

SOUTH AFRICA / JUDGMENT

Mkhwanazi and Another v S (Appeal) (AR504/2018) [2023] ZAKZPHC 162 (22 September 2023) [2023] ZAKZPHC 162

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Henriques, Seegobin

CASE / FILE NUMBER

AR504/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE NO: AR504/2018

In

the matter between:

VUSIMUZI
MKHWANAZI
FIRST APPELLANT
NOMVULA
REJOICE NYEMBE
SECOND APPELLANT
and
THE
STATE
RESPONDENT

CORAM:

Henriques J (Seegobin J concurring)

HEARD:

4 November 2022

DELIVERED:

September 2023

ORDER

On

appeal from: Regional Court, Ladysmith (Magistrate H Visagie)

sitting as court of first instance):

1.
The first and second appellants' appeals against their convictions and sentences are upheld.
 2.
The convictions and sentences are set aside.
- APPEAL

JUDGMENT

Henriques J (Seegobin J concurring)

- [1] Four accused, among them the two appellants, were charged with one count of murder read with the provisions of s 51, Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 and one count of attempted murder in the Regional Court, Ladysmith. The respondent alleged that the appellants unlawfully and intentionally killed Robert Phumlani Mkwanazi (the deceased) and attempted to kill Thamsanqwe Mkwanazi (Thamsanqwe), by striking them with sticks, an iron and rods. It is common cause that the appellants, the former accused 3 and 4 as well as the deceased and Thamsanqwe, are siblings.
- [2] All four accused pleaded not guilty and the third and fourth accused, Thokozani Mgoma (Thokozani) and Zanele Mkwanazi (Zanele), were acquitted on both counts. On 22 November 2017, the first appellant was convicted on both counts, whereas the second appellant was acquitted on both the attempted murder and murder count but found guilty on a competent verdict of common assault in respect of the murder count.
- [3] On 22 March 2018, the first appellant was sentenced to eight years' imprisonment on the murder count and five years' imprisonment on the attempted murder count, three years of the sentence imposed on count 1 was ordered to run concurrently with that imposed on count 2. The second appellant was sentenced to six months' imprisonment, wholly suspended for five years subject to certain conditions. Both appellants were granted leave to appeal their convictions on 4 April 2018, and the first appellant was granted bail pending the finalization of this appeal.

Grounds of appeal

- [4] The appellants submit that the court a quo committed several misdirections and erred in rejecting the version of the first appellant as being false and in accepting the version of the respondent's witness, specifically Thamsanqwe. In respect of the second appellant, it was submitted that the court a quo erred in accepting that the evidence proved that she had assaulted the deceased.

Issues

- [5] The issues in the appeal are the following:

- (a) Whether the evidence established that the first appellant acted within the bounds of self-defence when assaulting the deceased and Thamsanqwe, and if he did, whether he is entitled to an acquittal;
- (b) If, however, he exceeded the bounds of self-defence, then the question to be considered is whether he was correctly convicted and whether he ought to have been convicted of any competent verdict; and
- (c) Whether the second appellant had assaulted the deceased by placing a foot on his chest and consequently, if the court a quo was correct in convicting her of common assault.

Evidence before the court a quo

- [6] In the court a quo, the respondent presented the evidence of several witnesses who witnessed the assault on the deceased and in the main, relied on the evidence of the complainant, Thamsanqwe to found the convictions of the first appellant.
- [7] At the commencement of the trial in the court a quo, all four accused, including the first and second appellants, pleaded not guilty, their defence being one of a bare denial. Subsequently,

however, the first appellant indicated that he had acted in private defence when he assaulted the deceased and Thamsanqwe. In addition,

he indicated that Thamsanqwe also inflicted injuries which may have contributed to the death of the deceased.

- [8] The second appellant exercised her right to remain silent and did not testify nor did she call any witnesses.
- [9] At the behest of the court a quo, a witness, Njabulo Happy Mazibuko (Mazibuko) was called to testify. He, however, did not observe the assault on the deceased and Thamsanqwe as he was called to the scene after the incident had occurred. His evidence did not advance either case.
- [10] On the evening of 15 June 2016, the deceased and Thamsanqwe, who were heavily intoxicated, returned to their individual dwellings at the family homestead. On their arrival at home, he found the first appellant, Thokozani, Zanele and his mother. Thokozani then enquired from their mother why she did not tell them that one of their siblings had returned with muti. Thamsanqwe shouted at Thokozani that she was causing problems at their home and ought to get in her car

and return to Durban.

