

SOUTH AFRICA / JUDGMENT

S v Mchunu (SS65/2023) [2023] ZAGPJHC 1411 (28 November 2023)

[2023] ZAGPJHC 1411

COURT

South Gauteng High Court, Johannesburg

BEFORE

Du Plessis

CASE / FILE NUMBER

SS65/2023

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
CASE NO: SS65/2023

In the matter between:

THE
STATE
And
MCHUNU, SIYABONGA
SIBONELO
ACCUSED

JUDGMENT

DU PLESSIS AJ

- [1] On the first evening of this year, Mr Mchunu stabbed a policeman, Mr Ntshidi Marutla, in Leonard Street, Turfontein, during a tussle between him and the policeman after getting out of the back of a police vehicle. He handed himself over to the police at Johannesburg Central straight after the incident, where he handed over the knife as well as the deceased's firearm. The reason (and the lawfulness) of the stabbing and what Mr Mchunu's intention was is in dispute.

[2] Mr Mchunu faces trial on a count of murder, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997; robbery with aggravating circumstances for taking the deceased's firearm, attempted murder of the deceased's police partner Mr

Makasani, unlawful possession of an unlicensed firearm, unlawful possession of ammunition and possession of a dangerous weapon – being the firearm took in the robbery charge, and the knife used in the stabbing.

[3] At the beginning of the trial, the indictment was read, listing the charges against the accused. Each count in the indictment was translated separately to the accused, and he was given the opportunity to enter his plea. When questioned about section 51(1), the accused indicated that his legal representative had informed him about it. The accused was also advised that he could inform the court when he wanted to consult with his legal representative, and he proceeded to enter a plea of not guilty to all charges, offering no plea explanation.

[4] Ms Bovu, the defence attorney, confirmed the plea of not guilty on behalf of the accused and indicated that the accused would exercise his right to remain silent for the time being.

[5] The State then proceeded to present Section 220 admissions:

i. The deceased, identified as Ntsidi Marulta, died on 1 January 2023 due to a penetrating incised wound on the chest.

ii. Mholale Matlakala made the declaration of the deceased's death at the scene.

iii. Dr. Ngude conducted a post-mortem examination and confirmed the cause of death as a penetrating incised wound.

iv. A photo album was presented as evidence.

v. Various exhibits, including the firearm and 12 cartridges, were sent away for examination.

vi. The J88 form of Twanani Brian Masakni was presented.

vii. It was noted that the accused had gone to the police station on 2 January 2023.

[6] The State called five witnesses.

Emmanuel Meluleki Dlamini

[7] The first to testify was Mr Dlamini, a security officer for Fidelity Security. He shared details about an incident that transpired on 1 January 2023, at his workplace, Clover City Deep.

[8] Mr Dlamini confirmed their presence at work that day and specified that he was stationed at the main gate guardhouse. He explained his employment under Fidelity at the Clover business premises.

- [9] On the night of the incident, Mr Dlamini described their routine of turning off the lights in the guardroom to prevent people outside from seeing in. During this time, he noticed an individual climbing the transformer to gain entry to the yard. This person proceeded to the storeroom with double glass doors. In response to the person's presence, he turned the lights back on to make him aware that they were watching him.
- [10] The person then approached the guardroom door and banged aggressively on the window. Mr Dlamini contacted ADT, an armed response company under Fidelity, and was advised to remain inside while assistance was being sent. ADT arrived within two minutes, and the police and other law enforcement vehicles reached the scene soon after that.
- [11] The person informed the police that he was being followed by individuals who accused him of being a hitman. He claimed to have arrived at the premises by running and appeared dirty and dusty. Mr Dlamini did not note anyone chasing him outside the premises.
- [12] The police decided to take the person to where he wanted to go. They asked him, and he said he stayed on the other side of Moffatview. Two male police officers escorted him into the back of a marked police vehicle. The police drove the intruder to the specified location, and he did not return to the premises.
- [13] Throughout his testimony, Mr Dlamini appeared visibly sad and avoided eye contact with anyone in the courtroom.
- [14] During the cross-examination, several points were addressed. The discrepancies between Mr Dlamini's account and Mr Mchunu's testimony are important, particularly regarding Mr Mchunu's actions and demeanour. Mr Dlamini discussed how Mr Mchunu's behaviour, including banging on the door and demanding entry, appeared aggressive, which led to a call for backup assistance. Mr Mchunu's version was that he banged on the door because he feared the people chasing him. At the time, Mr Dlamini admitted that he did not know what Mr Mchunu was looking for.
- [15] Mr Dlamini asserted that they did not see any people chasing the accused outside the premises on the night in question, countering Mr Mchunu's account as put to him. Mr Dlamini's patrol duties were discussed, with the witness confirming that they patrolled inside the premises but not outside. This was contrasted with Mr Mchunu's claims about the presence of other people outside.
- [16] Mr Dlamini explained that he would not dispute Mr Mchunu's intention to seek help but emphasised the importance of approaching non-aggressively.
- [17] Mr Dlamini denies that they searched him thoroughly – Mr Qwabe, the other security guard, only used a stick to open his jacket to look at what was under it, nothing more.

