at page 437 E.



[27] A question that arises, and which the Court also posed to Mr Mdlalose while he was testifying, is whether the person who is being attacked must flee if she can do so in order to ward off the attack. Put differently, whether there is a duty to flee. It seems as if there is no general duty on a person attacked to flee, and more so not to flee from his or her own house if he or she is attacked there<sup>11</sup>. Her house or place of residence is her last refuge - her "castle" - where she may protect herself against any unlawful attack.

[28] The conduct of a youthful defender in a sudden emergency may be judged more leniently than that of a more mature person.<sup>12</sup> The question is not whether other methods of defence might have been successful, but whether the method in fact adopted was reasonable. In judging the reasonableness of the defender's conduct, the courts guard against the attitude of an armchair critic who is wise after the event.<sup>13</sup> The defender's belief in the unlawfulness of the attack, the danger to his or her life or the reasonableness of the means of defence is relevant to the lawfulness of the defender's conduct only in so far as the court must determine whether his or her belief would have been shared by a reasonable person.<sup>14</sup> It appears therefore that the approach to the

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<sup>11</sup> Snyman, supra and S v Engelbrecht 2005 2 SACR 41 (W) at par 354.

<sup>12</sup> R v Mpofu 1969 1 SA 334 (R) page 336 and LAWSA, par 46.

<sup>13</sup> R v Patel 1959 3 SA 121 (A) page 123.

<sup>14</sup> LAWSA, supra, para 46.

question of unlawfulness in private defence is therefore not purely objective, in that courts determine, not the real nature of the attack and concomitant danger ex post facto, but the attack and danger as they would have been perceived by a reasonable person.

[29] If, subjectively, a person did not foresee the possibility of death and it can also not be said that she or he ought reasonably to have foreseen it, both intention and negligence in respect of death are absent and she is not guilty of either murder or culpable homicide.

[30] It is the attacker, who unlawfully and intentionally launches the attack, who carries the risk of injury or death, and not the attacked party. In the judgment of REX v Zikalala<sup>15</sup> the court quotes, with approval, from Gardiner and Lansdown's Criminal Law and Procedure, Vol. 2, p. 1413, the following propositions, based on authority, are stated:

*“Where a man can save himself by flight, he should flee rather than kill his assailant. So think Matthaeus (48.5.3.7) and Moorman (2.2.12), and see also van der Linden (2.5.9); R v Odgers (1843) 2 A Mood. & R. 479; R v Smith (1837) 8 C. & P. 160; but Damhouder (c. 72), with his ideas of defence against dishonour, is of the contrary opinion. But no one can be expected to take to flight to avoid an attack, if flight does not afford him a safe way*

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<sup>15</sup> 1953 (2) SA 568 (A).

*of escape. A man is not bound to expose himself to the risk of a stab in the back, when by killing his assailant he can secure his own safety Moorman (2.2.12); Von Quistorp, para. 244 . . .In considering the question of self-defence, a jury must endeavour to imagine itself in the position in which the accused was."*

[31] The question that I must therefore ask is whether I am satisfied that the State proved its case beyond reasonable doubt and whether it has proved that the killing of the deceased in the circumstances was unlawful. Even if it was on the face of it unlawful, the Court must be satisfied that the State proved that Mr Mdlalose had the necessary intention (*culpa*) to kill the deceased. If I cannot find that the killing was intentional, it might be that the death was caused negligently, in which case Mr Mdlalose may be guilty of culpable homicide.

[32] The Court must keep in mind that:

*"...no onus rest on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal".<sup>16</sup>*

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<sup>16</sup> R v Difford 1937 AD 370 at page 373.

[33] As alluded to earlier in this judgment, the evidence of Ms Mthethwa did not assist the State in any way. The value of the evidence is tainted by the hearsay-nature thereof. During her evidence in chief an impression was created that Mr Mdlalose was a jealous person, but during cross examination it became clear that her opinion in this regard was only informed by the deceased that told her he assaulted her. The witness was evasive in telling the court what a boyfriend meant after she testified that deceased told her that Mr Mdlalose assaulted her after he had seen her with another *boyfriend*, then trying to explain that it was only another way of referring to a "male friend". I am of the view that in calling this witness the State wanted to prove that accused premeditated to kill the deceased. The evidence before me does not support the contention held by Adv Poodhun on behalf of the State. If there was the slightest indication thereof, the quality of the evidence led destroyed that possibility. Even if I accept that the assault, as Ms Mthethwa testified, did take place, it cannot as a fact be accepted that Mr Mdlalose planned to kill the deceased that fateful night. Premeditated murder was simply not proved beyond reasonable doubt by the State. The accused denied that assaulted the deceased. During cross examination she stated that she "*did not know*" when it was stated that Mr Mdlalose will testify that he never laid a hand on her during the five years that they had a relationship.