[11] A verbal altercation took place during which time a window of the main homestead was broken. After this, Thokozani, Zanele and their mother then went into the main house and the first appellant went into his home. When Thokozani, Zanele and their mother had gone into the main house, they opened their mother's bedroom window

and started pelting him with stones. Whilst this was taking place, the first appellant also left his dwelling at the homestead and came to stand on the veranda of the main house. Thamsanqwe walked away from the main house and went towards the deceased's dwelling and before reaching the door, felt his siblings pelting him with stones. He then proceeded to the deceased's house to look for his house keys.

[12] When the deceased came out of his dwelling, and stood in the doorway, the first appellant, Thokozani, Zanele and their mother were standing behind Thamsanqwe. At the time, he observed the first appellant with

a golf stick and saw him strike the deceased with it, whilst Thokozani and Zanele were throwing stones at the deceased. Thamsanqwe

then went into the house to fetch his sticks and knobkerrie and when the first appellant followed him, the first appellant struck him with the golf stick on his head whilst he Thamsanqwe was in the doorway.

[13] At the time, Thamsanqwe had the knobkerrie in his hand but Thokozani and Zanele grabbed the knobkerrie from him. Thamsanqwe could not recollect how many times he was struck by the first appellant. Thereafter, the first appellant went to the deceased and struck him until the deceased fell to the ground. At the time of the assault by the first appellant, the deceased was unarmed. Whilst the first appellant was assaulting the deceased, Thamsanqwe was trying to intervene and attempted to remove the golf stick from the first appellant. Thokozani and Zanele were still assaulting Thamsanqwe and the deceased with stones.

[14] After the deceased fell to the ground after the assault by the first appellant, the first appellant then turned his attention to Thamsanqwe and was repeatedly assaulting him, by hitting him on his head. Thamsanqwe kept on stepping back until he reached the fence, tripped over a rock and fell down. He confirmed that the assault by the first appellant on both himself and the deceased stopped when they were lying on the ground.

[15] According to Thamsanqwe's evidence, the first appellant, Thokozani, Zanele and Mazibuko witnessed the assault on him. Whilst the deceased was lying on the ground, the second appellant arrived, spoke to the deceased saying 'so Pat this is you lying on the ground as clever as you are'. The second appellant then went into the house and came out with a pick wanting to further assault the deceased but Mazibuko stepped in and prevented her from assaulting the deceased and then removed the pick from her hands. The second appellant then turned to him, Thamsanqwe, and repeatedly said

to the first appellant 'kill this dog we will bury him'. Thamsanqwe testified that he was not so drunk and was able to see and observe what was going on around him. He was not armed at the time.

[16] During cross-examination, however, Thamsanqwe changed his version. He confirmed that on his arrival at home, he went to the main dwelling to chase Thokozani away. He confirmed that their siblings had obtained a domestic violence court order against the deceased but he failed to admit that the reason for this was that he and the deceased

had assaulted them in the past. It also emerged during the course of cross-examination for the first time, that he was angry with

Thokozani as she had referred to him as a witch.

[17] He confirmed that he had been arrested on a prior occasion because of allegations of numerous assaults which the siblings had made against him. He disputed, when it was suggested to him, that he and the deceased were the troublemakers and that they had threatened their mother, banged on the window and struck Thokozani's motor vehicle. He also disputed that he had a physical altercation with Siyanda and that he stabbed Siyanda with a spear so that he cut his finger.

[18] On Thamsanqwe's version, the first appellant, for no reason, started assaulting the deceased. He confirmed that at some stage during the physical altercation, he was armed with a knobkerrie but says that the deceased was unarmed. Apart from admitting that he carried a knobkerrie, he also admitted that he assaulted the first appellant with the knobkerrie. It was suggested to him that when he assaulted the first appellant and the first appellant he tried to avoid the blows with his hands, the deceased, Thokozani and Siyanda were present. Thamsanqwe confirmed that the first appellant, his mother and accused 3 and 4 were present. .

[19] He disputed that when he lashed out and tried to assault the first appellant, the first appellant avoided the blow and that is when Thamsanqwe hit Thokozani on her foot. He denied that when the first appellant dispossessed him of the knobkerrie, the deceased was in possession of a spear and an iron rod. He disputed the first appellant's version that he hit the deceased on his hand with the knobkerrie when the deceased tried to stab him with the spear.