Constable Twanano Brian Makasani

- [18] Constable Makasani is a police officer with the rank of constable who has been stationed at Moffatview police station for the past ten years. He primarily served in the role of crime prevention, which involved patrolling the streets in full uniform and using marked police vehicles.
- [19] Constable Makasani explained that his duties include patrolling in marked vehicles, stopping and searching individuals who appeared suspicious, and responding to complaints received through the control radio. For protection during patrols, he described using equipment, including a firearm, bulletproof vest, and pepper spray.
- [20] On the night of 1 January 2023, Constable Makasani was on patrol with Warrant Officer Marutla, the deceased. They received a call via car radio control about a reported robbery in Clover City Deep, and despite the presence of other police vehicles, they decided to respond. Upon arrival, they encountered security guards at Clover City Deep who informed them that a male individual had entered the premises by jumping a wall. The guards did not report a robbery but stated that the man was fleeing from individuals who wanted to harm him, accusing him of being a hitman. The police officers approached the man, who matched the description given by the security guards.
- [21] The police officers interviewed the man, who claimed to be running away from individuals who wanted to kill him. The security personnel confirmed that the man had not committed any mischief on the premises and requested that the police officers take him to his desired location. Warrant Officer Marutla searched him – not a full body search – then they went to the van and asked him where he wanted to go.
- [22] The man asked to be transported to a park in Unigray. The police officers agreed and placed him in the back of their vehicle. They stopped, opened the back, and told him to get out. He did not get out there. He instead requested to be taken to Rosettenville. They proceeded as requested, but the man again changed his mind, demanding to be taken to Turfontein. At a point on Geranium Street, the man insisted they take him to Turfontein and became aggressive.
- [23] At Turfontein, the person started banging on the door as they were driving. They understood he wanted them to stop, so they stopped and asked him to get out of the vehicle. He said no, he wanted to be taken to Jeppe. He was now being aggressive.
- [24] When the man refused to exit the vehicle, Warrant Officer Marutla attempted to remove him, leading to a scuffle. At some stage, Warrant Officer Marutla took out pepper spray, but the man was too strong. He could not spray him, as the man just hit the pepper spray out of his hands.
- [25] The man, who had a knife, tried to stab Constable Makasani when he tried to intervene and scratched his wrist as he blocked the attack. Constable Makasani then took out his firearm, intending to shoot him as he wanted to kill him, but when he cocked the firearm and pulled the trigger, the firearm was not working.

- [26] The man pushed Warrant Officer Marutla to the ground, and Constable Makasani tried to intervene again by kicking the man. He kicked him twice in the face. It did not make much of a difference. He then put his arms around his neck from behind to pull him off Warrant Officer Marutla. He was then scratched on the chin with the knife when the man again attempted to stab him.
- [27] He then saw the man insert the magazine of the Warrant Officer's firearm into the firearm. The man fled the scene and ran toward a passage.
- [28] The witness checked on Warrant Officer Marutla, who was unresponsive as he had been fatally stabbed.
- [29] The witness was shown several photos in Exhibit "D", including photo numbers 15-17, which featured the Warrant Officer. He positively identified the person in those photos as Warrant Officer Marutla. Photo number 19 showed that the Warrant Officer had been stabbed in the neck, a detail that he did not observe on the day of the incident. Photo number 20 revealed a stab wound to the chest, which he had not noticed during their presence at the scene due to the tense and fast-paced nature of the situation.
- [30] Constable Makasani identified photo number 59 as resembling the knife that had been used in the stabbing. However, the witness did not know where the Warrant Officer had found this knife.
- [31] Constable Makasani clarified that they had not attacked or assaulted the man, except when he was on top of Warrant Officer Marutla during their physical altercation. Warrant Officer Marutla had not assaulted the man either; he only kicked him when he pinned down Warrant Officer Marutla.
- [32] He confirmed the J88 document as the record of how he was injured during the incident. He expressed the belief that had they not blocked the accused from stabbing them, he would likely have been killed.
- [33] In the cross-examination, Constable Makasani was asked if there were other groups of people outside the factory premises, to which Constable Makasani responded that there were not. They did a minor search before placing the accused in a police vehicle. Constable Makasani explained they did not conduct a full body search, as he didn't consider the accused a suspect at the time.
- [34] They checked the vehicle to check everything is ok, it was not involved in an accident, and it was clean. A wheel was in the back of the van – it was taken to the garage to be patched.
- [35] He was questioned about Mr Mchunu's request to be taken to different locations and the events that occurred during the journey, including stops at various places: first Unigray, then Rosettenville via the Moffatville police station where the Warrant Officer collected something and a Petrol station where they stopped to smoke and buy a coke. At Rosettenville, Mr Mchunu started to bang at the door and then became aggressive – he was