[34] The evidence of the Ms Maseko is also of no assistance to the State. The evidence appears to be biased in favour of Mr Mdlalose and in any event only covers the period between the time when Mr Mdlalose approached her for assistance and when the ambulance attended the property to fetch the deceased. Thereafter she opened the door for Sergeant Ndou. She testified that she found Mr Mdlalose on the floor, holding the deceased and crying out her name. This conduct is not consistent with a person that just murdered another person in a fit of jealousy. Her evidence, to the contrary, corroborates that of Mr Mdlalose in that he wanted to assist the deceased, and do anything to help her.

[34] The evidence of Sergeant Ndou (he was a Constable at the relevant time) confirms the post mortem report to a large extent, save for the injuries on the back of the deceased. It is however of no moment as Mr Mdlalose admitted that he inflicted the injuries on the deceased's back and lower legs during the ensuing mayhem of the fight. He also confirms that Mr Mdlalose admitted that he stabbed the deceased with the screwdriver. His initial evidence to the effect that he saw no injuries on Mr Mdlalose was undone during cross examination as well. Despite the fact that he testified that he did ask Mr Mdlalose about his injuries, he failed to note the injury to his ear as clearly appears from photo 20. It was not the State's case

that Mr Mdlalose was injured after the inspection of the crime scene. The only reasonable inference is that Sergeant Ndou was not interested in any injuries to Mr Mdlalose.

[35] During cross examination Mr Poodhun put it to Mr Mdlalose that he had no injuries. Mr Mdlalose's answer was that they (the Police) were not interested in his injuries and was "shouting" at him. Sergeant Ndou confirmed that at the hospital accused told him that there was a fight between him and the deceased and that he stabbed her. He further corroborated Ms Maseko and Mr Mdlalose's version that it was dark as there was some power interruption at that stage.

[36] Although the witnesses for the State were truthful, their evidence does not assist the Court to reach a conclusion.

[37] Mr Mdlalose's version is that he was attacked by the deceased. He tried his best to stave off this unlawful and unsolicited attack in his home, but to no avail as the deceased kept returning or following him. He initially, and after the "slap" with open hands, got dressed and left the bedroom. The deceased followed him to the sofa and assaulted him again. Just to, when Mr Mdlalose tried to avoid further

confrontation, go further and take a screwdriver to assault him. When she is disarmed by Mr Mdlalose, she attacks him further by throwing him with everything she could lay her hands on in the room. She even hit him with a broken jar, and kicked him when he fell down. Mr Mdlalose testified, and it was never challenged by the State, that the deceased overwhelmed him, and that he fended her off with the screwdriver.

[38] Mr Mdlalose was asked by the Court, and Mr Poodhun, why he did not flee. His answer was simply that it did not even cross his mind. Although the door was open, and there was an opportunity to escape, he testified that it was his house, and he never thought that the fight would escalate to that level of ferocity. His undisputed evidence was that he never intended to kill the deceased. He was in love with her, and did everything possible to help her after she collapsed. Because of the darkness, he did not know where he stabbed the deceased. At a stage he was on the floor and swung/stabbed with the screwdriver to fend the attack by the deceased off. This was also not challenged, and it explains the injuries to the deceased's lower limbs.

[39] The only version of what transpired in that room on that unfortunate night is that of Mr Mdlalose. That version states that he never

intended to kill the deceased, but defended himself against her unlawful attack, in a dark room. He told the court that when he stabbed the deceased for the first he thought she would retreat but she kept on coming to him hitting him with various item that she could pick inside the house. The state did not present any evidence which rebut the evidence of the accused. It was also not challenged that there was a fight between them and that the deceased was the one who started to attack Mr Mdlalose. The fact that Mr Mdlalose walked away from the attacks, before he was confronted by the deceased with the screwdriver in the bedroom, with no escape route available to him was also not disputed. In all, his version was not really attacked at all.