[20] Thamsanqwe also denied that when the deceased dropped the spear, which fell near him, he picked it up to stab Siyanda but Siyanda tackled him to try and take the spear away from him. He further disputed that the deceased assaulted the first appellant with the iron rod and that the first appellant was defending himself with the knobkerrie and that the first appellant struck the deceased with the knobkerrie as he was under attack by the deceased, until the deceased

fell to the ground and stopped his assault on the first appellant. He confirmed that the second appellant did not assault the deceased as she was dispossessed of the pick.

[21] He was adamant, however, that the second appellant kicked him in his chest but conceded that this was not borne out by the J88, as the only injuries reflected on the J88 were injuries to his head. He reluctantly confirmed that there were inconsistencies and contradictions between the first and second statements which he made to the police as well as his evidence in court. During the course of cross-examination, Thamsanqwe eventually agreed that the deceased was not unarmed and had gone inside his house to fetch a stick to fight with the first appellant.

[22] Zenzele Madladla (Madladla) testified that on 15 June 2016, he, Thamsanqwe and the deceased were drinking at a store. After a while, Thamsanqwe left, saying he was going to call someone. Shortly thereafter, the deceased left and they thought that he had gone to the toilet but subsequently learnt that he had gone home. Thamsanqwe returned and asked where the deceased was and they told him that he should buy some beer. Thamsanqwe then purchased the beer but did not

drink it, saying he was going look for his brother and would drink the beer when he returned. They then went back inside, purchased more beer and continued drinking but Thamsanqwe never returned.

[23] After they had finished drinking beer, they went home and after a short while Mazibuko came to his home saying that Thamsanqwe and the deceased needed assistance as they were being assaulted by their family. He then accompanied Mazibuko to the homestead of Thamsanqwe and the deceased, and on their arrival found the deceased lying on the ground in a pool of blood. There were no weapons next to him. The people present were Thokozani, the first appellant, Zanele, the first appellant's wife, and the sibling's mother. At the time he noticed that the first appellant was carrying a golf stick and a knobkerrie. He then approached the deceased, took his cellphone and summoned an ambulance.

[24] When he first arrived, he looked around the property and could not find Thamsanqwe. He then approached the first appellant who showed him where Thamsanqwe was and he found him lying injured on the ground. He then took Thamsanqwe into the deceased's room and that is when Thokozani took out a cellphone and phoned the police. Their sister, Nomvula, the second appellant, arrived and said it is fine that he ended up here because he did not listen. She then shook the deceased with her foot and was saying to him 'get up and fight because you are the master here'.

[25] The second appellant then went outside to where Thamsanqwe was and he could hear they were talking, although he did not know what they were saying. When he had asked people who were standing around what had

happened, Thokozani responded by saying that the deceased and Thamsanqwe had attacked them. He testified that he was not so drunk

that he did not know what was happening around him and identified all four of the accused, including the first and second appellants, as the persons who were present at the time. He also observed the first appellant's son, Siyanda, as he had sent Siyanda to call an ambulance. He did not notice whether Thokozani or Siyanda were injured.

[26] Madladla confirmed the second appellant's version that she was not present at the time of the assault and had arrived after Thamsanqwe had been injured and was lying on the bed in the deceased's room. He also corroborated the second appellant's version that she did not kick Thamsanqwe whilst he lay on the bed.

[27] After the State had closed its case, the accused made an application for a discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 which was refused. Prior to the defence commencing with evidence, Thamsanqwe was recalled as a witness as he had placed on record that he no longer wanted to proceed with the case and wanted to withdraw the charge. What emerged during questions from the State was that the reason for him wanting to withdraw the charge was that he wanted to reside at home and that the family had apologized to him, not that he had not been assaulted.

[28] During cross-examination by the legal representative for the first and second appellants, Thamsanqwe conceded that he had informed the legal representative that morning, that he was so drunk on the night in question that he could not remember what occurred. He changed his version that the second appellant had assaulted him and indicated

that she had placed her foot on his chest. He conceded that he was so drunk on the day in question that he had no clear recollection of the night's events. He also conceded during further questioning that he did not witness the assault on the deceased, that he observed that the deceased had a small stick, and only observed the deceased when he was lying on the ground.

[29] That then concluded the evidence for the respondent.