instructing them, not requesting them, to go places. He then wanted to go to Turfontein, and once in Turfontein, he said he wanted to go to Jeppe.

- [36] When they reached Leonard Street, he became aggressive and wanted him to get out of the van, but he refused. Warrant Officer Marutla pulled him out of the van, but he resisted. He was asked how two policemen had such a hard time controlling one person, being overpowered by one person, despite having pepper spray and firearms. He stated that he could not understand, but that on that day, Mr Mchunu had a lot of strength.
- [37] It was put to Constable Makasani that they used pepper spray to get it out, but he stated that Mr Mchunu assaulted Warrant Officer Marutla before he could use it. Some concerns were also raised about the witness's written statement, specifically the omission that the pepper spray fell. He stated that he didn't review his statement thoroughly and might have made errors when writing it. He also wrote in the statement that it was dark; he struggled to see exactly what was happening, as it was load-shedding.
- [38] He testified to light injuries – not life-threatening injuries.
- [39] When Mr Mchunu's version was put to him, he denied his version of events. The defence counsel also detailed the accused's perspective on the events, including his claim that he acted in self-defence when he stabbed the deceased.
- [40] In the re-examination, Constable Makasani explained his actions concerning the accused's attempt to stab him and why he believed the accused might have intended to harm both him and the deceased. He also stated that his injuries were relatively minor but required medical attention.
- [41] In response to the court's question regarding the customary practice of police giving people lifts, Constable Makasani clarified that it is not customary for the police to provide individuals with rides.
- [42] The State proceeded to ask questions related to the question. Constable Makasani explained that they had responded to a reported robbery in progress and had found the accused on the premises. He mentioned that they were requested to remove the accused from the premises and complied with this request. He also confirmed that the security personnel on-site did not find the accused involved in any criminal activity.
- [43] The defence questioned Constable Makasani about why they were giving the accused a lift if it was not customary for the police to do so. He clarified that they were not giving the accused a lift in the conventional sense but rather carrying out the instructions from security to remove the accused from the premises. Their purpose was to take the accused to the location he had requested to be dropped off.

Sergeant Ishmael Miyambu

- [44] Sergeant Miyambu, a sergeant with SAPS Joburg Central with 17 years of experience, was the arresting officer. He described the events of 2 January 2023 during the chief examination. He recalled being stationed at the Community Service Centre (CSC) in the early morning hours. He was there with Sergeant Monanyane, but they were not patrolling in vehicles together.
- [45] A person, later identified as Mr Mchunu, approached them. Mr Mchunu informed them that he was being chased by a group of individuals who intended to kill him. When asked about the reason for this threat, Mchunu mentioned that it was because he had killed a police officer.
- [46] Sergeant Miyambu inquired further about the location of the incident and the method used to kill the police officer. Mr Mchunu stated that the incident occurred in City Deep, and he used a knife and that he took the officer's firearm. Sergeant Miyambu asked him about the whereabouts of the firearm, and he responded that he had hidden it on a bridge but did not specify whether they should travel there by foot or by vehicle to go look for it.
- [47] Upon searching Mr Mchunu, Sergeant Miyambu discovered the firearm on the left side of his waist. The firearm appeared to be cocked. The knife was found on Mr Mchunu's right side, and he confirmed that this knife was used in the incident.
- [48] Sergeant Miyambu mentioned that they were not alone during the search. Sergeant Monanyane was next to the witness, approximately 20 centimetres away, presumably ensuring their safety. He was in full uniform during this incident.
- [49] After the weapons were handed over, they went to the scene where Mr Mchunu claimed the police officer was killed. At the scene, they spoke to an individual identified as Mr. Gavneder and informed him about the firearm's discovery. Gavneder confirmed that the firearm was indeed a police-issued weapon that belonged to the deceased officer.
- [50] After the confirmation, they returned to the police station, informed Mr Mchunu of his rights and placed him under arrest for the possession of a firearm and ammunition without a license, as well as for being in possession of a dangerous weapon.
- [51] During the cross-examination, he read Mr Mchunu's previous witnesses' statements, suggesting that Mr Mchunu had stated he was being chased for being a hitman, not because he had killed a police officer. Sergeant Miyambu, however, pointed out that he was not present during those initial interactions and could not dispute what was said at that time. He was questioned about a possible communication breakdown when the accused arrived at the police station and his fluency in isiZulu.
- [52] Sergeant Miyambu confirmed that Mr Mchunu had informed him that he had taken the police officer's firearm. However, he stated that he was unaware of the firearm's possession until they searched Mr Mchunu, as he claimed it was hidden under a bridge. It was then argued that Mr Mchunu's actions were inconsistent with someone who had hidden the firearm, but he reiterated that the accused never disclosed having the firearm on his person.

