

SOUTH AFRICA / JUDGMENT

S v Ntamehlo (CC60/2021)

[2023] ZAWCHC 181; 2023 (2)

SACR 518 (WCC) (2 August 2023)

[2023] ZAWCHC 181

COURT

Western Cape High Court, Cape Town

BEFORE

DM Thulare

CASE / FILE NUMBER

CC60/2021

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Policy

FLYNOTES:

CRIMINAL – Gender-based violence – Murder –
Planned killing of wife calculated to deny her the benefits of the joint estate – Accused not only disqualified from inheriting from deceased, but also to receive any benefit from matrimonial property – Accused sentenced to life imprisonment –
Patrimonial benefits of marriage between the accused and deceased in respect of their property are forfeited.
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
CASE
NO: CC60/2021
In
the matter between
THE
STATE
V
BABSY

NTAMEHLO

JUDGMENT

ON SENTENCE delivered 02 August 2023

THULARE J

[1] The accused was convicted on one count of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) as amended. The accused appear before the court for purposes of sentence. In order to assist with sentencing, the defence asked for a pre-sentence report which was prepared and presented by the probation officer, Mr TC Majikela. The accused also testified in mitigation of sentence. In its assistance to the court on aggravation of sentence, the State led the evidence of L[...]1 T[...], L[...]2 T[...] and N[...]2 B[...] T[...] in respect of the impact of the crime on them as victims and also led the evidence of Katlego Phiri, the Social Worker, who provided a victim impact report on the victims.

Senzeni na?

[2] These are lyrics of a song from the days of the struggle against colonialism and later apartheid in South Africa. It is a question

which the Black majority asked, singing, to both their oppressors and their God. Loosely interpreted, it means: What have we done? It was both a prayer and a plea for an explanation for what was done to them. In recent times, it has been adopted by women in their struggle against gender-based violence. It is in response to the observation that the body of a woman has physically, emotionally, psychologically and spiritually been turned into a potential scene of crime.

[3] The accused and the deceased, N[...]1 T[...], were married to each other under customary law in 2008 and had one child, L[...]2, and the three lived together. The accused was abusive to the deceased and the families of both were aware. The accused's own relatives spoke to him about it but this did not help. The deceased's family even moved her brother from the Eastern Cape to Cape Town to come and stay with the three. This did not deter the accused. Multiple Protection orders issued by the Bellville Magistrates Courts did not stop him.

[4] The accused caused the deceased to sell her own RDP house in Atlantis and to use the funds to build a house in the accused's rural village which was to be their home in the Eastern Cape. The accused got an RDP house in Fisantekraal, Durbanville, Cape Town and the understanding was that it would be their home in the Western Cape. The accused's abuse of the deceased caused them to lose love, trust and respect for each other. The accused wanted the deceased to leave the RDP house. The deceased saw herself as a joint owner who contributed to their joint property. She was not prepared to walk away with nothing from the estate that she had helped to build. She refused to leave the house in Fisantekraal, unless the

accused paid her for her fair share of their estate. The accused planned to kill her. The accused picked a Sunday night to execute his plan. The plan was exactly in line with a message he had sent to his clan name-sake, Nyameko, some weeks before the killing. Their clan name was Tshawe. The message read:

“Mtshawe lekaka ndirhalela uykhama ndiybulale nobakupha ekuzenikusa ndogqiba ndiyoyitshisela kulomlambo ulaphezantsikwethu mntakwethu ndonele.”

The message was interpreted as:

“Mtshawe this shit I wish to strangle to death even around the early hours of the morning and conclude by burning it at the river down from us my brother I had enough.”

[5] The accused strangled his wife to death in the evening of 6 September

2020. This was in such a way that she screamed only once and because of the trauma was unable to scream further and died within 3-4 minutes. The accused put her lifeless body into a wheelie bin, went outside the house on the street to check who was in the street and whether he could, without being seen dispose of the body. He pushed the wheelie bin into the field towards the banks of the Mosselbank river. Between 21H00 the Sunday evening and 3H00 the Monday morning the accused attempted to burn the body of N[...]1 at the river bank, as part of his disposal of her body. When he realised that he was caught up for time, he dug a grave and also because of time constraints and the risk of being seen if it became lighter, he dug only to have the body 30 cm deep in a water logged area. He buried her alone on the river bank.