[30] The first appellant testified that the deceased was his and Thamsanqwe's brother. The second appellant, Thokozani and Zanele are his sisters. He confirmed that on 15 June 2016 at the family homestead after 21h00, he heard a noise which sounded like fighting which caused him to come out of his room. The voices sounded like that of Thamsanqwe and the deceased, who were swearing and using vulgar language, shouting that they were going to burn the main house

down and Thokozan's car, which was parked in the yard. Whilst standing there, he could hear the sound of glass breaking and a vehicle being struck.

[31] He then went to the main house to try and stop them from fighting and to find out what was going on. When he reached them, the deceased said to him 'you are here you from Johannesburg'. Both of

them were drunk because they did not even know what they were saying and he observed that Thamsanqwe was carrying a 'dumpie'

with him at the time. Both Thamsanqwe and the deceased proceeded to the deceased's home and prior to them reaching his home, both the deceased and Thamsanqwe picked up stones. They placed the stones down on the floor in front of the deceased's house. The first appellant indicated that, at the time, he was not armed but on his arrival at the deceased's house, he observed Thamsanqwe come out first, followed by the deceased. Thamsanqwe walked in front armed with a knobkerrie and the deceased was carrying a spear and an iron rod that was in a T-shape.

[32] When he reached them, Thamsanqwe attempted to assault him with a knobkerrie. The first appellant avoided the blow which then struck the deceased on his head, who was approaching him in an attempt to stab him with the spear. He observed that his son, Siyanda, was present. Thamsanqwe was assaulting him with a knobkerrie and the deceased approached with a spear wanting to stab him. The first appellant, who was unarmed, reacted by pushing Thamsanqwe who then fell to the floor. Before Thamsanqwe fell, Siyanda and Thokozani came toward him and when Thamsanqwe tried to hit him, missed and struck

Thokozani on her leg. When he pushed Thamsanqwe down and away from him, he managed to retrieve the knobkerrie from him.

[33] After dispossessing Thamsanqwe of the knobkerrie, he hit the deceased with the knobkerrie on his hand to dispossess him of the spear which the deceased was holding which then fell to the ground. The first

appellant retaliated and struck the deceased as the deceased was approaching with the T-shaped iron rod in an attempt to assault him. He confirmed that he had struck the deceased on the bottom part of his body, on his leg. He estimated this to be approximately three or four times. He then took away the weapons that the deceased was carrying and he had the knobkerrie in his hand as well. He also admitted to assaulting Thamsanqwe and the deceased in retaliation for them assaulting him first. Siyanda then said to Thamsanqwe and the deceased 'what are doing to my father'. Siyanda and Thamsanqwe then struggled over the spear and Siyanda eventually dispossessed Thamsanqwe thereof.

[34] When both the deceased and Thamsanqwe were on the ground, the assault stopped. The first appellant's wife, Thokozani, Zanele and his mother then approached. He and Siyanda were in close proximity to the

deceased and Thamsanqwe when they approached. It was at this point in time that he telephoned for an ambulance and the police. While standing there with the weapons in his hands, he was approached by Mazibuko who tried to intervene, saying that he knew that the deceased and Thamsanqwe are troublesome at home. Mazibuko then left and returned with Madlala, who enquired what had happened. He was also under the influence of alcohol and informed the family that he had been drinking with Thamsanqwe earlier on that day.

[35] The first appellant testified that whilst they were waiting for the police and the ambulance to arrive, Thokozani took her cellphone and telephoned the second appellant who then arrived after the incident.

He confirmed that the second appellant, Thokozani, and Zanele did not assault anyone. He felt that his life was in danger because his brothers were attacking him and he had not quarrelled with them earlier on in the day. The first appellant confirmed that he was not armed with a golf stick but was carrying the knobkerrie which he had dispossessed Thamsanqwe of.

[36] During cross-examination, he confirmed that he had not consumed any alcohol at all and was woken up when he heard fighting between the deceased, Thamsanqwe and their family. He confirmed that he had opened a criminal case against the deceased and Thamsanqwe because they were troublesome and certain of his family members had also obtained protection orders against the deceased and Thamsanqwe as they had assaulted them on prior occasions.

[37] Siyanda corroborated the first appellant's version of events on the night in question. He confirmed that he was returning to the main homestead, having gone to fetch blankets from his mother's homestead in the same yard. He heard Thamsanqwe and the deceased shouting and using vulgar language near the window of his grandmother's bedroom. After a while, he heard a window break and a car being hit. He then went to the front door of the main homestead and that is when he observed Thamsanqwe and the deceased walking towards the deceased's room. They were being followed by his father, the first appellant. He followed them down to the deceased's room and on his arrival, found the three of them standing outside.