- [53] When put to him that Mr Mchunu indicated that he had informed the police officers about the firearm in his waist but was about to take it out when he was searched, it was firmly denied. He also denied that the police at the police station pointed firearms at him.

Sergeant Johannes Tshireletso Monanyane

- [54] Sergeant Monanyane holds the rank of Sergeant at Joburg Central and has served in crime prevention for a decade. On the date in question, he was partnered with Sergeant Miyambu and stationed at the Joburg Central police station's charge office. When Mr Mchunu arrived at the police station, he informed Sergeant Monanyane and his colleague that people were pursuing him with the intent to kill him. Upon inquiry, the accused revealed that he had killed a police officer.
- [55] Sergeant Monanyane and his colleague inquired about the location of the incident, Mr Mchunu stated that he had committed the killing and hidden the police officer's firearm under a bridge. Mr Mchunu then consented to being searched, which was conducted by Sergeant Monanyane's colleague.
- [56] During the search, a firearm was found on the accused's left side, and a knife was found on his right side. The firearm bore a SAPS emblem and was identified as a Z88 pistol with an intact serial number. The knife had a black handle with bloodstains on the blade.
- [57] Following the recovery of the weapons, Sergeant Monanayane procured gloves and seal bags, placing the firearm in one of the bags. Mr Mchunu was read his constitutional rights and informed of his arrest and its reason. The exhibits were handled by the colleague, who sealed the bags in Mr Mchunu's presence and registered them at the Joburg police station.
- [58] During cross-examination, it was established that other police officers were present at the charge office, standing approximately three meters from the witness. Mr Mchunu's claim that he had killed a police officer and concealed the officer's firearm under a bridge prompted the search for the weapons.
- [59] It was put to him that his story does not make sense: why would Mr Mchunu be honest about killing a police officer and then lie about the firearm? It was put to him that the accused tried to be open about the firearm and knife at the charge office, which he refuted. It was suggested that Mr Mchunu had intended to reveal the firearm but was stopped by Sergeant Monanyane's colleague, to which Sergeant Monanyane disagreed. Sergeant Monanyane clarified that the accused did not take out the firearm himself but was searched, and the firearm was found in his possession.

Constable Mpho Bradley Madisha

- [60] In the examination in chief, Constable Madisha, a constable at Booysens for seven years, affirmed that they were present at the scene on 1 January 2023, around midnight. The location of the incident was identified as the corner of Leonard and Bertha Streets in Kenilworth, Turffontein. He detailed how he arrived at the scene, explaining that they

received a call for backup and proceeded to the location. Upon arrival, they found a marked police vehicle with one of the officers outside speaking on the phone. The other police officer, Makasani, was on the vehicle's rear passenger side.

- [61] The witness approached the scene and inquired about what had happened. Constable Makasani informed them that they had been trying to drop off a homeless person on the corner of the street. A scuffle ensued during the attempt to remove the homeless person from the van. Constable Makasani further explained that a homeless man had disarmed the other police officer, Warrant Officer Marutla. After learning about the incident, the witness cordoned off the scene and summoned all relevant role players.
- [62] When asked about their observations of the deceased, the witness stated that he had seen the body and described that the deceased had been stabbed. However, the witness did not specify the exact location of the stabbing wound but indicated it was on the left side of the waist.
- [63] In the cross-examination, the witness affirmed that they were not physically present during the incident and had been informed about the events.
- [64] This then was the State's case.