Ungubani uBabsy

[6] The accused is 43 years old. He was 40 years old at the time of the commission of the offence. He was employed as a general labourer at a construction company. He has been in custody since his arrest on 8 September 2020. He alleged that his highest academic qualification was standard 2. He was a first offender. The accused's mother, Nonkasala, was married to Thembekile Ntamehlo. This family had four children. They were Mphatheni the accused's elder brother, Phumla his elder sister, the accused and Section, his younger brother. The family lived in Busila, Emantlaneni in the Eastern Cape. Both his parents are now deceased.

[7] After intervention by this court, the Director-General in the Department of Social Development supported Majikela to travel to and spend 3 days in Busila in the Eastern Cape, so as to provide a comprehensive pre-sentence report that matched his academic training, competency, skills and the facts revealed by his investigation. Members of the community of Busila who were interviewed indicated that although Thembekile was involved in community affairs, he was known to abuse Nonkasala. The accused's maternal uncle informed Majikela that on many occasions his sister would flee and come home. However, being in a deep rural and cultural stronghold, the accused's mother would be sent back to her husband. The accused's maternal grandmother passed on whilst his mother was still

young and the mother was raised by other maternal relatives. She never went to school and looked after relatives' children until she was married. The children, including the accused, witnessed the abuse by her husband.

- [8] Whilst her marriage was characterized by abuse, she was left for long periods of time alone in Busila whilst her husband worked firstly in Malmesbury in the Cape and later in mines in Johannesburg. It was during these long periods that the mother had a relationship with another man and the accused was conceived. In his early twenties, the accused was identified by women in Busila as the man who in the middle of the night broke into the homes of single women, forcing the doors open and sexually assaulting them. No criminal charges were laid against the accused as the matter was dealt with in terms of isiXhosa customary practices. The accused's biological father acknowledged paternity during the customary investigations and also brought the required goat to the Ntamehlo homestead where a cleansing ceremony was performed for the accused. Over and above witnessing the abuse of his mother, Majikela's view was that this was also a critical development in the life of the accused, knowing only in his twenties that Thembekile was not his biological father.
- [9] Phumla disclosed to Majikela that the accused had been abusive to women in his romantic relationships. She related the abuse of Celiwe, the accused's girlfriend before he met the deceased, the two-timing of Celiwe and the deceased and how the accused abused both when they confronted him about his two-timing. N[...]2 related how the accused was violent towards the deceased during their relationship. The accused had extra-marital affairs but accused the deceased of same. He would not sleep home most of the time. Both her, L[...]2, L[...]1 and Maseti, Section's wife who was close to the deceased, told about how the accused left the marital home between 2019 and 2020 and went to stay with another woman in Fisantekraal. The accused however kept a close eye on the movements of the deceased and now and then came home to check up on her. These witnesses also testified about the injuries that now and then would be observed on the deceased when she reported her abuse, including a swollen face on occasions. The accused was otherwise described as a quiet man who was not talkative, and did not abuse alcohol. To the outside world, he was seen as a God-fearing man who attended church on Sundays. He was a preacher at St. John's Apostolic church.

Wathint' Abafazi!

- [10] In *S v Kasongo* 2023 (1) SACR 321 (WCC) the State led the evidence of Professor Naeemah Abrahams, a director of Gender and Health Research Unit of the South African Medical Research Council. She has worked for 30 years as a researcher on interpersonal violence and gender-based violence and her areas of expertise included research on the murder of women by their intimate partners. Her evidence was based on research findings in SA and from around the world. At para 13 to 16 in *Kasongo* the court said:

"[13] In explaining gender-based violence, she said intimate partner violence was the most common form of violence that women experienced,

perpetrated by an intimate partner and the most common types were physical, sexual and emotional abuse. Gender-based violence explained

the role of gender and power dynamics in the use of violence by men against women and girls. Male control was part of gender-based

violence. Male partner controlling behavior was an undisputed part of violence in intimate partner relations. This was described by women and included the male partner controlling the partner's relationships with important others such as family and friends which was often the victim's support system. Monitoring her phone and communications with others was therefore a common behavior reported by women. Stalking was part of the controlling behavior and the motivation was to gain information about the victim- such as who she met. It was also a form of psychological abuse as stalkers made sure that they were seen and used this as a threat.

[14] Studies in SA and across the globe found that intimate partners were the most common perpetrators of violence against women. Between 25-65% of women in SA reported ever experience of physical/ sexual and emotional abuse by a current or ex-partner and the levels differed dependent on where and who was spoken to. Studies with men on their perpetration of intimate partner violence showed higher proportions disclosed, for example in Gauteng 50% of men said they had ever used physical violence against their partner, KwaZulu Natal and the Eastern Cape 42% of adult men interviewed had ever been physically violent towards a partner and

14% had done so in the previous year.