[38] Thamsanqwe and the deceased were on either side of his father. The deceased was armed with a spear and a T-shaped iron rod and Thamsanqwe was armed with a knobkerrie. His father was unarmed. Thamsanqwe tried to hit the first appellant with the knobkerrie but he ducked and the blow struck the deceased. By this stage Thokozani had arrived. Thamsanqwe tried to strike the first appellant again but this time the blow struck Thokozani on her leg. The first appellant then dispossessed Thamsanqwe of the knobkerrie, pushed him and Thamsanqwe fell to the ground.

[39] The deceased then attempted to stab the first appellant with the spear but the first appellant struck him on his hand with the knobkerrie and the spear fell to the ground near Thamsanqwe, who picked it up. Thamsanqwe then tried to stab Siyanda with the spear but Siyanda was able to push him away and dispossess him of the spear and he fell to the ground. It was during this struggle that Siyanda was stabbed in his hand.

[40] He testified that he did not witness any further assault on the deceased or Thamsanqwe by the first appellant after they both lay on the ground and had been dispossessed of their weapons. The deceased and Thamsanqwe were then taken into the deceased's room whilst they waited for the ambulance and the police. When he walked away to wash his bleeding hand, he observed the first appellant with the knobkerrie, spear and T-shaped iron rod in his hands. The second

appellant arrived on the scene after the assault had taken place.

[41] He confirmed that both the deceased and Thamsanqwe were drunk on the night in question and were always causing trouble using vulgar language and making a noise. What made this occasion different from the other occasions, was that this was the first time that they had threatened to burn the house and car.

[42] That then was the evidence presented by the first appellant. The medico-legal reports in respect of the two counts were handed in by consent. The injuries which the deceased sustained during the incident were not disputed nor was the cause of death as being head and chest injuries arising from an assault. The chief post mortem findings were an open skull fracture with brain tissue injury, multiple rib fractures on the left hand side, with a left lung injury and haemothorax. An examination of the body of the deceased revealed several scalp lacerations as well as lacerations to the right side of the forehead, the left parietal area and left parieto-occipital area.

[43] The injuries which Thamsanqwe as well as Siyanda sustained on the night in question, as recorded in the respective J88s, were similarly not disputed. The J88 completed in respect of Thamsanqwe, reported

multiple lacerations on his head and he was actively bleeding. At the time of the examination, the doctor recorded that he was

‘non-cooperative, and admitted that he consumed alcohol’. The J88 completed in respect of Siyanda on 17 June 2016, recorded a 3cm laceration on his left middle finger. The photographs taken at the alleged scene of the incident also confirmed a broken window at the homestead (exhibit E).

The findings of the court a quo

[44] In convicting the first appellant on both counts, the court a quo, when evaluating Thamsanqwe's evidence, was of the view that he was a single witness and his evidence had to be approached with

caution. It referred to the contradictions in his evidence and the fact that he retracted portions of his evidence from when he first testified and when he was cross-examined. It found as a matter of fact that Thamsanqwe was under the influence of alcohol when the incident occurred. In addition, it also acknowledged that the two witnesses, Madladla and Mazibuko, were also heavily intoxicated when they attended at the Mkhwanazi homestead. It found Mazibuko to be an uncooperative and evasive witness.

[45] In evaluating the evidence of the first appellant, it found that ‘he displayed no confidence in his version’ and changed his version ‘midstream’. It found the first appellant’s version inconsistent with the probabilities.

[46] Despite finding the evidence of Thamsanqwe unreliable and replete with contradictions and inconsistencies, the court a quo found that the probabilities favoured Thamsanqwe’s version and accepted same. The court a quo was of the view that the conduct of Thokozani, namely the insults directed at Thamsanqwe was the trigger event which prompted Thamsanqwe’s conduct.

[47] Despite the court a quo’s acceptance of Thamsanqwe’s evidence, further on in the judgment, the court a quo was then was critical of his evidence and his failure to make certain disclosures to the court during cross-examination. It found:

‘I have no doubt that the complainant deliberately withheld the fact that he broke the window from the Court and when he eventually

disclosed it, he was not completely frank about how it came about. He clearly downplayed the role which he played and one can safely accept that he maliciously broke the window and one can further accept that it was this conduct of the complainant which triggered the events which were to follow.’