Mr Siyabonga Sibonelo Mchunu

- [65] Mr Mchunu testified in his own defence. In his evidence-in-chief, Mr Mchunu recounted the events of 1 January 2023 in Rosettenville, which he calls Rochenville. He detailed coming from the mountain in Booysens, where he had picked up empty bottles for some money. He then realised that he was being followed by a group of people who said they found the person, the hitman. He was followed for a while, after which the group said he would meet his friends where he stayed. Before he could reach where he stayed, he met another group singing "this is him".
- [66] He then sought refuge at Clover City, a factory, where he jumped over the wall and banged on the window of the security office, requesting police assistance from the officers as a group of people chased him. As he sought assistance, they were hiding in the shadows.
- [67] Mr Mchunu's version is that he was afraid and shocked, not aggressive. However, despite initial resistance, police were called and arrived in their numbers.
- [68] Two police officers remained, and they put him in the back of the van and left. Mr Mchunu explained his situation and asked them if they could drop him off with his brother in Jeppe because he feared for his safety where he stayed. He never asked them to take him to Unigray Park.

- [69] Instead of Jeppe, he was driven to an unfamiliar location – a house without a roof, where the police asked him if he had R1500 to allow them to assist him in getting to Jeppe. He was calling his former girlfriend when the police took another call on the speaker phone of the cell phone, saying that the money he was offering was too little. This all happened on the police phone.
- [70] They then closed the back of the van where he was sitting. The situation escalated when money was allegedly exchanged between the police and the people who chased him at a garage in City Deep. Eventually, they arrived in Rosettenville.
- [71] They stopped there and opened the back door of the van. He refused to get out. The deceased then took out pepper spray, and they wanted to spray him, but it did not reach his eyes. The deceased tried to grab him to get him out of the van, but he refused. The other police officer was on his phone some distance away. The police officer struggled to drag him out of the van, and then took out his firearm. He then got out of the back of the van and started fighting for the firearm. He jumped out of the van and jumped for the firearm, and a struggle ensued for a firearm.
- [72] As they struggled for the firearm, sometimes the police officer was on top, sometimes he was at the bottom. At that stage, the other police officer kicked him in the face. The firearm of the deceased fell from his hands, and they both fell to the ground.
- [73] After that he was kicked in the mouth, he reached for the knife that he found in the tyre in the back of the van and took it out when the police met with the people chasing him at the petrol station. He tried to stab the police officer, who kicked him in the mouth. He then stabbed towards him, but he did not notice if he was successful as it was dark. The other police officer then tried to shoot him three times, but the firearm did not go off.
- [74] Mr Mchunu then tried to reach for the firearm, and the deceased grabbed him by the leg. That is when he stabbed the deceased. He stabbed him in the front, although he could not say where exactly. He does not know how many times – he was just stabbing in all directions for the deceased to let go of his leg. He then picked up the firearm, and left the scene through a passage where he saw the car that gave the money to the police. He then went to the police station to report the altercation.
- [75] He then went to the police station, where he found many police officers. He explained to them that he had not met with trouble and that people chased him, saying that he was a hitman and that, in the end, he stabbed a policeman, after which he took out the knife. As he wanted to take out the firearm, they said no, they would take it out.
- [76] He was questioned about the police's version: that he asked to go to Unigray park and refused to get out. He said that it was lies – he asked to go to Jeppe, and he refused to get out because they did not take him to Jeppe and he did not know where he was. He acknowledged that he banged the back of the van, not because he wanted to get out, but because he wanted to know where they were taking him.