[15] The killing of women by male intimate partners was the most extreme form of intimate partner violence as well as the most extreme consequence of intimate partner violence. Her research showed that almost 3 women were killed by their intimate partners per day in South Africa. The data from 66 countries in 2013 found that globally 33% of homicides of women were committed by an intimate partner. In comparison, in 2017, 52% of women were killed by intimate partners. Intimate femicide is much more common in South Africa than in most countries of the world. 52% versus 36% indicated that our rate was almost 5 times the global rate.

[16] National studies showed that the victim's home was the scene of crime in 62% of intimate femicides in 2009. 1 in 6 women killed by their intimate partners, that is, 15,3% were either divorced, separated or in the process of separating from the perpetrator. The heightened risk of being killed during the time of separation was well described as a precursor in the international literature and was an extension of controlling behavior."

At para 17 the court continued:

"Research also found that it was men with fragile self-esteem and inherent propensity for violence, who after a time started accusing their partner of infidelity, which was usually perceived infidelity. Most men in prison described the act of killing their partner as one of 'snapping' or 'losing control' but it was often an act which was committed in order to regain control. Most men felt belittled or humiliated at

the point where they killed their partner and felt no remorse, and usually externalized blame, asserting that 'she had made me do it'. At this point they saw her as being of such little value that she deserved to be the victim of his outburst of extreme aggression. The killing was a final attempt to regain the upperhand over their partner, one who was no longer regarded as worth having. In her closing remarks, the Professor said:

"We all have a responsibility daily as individuals and as part of the state systems of justice to prevent and to ensure justice to victims are ensured."

- [11] N[...]2's feet could not carry her when she heard about the discovery of the body of the deceased and the circumstances under which it was discovered. From that day, she struggled to sleep. She had hypertension already and after that even if she took her medication her blood pressure could not be controlled. She had severe headaches and took up to 8 painkiller tablets during a single night in order to calm down and sleep. The doctor increased her blood pressure dosage and even warned her of a possible stroke if she did not ease things and let go, which is not easy. It became difficult for her to relate to men. She was so angry at men that she felt like killing each one of them that she came across. This made it difficult for her at work so much so that she almost lost her job because of that attitude.
- [12] L[...]2, L[...]1 and N[...]3, the deceased's younger sister were now her added responsibility to provide for. She had to take over from the deceased who took care of her siblings N[...]3 and L[...]1 since they were 9 and 8 years old respectively after the parents passed on. The deceased became a full time parent to her siblings whilst she herself was still young. N[...]2 had 4 children of her own and as a result of the death of the deceased she now had to look after 7 children. Watching L[...]2 struggle through his emotional life, as a result of what he had to experience at a young age is a traumatic experience for her. What made the situation even worse was that as they prepared for burial, an unknown family from Centane in the Eastern Cape came out of the blue and claimed that N[...]1 was its biological child. That family took her body from the T[...] family and took her body to Centane for burial. L[...]2 did not know the family and refused to go with them. To date, L[...]2 did not know where his mother was buried. L[...]2 would close himself in the bedroom and when she went to check up on him she found him crying. His facebook posts and statements about his mother touch her. He is still grieving and angry. He is struggling to cope with school work. The added financial responsibilities have made life very difficult for her and her family.
- [13] L[...]1, who was part of the search team that discovered the shallow grave after following the trail of the wheelie bin, was shocked by the discovery. He could not cry that day. He felt angry at himself for failing to do enough to protect her sister, as he looked at the shallow grave. He could not sleep or eat because he was stressed. The following days were difficult. It was as if he was losing his sanity. He started abusing alcohol every day to try and cope with his stress and anger. He developed blood pressure challenges and is under doctor's observations every three months. His family had specifically requested that he move from the Eastern Cape and come to Cape Town, in an effort to protect his sister against the accused's abuse. His anger at himself emanates from his thoughts that he had failed to

protect his sister as was expected. He is trying his best to forgive himself. His comfort zone comes from the fact that the accused is far bigger and stronger than him and would have killed him as well, and also the knowledge that his sister is now safe in heaven. He however still fear the accused as he had looked at him in

a funny way during his testimony and he was aware that those in custody use connections outside to hurt those that they want to.