[48] It rejected the first appellant’s version that when he followed the deceased and Thamsanqwe to the deceased’s home, he observed them picking up stones and placed them in front of the house. It opined that this conduct of the deceased and Thamsanqwe was not the conduct of persons so inebriated that they did not know what they were doing, and was of the view that the first appellant’s evidence was a fabrication to explain the presence of the stones in front of the deceased’s home.

[49] It rejected the first appellant’s evidence that he merely wanted to talk to the deceased and Thamsanqwe, as according to the first appellant, they were highly intoxicated, aggressive and violent. In rejecting the first appellant’s and Siyanda’s evidence, the court a quo was of the view that they contradicted each other and their versions were inconsistent with the probabilities.

- [50] Because it did not find corroboration for Thamsanqwe's evidence as to how the physical altercation between the deceased, Thamsanqwe and the first appellant started, the court a quo indicated that it accepted that the first appellant acted in self-defence when he assaulted Thamsanqwe and the deceased.
- [51] In rejecting the first appellant's version, the court a quo focused on the first appellant's evidence in relation to the number of blows inflicted during the assault. It found that the first appellant's version of the assault was not supported by the injuries reflected in the post-mortem conducted on the deceased. In relation to the injuries, the court a quo preferred the evidence of Madladla.
- [52] In relation to count 2, the court a quo found that Thamsanqwe's evidence that he was assaulted with a golf club by the first appellant was corroborated by Madladla. The court a quo also found that Thamsanqwe was assaulted by the first appellant when he lay on the ground. Consequently, he could not raise self-defence.

It found that given the nature of the weapon used, being a knobkerrie, and the fact that the blows were aimed at Thamsanqwe's

head, the first appellant assaulted Thamsanqwe with the intent to kill him in the form of *dolus eventualis*.

- [53] In convicting the second appellant of common assault, the court a quo accepted the evidence of Madladla that she placed her foot on the deceased's chest, challenging him to get up and fight.

Analysis

- [54] A court of appeal will not readily interfere with the factual findings of a trial court unless there is evidence of a clear misdirection. See in this regard *S v Monyane and others*[1] where the court held the following:

'This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong . . . This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony . . .'

- [55] The first appellant raised a defence of private defence, and it is necessary at this juncture to remind ourselves of the law in relation thereto, when considering the evidence presented in the court a quo and its findings.

- [56] The author, CR Snyman,[2] defines private defence as:

‘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, 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.’

[57] The author draws a distinction between the requirements of private defence, and deals firstly with the requirements of the attack with which a person who acts in private defence must comply, and secondly

the requirements with which the defence must comply.

[58] The requirements of the attack are the following: (a) the attack must be unlawful,

(b) directed at an interest which legally deserves to be protected and (c) must be imminent but not yet completed.

[59] 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 is to consider whether there is a duty to flee and the defensive act must be the only way in which the attacked person can avert the threat to his/her rights or interest;

(c) There must be a reasonable relationship between the attack and the defensive act. A proportional relationship is not necessary between ‘the nature of the interest threatened and the nature of the interest impaired’;[3] and

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

[60] The test is an objective one and one must

‘... not judge the events like an armchair critic, but should to the best of her ability endeavour to place herself in the shoes of the attacked person at the critical moment, and keep in mind that such a person probably had only a few seconds in which to make a decision which was of vital importance to her. The court should then ask itself whether a reasonable person would also have acted in that way in those circumstances.’[4]

[61] At the time a person suffers a certain attack, one ‘cannot always be expected to weigh up all the advantages and disadvantages of her defensive act, and to act calmly’.[5] Our courts have clearly recognized this, if regard is had to *S v Ntuli*,[6] where the court held 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 the precise bounds of legitimate selfdefence or the foreseeability or foresight of resultant death.’

[62] One of the most important elements of the defence is that

‘it can be resorted to only when it is necessary to do so. It must be the only means available at the time for warding off the attack. The force utilised to resist or prevent the attack must have been necessary and proportional to the attack. If it were otherwise

private defence degenerates into private vengeance. A defence which uses more force than is necessary, or which is unjustified or unnecessary is not protected.’[7]

[63] The court in Mpati dealt with the principle of proportionality and whether the defender acted reasonably in defence and took the following factors into account:

‘26.1 The relationship between the parties;

[Their respective] ages, gender and physical strength;

The nature, severity [and] persistence of the attack;

26.4 Whether a weapon was used in the attack;

26.5 The nature of the severity of harm or injury likely to be sustained in the attack;

26.6 The means available to avert the attack;

26.7 The nature of the means used to offer defence; and

26.8 The nature and extent of the harm likely to be caused by the defence.’[8]

[64] During the course of argument Mr Heunis, who appeared for the appellants, referred us to *S v Steyn*[9] in which the appellant was convicted in the court a quo of murder. She had relied on private defence and such defence was rejected by the court a quo.