- [77] In cross-examination, he was asked about the version put to Constable Makasani that he wanted to be taken to his uncle and not his brother. He stated that the two versions are the same, as they are family – the uncle and a brother are the same person. He was also interrogated on how he knew how to get to the police station if he did not know Rosettenville, to which he replied that he walked around trying to find the nearest station. He was interrogated about the geography of the area in relation to Booysens that he knew, and he answered many times that he could not answer the questions because he did not know the area.
- [78] It was interrogated why the evidence of being kicked in the mouth was only raised today, to which he answered that he did tell his legal representative. He doesn't think that the police who took his statement wrote down how he was injured. The statement was not read back to him, and the person writing did not understand isiZulu well.
- [79] He was also asked about the likelihood of staying in the back of a van if there was pepper spray sprayed. He stated that it happened, and he could not explain it. He found the knife as he was looking for cigarette butts around the back of the van.
- [80] He was not angry. He was scared and afraid. That is why he took the knife – he noticed that they did not take him where he asked them to take him, and he took the knife for protection. He was not ready to stab anyone. He was hoping that the knife would prevent people from coming close to him. He kept the knife on the waste at the right.
- [81] He repeated that he refused to get out of the car because the police were taking money from the vehicle that followed him and was now getting hostile. At this stage, he got visibly angry, explaining that he no longer trusted the police, as they were going with the people harming him and not with the person who was seeking assistance.
- [82] He stabbed the deceased because he was trying to scare him.
- [83] When interrogated about why, at the police station, he did not call for the captain to report that the police were not following the law, he explained that he did not know who the captain was and that he was so scared that it did not cross his mind to get a police officer. He just wanted to hand over the knife and the pistol. He did speak of the maltreatment, but when he consulted
- with his attorney, it was not in his statement. There was also a language communication breakdown.
- [84] The advocate for the State told him he was fabricating his story. He denied it, saying that he did tell the police that there was no justice being served – he saw the police exchanging money with the people chasing him. The money was not wrapped – he even asked them to get footage from the garage to confirm this was true. They asked that they check the phone of the police officer to verify that calls were made. None of this was done.

- [85] Asked why no one else saw the people, he disputed that the security guard went looking on the street, and he is not sure if the people did not perhaps hide from the police because they had weapons.
- [86] He stabbed the police because the other policeman tried firing shots at him, and he was afraid if he turned his back, the police would fire shots at him. He did not realise how many times he stabbed the police. He can acknowledge that he stabbed him more than once, but his intention was never that it should end in death.
- [87] He knows he cannot have a firearm without a licence, but he intended to get to the police station to explain what happened between him and the police. When he made the statement, he did not know that the policeman passed on, as it was not his intention to kill the policeman.

Evaluation of evidence

- [88] The burden of proof for criminal charges is beyond a reasonable doubt. This contrasts the comparative civil standard, which requires one party to convince the court that their case is more probable than the opposing party's. The burden of proof in criminal proceedings is strict: the State must establish its position beyond a reasonable doubt; whether or not this has been accomplished is determined by the State's case strength. The defendant is entitled to an acquittal if there is a reasonable possibility that his version of events is reasonably possibly true.[1] This conclusion must be based on the evidence as a whole. In other words, an accused's version is evaluated in the context of the entire case rather than in isolation.[2] The test is also not whether the court subjectively believes him or not, nor whether the State's case must be rejected. The emphasis is on the possibility that his evidence is reasonably possibly true. On those grounds, he must be acquitted.[3]
- [89] Mr Dlamini's evidence relates to what transpired at Clover City Deep. While he described Mr Mchunu as aggressive, he mostly seems to have taken issue with how he asked for assistance. Mr Mchunu does not dispute that he banged the windows – but he explained the reason for doing so as being afraid. He did not see the people chasing Mr Mchunu. There is no reason why Mr Dlamini's evidence should not be accepted. It, however, was more helpful in creating context and a narrative than providing information on any of the charges.
- [90] Constable Makasani was a confident witness but was also a single witness to the stabbing and the driving around Johannesburg. He, however, could not see the incident when the stabbing occurred in detail, as it was dark from load-shedding. There were also slight discrepancies between his statement and his viva voce evidence regarding the pepper spray and him "choking" Mr Mchunu, as opposed to "pulling off".
- [91] His testimony set out that at the time of the stabbing, there was a scuffle between the deceased and Mr Mchunu. He also testified that he did point a gun at Mr Mchunu in self-defence. The only significant discrepancy between his testimony and Mr Mchunu's was their route that night. While I can accept that it is not a usual practice in the police to transport

people and that it may well be that they offered to transport Mr Mchunu because of his fear and aggression at Clover, I find it difficult to believe that the police will transport a person from one end to another, and if they then become aggressive and refuse to embark, try to forcefully drag them from the vehicle instead of driving to the nearest police station for backup and possible arrest. I, therefore, treat his testimony on those specific aspects cautiously.