[14] According to L[...]2, his life was easy as his mother was caring and liked to smile a lot when they chatted. He drew a smiling face with bright eyes to show his life during his mother's lifetime. After hearing of his mother's death he felt lost and his mind was all over. He could not believe that his mother left him alone in this world. He drew a crying face with blood red eyes to reflect his life after his mother's death. On 12 October 2022 he wrote a letter which was handed in as part of the victim impact statement and which reads:

"Dear Judge/Magistrate

I would like to talk about how I felt when I heard about the death of my late mother. It was not easy to believe that she was murdered by my father because I trusted him. I was very confused when I heard about this death because when I last saw her she was very happy and when I left her I thought we would chat later.

2020 was a very difficult year that brought sadness in our families. I couldn't even focus at school because in exam room I was always thinking about my mother because she was the one who always encouraged me to be busy studying my notes. I had to repeat grade 8 because of this difficult situation.

My spirit was very down and I was emotionally damaged. My heart was broken into pieces and I was very cross with my father because he made me believe that other men are trash and they do not care about others. Every day I always wake up thinking about my mother. She was the one who used to wake me up every morning when I'm off to school.

My wound haven't healed yet because I thought I would work for my mother one day. My mother made me believe that women are stronger because she was hustling hard for I and my uncle to live easily.

I am trying to heal day by day so that I can forget about this difficult situation that my father had done. My mother is always in my heart and my mind. I miss her day by day. If she was with me now maybe I would have not a broken and damaged heart.

L[...]2 T[...]."

[15] L[...]2 would witness his parents arguing. Sometimes the arguments would be so loud that the neighbours heard it. His mother would at times wake up with bruises including to her face. Sometimes her face would be swollen, having redness in her eyes and she could barely open her eyes. The mother would then put on glasses to try and hide the injuries. However, the mother was open to him, L[...]1 and other family members about the abuse she suffered

at the hands of the accused. One time he saw his father strangle his mother. He intervened by trying to get between them. His father pushed him that he fell to the ground. He rose to come between them and his father stopped assaulting his mother. He had reported the abuse to Nyameko, Section and Section's wife.

- [16] Phiri reported that N[...]1 moved to the Western Cape after the passing of her parents and co-habitated with the accused. Her siblings were taken care of by their paternal aunt in the Eastern Cape. N[...]1 would send them money for their maintenance. When N[...]1 complained about her continued abuse by the accused, her family decided that L[...]1 should move in with her in Cape Town with the hope that his presence will help. N[...]’s family, with L[...]1, moved from the squatter camp to an RDP house in Fisantekraal in 2018. The house, issued in the name of the accused, was at 9[...] O[...] Street, Fisantekraal, Durbanville in Cape Town. Phiri provided court support, food parcel, school support and bereavement counselling to the newly constituted family of N[...]2.
- [17] L[...]2 had been aware that his mother was in an abusive relationship since he was in primary school and about to start grade 1 in 2012. At some point because of the abuse L[...]2 and his mother had to leave the common home for her safety. L[...]2 developed a positive bond with his mother and his relationship with his father became distant as a result of the domestic violence but more so when his father left the common home and moved in with a girlfriend who lived in the same area. During that period he would go to him when in need, and his father would accuse him of having been sent by his mother and would sometimes refuse to help him out.
- [18] Phiri reported that L[...]2 was highly affected by the death of his mother and changes that followed. L[...]2 felt frustrated, found it difficult to accept that his mother passed away, that his father was arrested and felt like an orphan with no one to care for him. He struggled to adapt to the new school and community, to make friends and avoided being asked of his sudden move from Fisantekraal to Delft. He felt embarrassed to share about what his father did to his mother. He developed social anxiety which affected his self-esteem. He used to be part of a nuclear setting and his separation from his parents led him to question his sense of belonging. He was the only child and found it difficult to transition into a bigger family setting when he moved to Delft. He had to adapt from having his own bedroom to sharing a bedroom with minimal privacy. L[...]2 was not ready to have any contact with his father and shared with Phiri that he had nothing to say to his father. N[...]2’s family was nominated by the T[...] extended family to take care of L[...]2. Phiri reported that L[...]2 was not responsive to trauma counselling, and was not willing to go for the alternative, which was to attend the trauma centre. He seemed receptive to express himself to N[...]2. Phiri empowered N[...]2 with techniques to implement to support the child. Phiri also referred the child for further counselling with a school educational psychologist and other support programmes. Majikela on the other hand recommended direct imprisonment as an appropriate sentence.

Mayihlale phansi, ibambe umthetho.

[19] Section 51(1) of the CLAA provides as follows:

“51 Discretionary minimum sentences for certain serious offences

- (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.”