- [40] The State submitted that Mr Mdlalose's version, if a holistic view of all the evidence is considered is improbable, and that the State's version is to be preferred. The Court does not have to be convinced that every detail of an accused's version is true. If the version is reasonably true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probability but it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities. But if it can be said to be so improbable that it cannot reasonably possibly be true.



[41] For the Court to accept the State's version, the inference to be drawn from the facts before the court must be the only reasonable inference<sup>17</sup>. In both civil and criminal matters inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. 'Whether I subjectively believe him is, however, not the test. I need not even reject the State case in order to acquit him. It is not enough that he contradicts other acceptable evidence. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State'<sup>18</sup>.

[42] The following version and evidence by Mr Mdlalose was not challenged by the State and is accepted by the Court on the principles of our law of evidence:

[42.1] Mr Mdlalose testified that the deceased is the one who started to assault him with open hand on his face,

[42.2] the attack by the deceased was an unlawful attack on him;

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<sup>17</sup> R v Blom 1939 AD 188, pages 202-203.

<sup>18</sup> S v Kubeka 1982 1 SA 534 (W) at page 537.

[42.3] he tried to avoid the attack by the deceased by leaving bedroom to dining room and again from dining room to bedroom,

[42.4] he admitted in evidence that he stabbed the deceased in self-defence as the deceased was overpowering him. He stated that he stabbed her several times, but that she kept on attacking him,

[42.3] his corroborated evidence was that, the room was dark and the deceased was hitting him with anything she could lay hands on.

[43] Did Mr Mdlalose act in self-defence, and if so, did he exceed the bounds of self-defence? His undisputed evidence, apart from a statement by Mr Poodhun during cross examination to the effect that he planned to kill, and indeed killed the deceased, was that he never intended to kill the deceased, but was left with no option, but to defend himself against the attack by the deceased. He did not flee, as it did not even cross his mind, because he had to defend himself all the time. Even though he testified that he was aware of the fact that the screwdriver is potentially a dangerous weapon, his undisputed version was that in hurting the deceased he hoped that she would stop attacking him, which did not happen. He said he just stabbed in the dark and did not know where he hit the

deceased. Only when she collapsed and failed to react to his calls did he realise that there might be serious injuries to her. The test is an objective one. Would any reasonable person in the position of the accused have acted differently? I am of the view that the answer to both the above questions is: no.

[44] A reasonable person would not have reacted differently under the circumstances as pictured in the evidence by Mr Mdlalose. It was dark, and according to him there was a persistent attack on him that he tried to avoid. The attack happened in his home where he is supposed to be safe. On his evidence, he fell and got up again. He tried to, and did indeed, grab the deceased from behind and tried to hold her, but she escaped from his grip and overpowered him. He was cornered in his room, in the dark. It is with regret that I have to find that the State failed to appropriately cross examine Mr Mdlalose. The state failed to prove the guilt of the accused beyond reasonable doubt and accused must be found not guilty and acquitted.


[45] I pause to mention that I do not have to believe the version proffered by Mr Mdlalose to acquit him. All I have to find is that his undisputed version is reasonably possibly true. The State case is of such a nature that I do not have to reject it to find in favour of Mr

Mdlalose. No evidence in the State's case rebuts the version that he acted in self-defence.

[46] Mr Mdlalose was allowed to appear to be a far better witness than he actually was because of the fact that his version was not really tested during cross examination. I had to keep tight reins on myself not to become too involved as to appear biased during the trial.

[47] Although I tend not to believe the version of Mr Mdlalose, but that is of no importance as it is the only version before me and I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. The version is not improbable at all, and I cannot draw any inference from the arguments by the State, as it is not evidence before me.

[48] I therefor find the accused not guilty, and he is discharged.

A handwritten signature in dark ink, appearing to be 'HF Brauckmann', written over a light blue background.

**HF BRAUCKMANN.**

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**REPRESENTATIVE FOR THE STATE: ADV POODHUN**

**INSTRUCTED BY: NATIONAL PROSECUTING AUTHORITY**

**REPRESENTATIVE FOR THE RESPONDENT: ADV RASIVHAGA**

**INSTRUCTED BY: LEGAL-AID SOUTH AFRICA**

**DATE OF HEARING: 24; 25; 26 & 27 AUGUST 2020**

**DATE OF JUDGMENT: 27 AUGUST 2020.**

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