- [92] The testimony of Sergeant Miyambu, who arrested Mr Mchunu and Sergeant Monanyane, differed in some aspects, including the sequence of events of booking the evidence and visiting the scene and the presence of other police during the arrest. There are not too much turns on this. There was an attempt to make much of the fact that Mr Mchunu allegedly stated that the firearm was under a bridge while it was on him. It is unlikely that Mr Mchunu would confess to everything but lie about the firearm. Either way, on their version, he allowed them to search him when the firearm was found. Furthermore, he informed the police of the presence of the knife and that he took the firearm.
- [93] Constable Madisha's evidence did not add much except to confirm what was testified about the scene. I accept his testimony.
- [94] Mr Mchunu was a relatively calm witness, although at times when talking about the actions of the police, he got agitated. This seems appropriate, taking into account his version. Although his version of being followed was not supported by any state witness, Mr Dlamini testified that he did not have a lookout outside the premises, and if his version is true, the police would be reluctant to admit to the presence of such a car or group of people.
- [95] I accept that Mr Mchunu was acting out of fear on the day. This was largely confirmed by Mr Dlamini too. Mr Mchunu remained steadfast that he only requested to be dropped off in Jeppe, and he repeatedly confirmed that he did not know the area of Rossettenville until that night – he learned about the name for the first time at the police station.
- [96] He was willing to answer every question, and his answers were consistent. His actions were also consistent with the explanations given and mirrored his mental state that he testified about. Except for the route that the police van drove that night and the issue of the firearm being under a bridge or not, the other witnesses largely corroborated his evidence.
- [97] Constable Makasani testified that he kicked him twice in the face after he was scratched with the knife, which is also what he testified. Constable Makasani testified about the firearm being jammed, which is also what he testified. Likewise, picking up the firearm, putting in the magazine, and disappearing into the alley are all corroborated.
- [98] I therefore find him, holistically considered, a reliable witness to the events, and I find his version reasonably possibly true. What must thus be decided is whether he should be held criminally liable for the conduct he admitted to during his evidence.

Private defence

- [99] Killing people is always prima facie unlawful. Private defence, furthermore, requires evidence. The accused must explain or justify his actions if he admits to killing someone. This is not an onus; the State must prove criminal liability, including unlawfulness, beyond reasonable doubt. It means the accused cannot simply claim private defence and leave the rest to the State.[4]
- [100] In general, the law does not allow private individuals to use force against other people to protect their legal interests; instead, they must rely on State agencies to do so. Because this is not always possible, the law allows a person to use force to defend themselves or someone else against an unlawful attack by another person. There are, however, strict guidelines in place.
- [101] Concerning the attack, there must be an unlawful attack or threat of such an attack.[5] The attack must endanger a legally protected interest, such as a person's life or physical integrity. The attack must still be ongoing or imminent; it cannot have already ended, and a person may not use force after the attack has ended, as this would be considered retaliation.
- [102] The defender's responses must be required to avert the attack using force - that is, there must be no other practical way to avert the attack. Force must be used reasonably and proportionately to the attack for the defender to protect himself from the aggressor's unlawful attack. A defence that employs more force than is required is not justified.
- [103] In some cases, the courts employ the test of whether the accused had reasonable grounds for believing that they are in danger – in other words if a reasonable person in the same circumstances would have thought the same.[6] Even if the defender's life is not in danger, he has the right to use lethal force if the situation calls for it, the threat is significant enough to justify it, the force is reasonably required to stop the assault or threat of attack, and there are no other viable options.[7] When someone is given a choice between options at a crucial moment, they shouldn't be evaluated as though they had the time and chance to consider all the advantages and disadvantages.[8]
- [104] Excessive force, or using more force than is reasonably necessary, is prohibited by this defence. This test is objective. Lastly, the response must be directed against the unlawful attacker only. It will not be a private defence when an innocent third person is harmed.
- [105] Mr Mchunu was terrified of the people chasing him. I have already stated that I find his version reasonably possibly true. He requested the police to drop him in Jeppe at his brother/uncle, and they did not do this. Instead, they drove him to a place unfamiliar to him. He was not a suspect. He was not arrested. When he resisted alighting from the vehicle, instead of driving to the police station for help or otherwise, the police, now angry, tried to pull him from the vehicle, using pepper spray and later pointing a firearm.

[106] Mr Mchunu, by this time, was not only afraid of the people who were following him but also mistrusted the police. Facing the barrel of a gun, he decided to try and disarm the policeman by jumping on him from out of the van. A scuffle broke out, and Mr Makasani joined, choking him. He was now up against two policemen, one who already pointed a firearm at him to get out of the van, and the second now pointing and cocking a firearm at him, that then became jammed. He protected his life with the only weapon he could find in the back of the police van, a knife, by stabbing Warrant Officer Marutla and Constable Makasani. When he saw the Warrant Officer collapse and his firearm falling, he grabbed the firearm along with the knife and made his way to a police station,

where he informed the police of what happened. None of this indicates a person who planned the murder and attempted murder of a police officer. I accept Mr Mchunu's version that he acted in self-defence, and the facts support his version. Although private defence speaks to the element of lawfulness, it is also evident from the evidence that he had no intention to kill Warrant Officer Marutla.