Subsection (3)(a) provides:

“(3)

- (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.”

The applicable provisions of Part I Schedule 2 read:

“SCHEDULE 2

(Section 51)

PART I

Murder. When –

- (a) It was planned or premeditated.”

[20] Discussing the concept of “substantial and compelling circumstances in *S v Malgas* 2001 (2) SA 1222 (SCA), it was said at para 8 and 9:

“[8] In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

- [9] Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* by the Court of Appeal, 'a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based - than if it is not'. Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the Legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets 'substantial' and 'compelling' cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration."

Sesfikile e Pitoli

- [21] One of the most popular protest songs was *Siyaya e Pitoli*. This not only referred to the march to the Union Buildings in Pretoria which was the seat of the Executive arm of government, but was also a commitment to one day occupy that seat. Whilst those who sang the song now occupy the seat, some of the reasons that inform the marches still remain a stubborn monument of our history. The indignity of women occasioned by toxic masculinity and patriarchy is one of them. Can women afford to change the lyrics, and sing in the same tune and proclaim *Sesfikile e Pitoli*?
- [22] The deceased had accepted that the accused had lost love and affection for her. He did not want her anymore in his life and in the house which he deemed his exclusive property. The accused wanted to have the economic spoils of their marriage all to himself. The deceased wanted the process of separation from the accused to include the economic share in their

joint estate. The accused killed her in the period when the economic impact of the separation was in dispute as he did not want her to benefit economically from the separation. The planned killing of the deceased was not only an extension of the controlling behavior of the accused, but was also calculated to deny the deceased the benefit of her share of the joint estate. The deceased was killed during the period of heightened risk of both “if I can’t have you then no one else can” and “you will get nothing out of me”. The deceased was strangled to death, her body put in a wheelie bin, wheeled to a secluded area and buried like human waste. The accused came back from a cold-burial and attempted to mislead his own child, the deceased’s family, his own blood relations and the community, including the police, about what happened to the deceased.

- [23] In my view, with appropriate court orders, women in South Africa should be able to begin to sing and say Sesfikile e Pitoli, after their courts have pronounced justice. The message should be unequivocal, clear and simple: A person who kills another, as an economic impact of domestic violence, should not be entitled to benefit from the estate of the person whom he or she has killed. The general principle is that no person may be enriched by his or her own unlawful conduct, or to benefit from conduct that is punishable by law. The accused, who killed N[...]1, for her share of the house in 9[...] O[...]a Street, Fisantekraal, Durbanville, Cape Town, may not be enriched by his own unlawful conduct. The accused must be found, on policy considerations, to lack the capacity to benefit from the person whom he has unlawfully killed. The accused is also unworthy to retain his share of 9[...] O[...] Street, Fisantekraal. The time has arrived, in my view, based on reasonableness, fairness and public policy considerations as factors, to determine whether a spouse should be declared unworthy to receive his or her half-share of the estate as a result of his or her own wrongdoing, as a necessary quantum leap in the fight against gender-based violence especially where it includes the killing of another.
- [24] The unworthy spouse principle is already part of our law. Section 9(1) of the Divorce Act, 1979 (Act No. 70 of 1979) provides that when a decree of divorce is granted on the ground of the irretrievable breakdown of marriage the court may order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited. It is a sad reality of our law that a spouse in divorce proceedings can obtain a forfeiture order of matrimonial property benefits, but a murdered spouse cannot. In my view the time has arrived that a spouse who caused the marriage to end as a result of a murder should not be placed in a better position than a spouse who caused the marriage to end as a result of a divorce. It follows that I am in the same school of thought as Wim Visser, Till murder do us part with reward, Divorce Law, September 2020 as well as the direction of *Makhaya v Minister of Finance* 2001 (2) SA (D) and *Leeb v Leeb* 1991 (2) SA (N), and I am not with *Ex parte Vonzell* 1953 (1) SA (C) and *Nell v Nell* 1976 (2) SA (T).

[25] The murder was well-planned for a quiet Sunday evening. The deceased was killed because the accused wanted sole ownership of the house situated at 9[...] O[...] Street, Fisantekraal, Durbanville, and wanted the deceased out of this house. The callous execution of the murder, the gruesome disposal of the body and the subsequent conduct of the accused not only disqualify him to inherit from the deceased, but also to receive any benefit from the matrimonial property. Reasonableness, equity and fairness demand that a person convicted of the intentional and unlawful murder of another be deemed unworthy to receive any benefit from the victim, including benefits as a result of the marriage, having regard to the patrimonial consequences of the marriage regime entered into. A person who is responsible for the intentional killing of another must be disqualified from receiving any benefit from the estate or from any benefit due to the estate. Where such a person is convicted of murder, such conviction should be enough to declare him unworthy to benefit from the death of the person they have intentionally and unlawfully killed. The economics of domestic violence must be such that it becomes expensive to abuse, or even to kill, another.