[65] On appeal, the Supreme Court of Appeal found that the only version which the court a quo had before it was that of the appellants. The trial court had indicated in its judgment that it formed a good impression of the appellant and found her to be reliable. She was the sole eye-witness to the incident and there was no reason to doubt her description of how the incident had occurred.

[66] At paragraph 18 of the judgment, the appeal court held the following:

‘It is indeed so that when an accused raises a plea of private defence, the court’s initial inquiry is to determine the lawfulness or otherwise of the accused’s conduct and that, if found to be lawful, an acquittal should follow.’ (Footnote omitted.)

[67] As already mentioned, the test is an objective one and in determining unlawfulness, the court considers ‘the conduct of the alleged offender against that of a reasonable person on the basis that reasonable conduct is usually acceptable in the eyes of society and, consequently, lawful’.[10] It is trite that

‘Every case must be determined in the light of its own particular circumstances and it is impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relies upon private defence. However, there should be a reasonable balance between the attack and the defensive act as “one may not shoot to kill another who attacks you with a flyswatter”.[11]

[68] In determining liability, one does not insist upon strict proportionality between the attack and the defence rather one decides

legality taking all the factors into account and whether the defender acted reasonably in a manner in which he defended himself or his property.[12] At para 19 of the judgment, the court identified factors which it considered relevant but which were by no means an exhaustive list which factors were quoted with approval in Mpati and referred to in paragraph 63 above.

[69] Turning now to the judgment of the court a quo. Having regard to the findings of the court a quo and its evaluation of the evidence of Thamsanqwe, the court a quo erred in accepting his evidence and relying on same when convicting the first appellant. It ought to have found his evidence to be unreliable in material respects and most notably, failed to properly consider that Thamsanqwe acknowledged that he had lied to the court when he had testified. When he was recalled as a witness, the prosecutor pertinently asked him whether he was telling the truth and whether he had lied.

[70] The transcript reveals that he acknowledged that he had lied, specifically at page 124 of the transcript, where the following was put to him:

‘No, but did you deliberately tell lies to the Court, in other words tell the Court things that you knew never happened? --- Yes.

... Come back to my question, how did you know which portions of your evidence was affected by your state of confusion? --- I apologize but half of what I said was a lie.

No, no, I do not want you to apologize, you must answer my question, because I must establish what the truth is. So answer my question

please? --- Yes, there is parts that I have said that was a lie.’

[71] In addition, when he was recalled, he indicated that he was so intoxicated on the night in question that he did not have a clear recollection of what had occurred. He also acknowledged that he did not witness an assault on the deceased. Once the court a quo found that his evidence was unreliable and replete with contradictions, it ought not to have made a finding that the probabilities favoured his version. In addition, it erred in finding that there was corroboration for his version, specifically in the evidence of Mazibuko and Madladla.

- [72] Both Madladla and Mazibuko confirmed that they arrived at the homestead after the incident had occurred and did not witness any assault on the deceased or Thamsanqwe. They both conceded that they were drunk and Madladla acknowledged that both the deceased and Thamsanqwe had been drinking with them. In addition, the court a quo found that Mazibuko was a very unsatisfactory witness and was evasive and reluctant.
- [73] What was noteworthy about Madladla's evidence was that it corroborated the version of the defence witnesses, namely that the second appellant arrived after the incident and did not assault either the deceased or Thamsanqwe.
- [74] The court a quo committed several misdirections in rejecting the evidence of the first appellant and Siyanda. Once the court a quo accepted that the first appellant acted in self-defence such conduct continues and does not change 'midstream'. The

undisputed evidence was that the deceased and Thamsanqwe were the aggressors and were armed, while the first appellant was unarmed. The evidence of the first appellant, as corroborated by Siyanda, was that when the attack by the deceased and Thamsanqwe commenced, he defended himself. The first blow which struck the deceased on his head emanated from Thamsanqwe. There is nothing on record to gainsay the versions of the first appellant and Siyanda that the first appellant acted in self-defence when deflecting the attacks by the deceased and Thamsanqwe.