[107] I am further satisfied that he acted within the bounds of self-defence in that the force was proportional and meted while the attack was ongoing.

Putative private defence

[108] If I were to find that Mr Mchunu did not act in private defence, he would have succeeded with a defence of putative private defence. Putative private defence is concerned with the mental state of the accused, which can be raised if the accused can show that he lacked the intention to murder because he acted defensively in the honest but erroneous belief that his life was in danger. Whether the erroneous belief is reasonable is not the question, as it is a subjective test. It must only be bona fide. Because the test is subjective, it is allowed to take into account the accused's unique characteristics, intelligence and background.[9] Mr Mchunu believed his life was in danger and that the police were in cahoots with the people who tried to kill him. When the police did not take him to his desired destination, and when they started using pepper spray and pointing firearms, he acted defensively in the belief that his life was in danger.

Possession of firearm and ammunition

[109] Unlawful possession of a firearm or ammunition without the relevant authorisation or permit[10] requires possession of the firearm unlawfully with the intention to hold it. The possession element requires the intention to hold it as if you are the owner or to keep or guard it on behalf of someone else. If a person believes that their possession is lawful, even if not, there is a lack of awareness of the unlawfulness and intention.[11]

[110] I am satisfied that Mr Mchunu did not hold these items for his own benefit but had them solely to hand over to the police.

Possession dangerous weapon

[111] S 3(1) of the Dangerous Weapon's Act[12] states

(1) Any person who is in possession of any dangerous weapon under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

[112] S 3(2) sets out factors that the court can consider to determine whether a person intends to use the object as a dangerous weapon, including the explanation that the person provides for the possession.

[113] Mr Mchunu was searched, albeit superficially, at the Clover premises. The testimony was that the knife was big. It is unlikely that even on a superficial search, it would not be found. Photographs indicated that there was indeed a tyre in the back of the van on the day. It is possible that Mr Mchunu found the knife in the back of the van, and took it for protection. Possession of the knife for private defence is not an unlawful purpose.

[114] After using it in private defence, he took the knife to the police station. The taking of the knife to the police station was not an unlawful purpose – it was for purposes of handing it in.

Conclusion

[115] In S v Chabalala,[13] the Supreme Court of Appeal stated that the correct approach is:

'to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt'.

[116] This I have done, and considering everything, there is reasonable doubt that Mr Mchunu is guilty of the charges put to him, and I find him not guilty on all charges.

Order

[117] I, therefore, make the following order:

1. The accused is acquitted of all charges.

WJ DU PLESSIS

Acting Judge of the High Court

Counsel for the applicant: Ms Bovu

Instructed by: Legal Aid South Africa

Counsel for the State: Mr Zuma

Date of the hearing: 31 October & 1, 3, 9, 17 November 2023

Date of judgment: 28 November 2023

- [1] S v Van Der Meyden 1999(1) SACR 447.
- [2] R v Hlongwane 1959 (3) SA 337 (A).
- [3] S v Kubeka 1982 (1) SA 534 (W) at 537F- H.
- [4] S v Ngomane 1979
- (3) SA 859.
- [5] Shelley Walker et al (2022). Criminal Law in South Africa. Fourth edition. Oxford University Press Southern Africa.
- [6] See for instace, R v Stephen 1928 WLD 170 at 172; R v Attwood 1946 AD 331 at 340; R v Hele 1947 (1) SA 272 (E) at 275,
- [7] Shelley Walker et al (2022). Criminal Law in South Africa. Fourth edition. Oxford University Press Southern Africa. Para 7.2.1.2.2.
- [8] R v Patel 1959 (3) SA 121 (A).
- [9] Botha, R. (2017) “Putatiewe noodweer as verweer in die Suid-Afrikaanse strafreg:’n Kritiese oorsig van die onseker

pad tot by Pistorius en daarná.” Litnet Akademies:’n Joernaal vir die Geesteswetenskappe, Natuurwetenskappe, Regte en Godsdienswetenskappe 14(2), 837.

- [10] In terms of the Firearms Control Act 60 of 2000.
- [11] Snyman Criminal law 7th ed 290.
- [12] 15 of 2012
- [13] 2003
- (1) SACR 134.

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