Amandla! Ngawethu!

[26] Section 173 of the Constitution of the Republic of South Africa provides as follows:

“Inherent power

173. The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

The Constitutional Court in *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) said at para 64:

“[64] In South Africa, in addition to s 28(2) of the Constitution, the common-law principle that the high court is the upper guardian of children obliges courts to act in the best interests of the child in all matters involving the child. As upper guardian of all dependent and minor children, courts have a duty and authority to establish what is in the best interests of children. Notably, in Mpofu v Minister for Justice and Constitutional Development and Others (Centre for Child Law and Amicus Curiae) 2013

(9) BCLR 1072 (CC) [2013] ZACC 15) (Mpofu) this court endorsed the approach in *Kotze v Kotze* 2003

(3) SA 628 (T):

“The high court sits as upper guardian in matters involving the best interests of the child (be it in custody matters or otherwise), and it has extremely wide powers in establishing what such best interests are. It is not bound by procedural strictures or by the limitations of the evidence presented, or contentions advanced or not advanced, by respective parties.”

[27] There are no compelling circumstances that exist that would warrant the court to deviate from the prescribed minimum sentence. The court need to put in safeguards to ensure that the custodial sentence imposed upon the accused, the child's only surviving parent, will not negatively affect the child. The mother was killed by the father. The father faces long term

imprisonment. The true identity of the father is in doubt as regards the father's paternal relations. His elders point to one family as his paternal relatives whilst the accused insisted that his mother told him about a different person as his father, both distinct from Ntamehlo as the father who raised him. It was on the eve of the mother's burial that another family informed the T[...] family that the mother was their blood child and took away the deceased's body. The child learned only after his mother's death that he may not be related by blood to the T[...] family. This is because it is now alleged that the deceased was conceived in a relationship of her mother with another man other than Mr T[...] to whom she was married. Just this identity crisis is enough to even break down an adult, let alone the child L[...]2. It has the potential to leave the child not only without knowing his true blood relations, but may deny the child of a home. The facts of this matter called on the court to do more than just pronounce the sentence and walk away with the hope that someone would intervene.

[28] For these reasons the accused is sentenced as follows:

A. The accused is sentenced to life imprisonment.

In the interests of justice, the court makes the following orders:

1. The patrimonial benefits of the marriage between the accused and the deceased in respect of the property referred to as 9[...] O[...] Street, Fisantekraal, Durbanville are forfeited by the accused in favour of the only child, L[...]2 T[...].
2. Advocate Zuko Mapoma, a practicing Advocate at the Cape Bar is appointed as curator ad litem for the child, L[...]2 T[...], at State's costs.
3. The Mayor of the City of Cape Town shall, without undue delay, ensure the establishment of a Trust for the benefit of the minor child, L[...]2 T[...], and assist in upholding the rights of the minor child of freehold ownership of the property referred to as 9[...] O[...] Street, Fisantekraal, Durbanville, in trust, as envisaged and in the spirit of Chapter 13: Upgrading of Informal Settlements, National Department of Housing, dated 14 October 2004, pages 18 to 29, and to take all steps necessary and ancillary for the full realization of this objective.
4. The Premier of the Province of the Eastern Cape shall within 30 days of this order trace the remains of the deceased, N[...]1 T[...], buried within the boundaries of the Province of the Eastern Cape, and shall immediately take all the necessary steps to ensure that the minor child, L[...]2 T[...] as well as N[...]2's family visit such grave as part of their emotional and psycho-social therapy as advised by the Social Worker, Katlego Phiri.
5. The Director-General, National Department of Social Development, is ordered to provide all the necessary resources, human and otherwise,

to support Ms Katlego Phiri, and all other necessary professionals in assisting the minor child with his emotional, psycho-social and other needs within their mandate as may be necessarily required.

6. The State, the curator ad litem, the Mayor of the City of Cape Town, the Premier of the Province of the Eastern Cape and the Director-General, National Department of Social Development, are granted leave to approach the court on notice, should the need arise on the feasibility of the order.

B. The accused is declared unfit to possess a firearm.

DM THULARE

JUDGE OF THE HIGH COURT

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