- [75] The first appellants's evidence is that he responded to the attack by Thamsanqwe by returning the assault until he was able to dispossess him of the knobkerrie. At the same time, he was warding off the attack by the deceased who attacked him with both the spear and the T-shaped iron rod. It is not disputed on the evidence that he dispossessed Thamsanqwe of the knobkerrie and stopped retaliating once he had been dispossessed. He used the knobkerrie to dispossess

the deceased of the spear, while lashing out and striking him until the deceased stopped the attack on him.

- [76] The blows to the deceased's body which were identified at the post-mortem are consistent with the first appellant's version and that of Siyanda, namely that he retaliated and struck the deceased several times whilst warding off the attack by him.
- [77] In respect of the first appellant, the court a quo committed a misdirection in finding that he had assaulted the deceased and Thamsanqwe whilst they were lying down on the ground. The evidence of Siyanda and the first appellant was to the effect that once the deceased and Thamsanqwe were on the ground and had ended their attack, and the first appellant had possession of the weapons, the assault stopped. There was simply no evidence to support the finding that the assault continued after they lay on the ground. Interesting enough, Thamsanqwe himself confirmed this.

- [78] The court a quo committed a further misdirection in finding that the first appellant had assaulted the deceased out of anger and therefore could not raise a defence of self-defence and that he changed his version 'midstream'. This was inconsistent with its finding that because it found no corroboration for Thamsanqwe's evidence as to how the physical altercation between the deceased and Thamsanqwe started, it accepted that the first appellant acted in self-defence when he assaulted them.
- [79] The court a quo found that Siyanda removed the spear when he went home and this contradicted the first appellant's version. However, this was not Siyanda's evidence. Siyanda's evidence was to the effect that when he left the scene to wash his hands, the first appellant was in possession of the spear, the knobkerrie and the T-shaped iron rod.
- [80] The court a quo's finding that Thamsanqwe observed the first appellant assaulting the deceased is not supported by the evidence of Thamsanqwe, Siyanda or Madladla. The court a quo found that when the first appellant inflicted the injuries, he had the intention to kill the deceased and inferred such intent from the circumstances of the case, being the nature of the injuries and their location on the body of the deceased. However, the injuries inflicted are also consistent with the first appellant's version of how he ward off an attack on him.
- [81] In respect of the second appellant, the court a quo erred in convicting her of common assault and relied solely on the evidence of Madlala that the second appellant had placed a foot on the deceased's chest challenging him to get up and fight. However, that was not the evidence of Madladla. The evidence of Madlala was to the effect that 'Then their sister, Nomvula arrived, she then said so it is finally ended up here, because you do not listen. Then she shook the deceased with her foot and then was saying to him, well get and fight because you are the master here'.
- [82] The evidence of Siyanda was that the second appellant arrived and sat in her vehicle. When the ambulance personnel arrived, she alighted from her vehicle and stood at the doorway of the room where the deceased and Thamsanqwe had been moved to after the incident. There is no evidence to corroborate Madladla's version, which is unreliable. In addition, all the witnesses confirmed that she arrived after the attack had ended.
- [83] In the result, given the misdirections of the court a quo, the convictions of both the first and second appellants cannot be sustained. The version of the first appellant that he acted in self-defence was reasonably possible true, and supported by Siyanda, and was consistent with the medical evidence.
- [84] Given the findings in relation to the appeal against the convictions, the appeals against the sentences imposed must likewise succeed.

Order

[85] In the result the following orders will issue:

1. The first and second appellants' appeals against their convictions and sentences are upheld.
2. The convictions and sentences are set aside.

HENRIQUES J

SEEGOBIN J

Case Information

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[1] S v Monyane and others [2006] ZASCA 113; 2008

(1) SACR 543 (SCA) para 15.

[2] CR Snyman Criminal Law 7 ed (2020) at 85.

[3] Ibid at 90.

[4] Ibid at 94.

[5] Ibid.

[6] S v Ntuli 1975

(1) SA 429 (A) at 437D-E.

[7] Mpati v S [2013] ZAECGHC 40; [2017] JOL 36859 (ECG) para 25 ('Mpati'); see also S v Steyn

[2009] ZASCA 152; 2010 (1) SACR 411 (SCA) para 19.

[8] Mpati para 28.

[9] S v Steyn [2009] ZASCA 152; 2010 (1) SACR 411 (SCA).

[10] Ibid para 18.

[11] Ibid para 19.

[12] Ibid.

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