THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 170/2017

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS,
GAUTENG DIVISION, PRETORIA **APPELLANT**

and

PORTIA THULISILE TSOTETSI **RESPONDENT**

Neutral citation: *The Director of Public Prosecutions: Gauteng Division, Pretoria* v *Portia Thulisile Tsotetsi* (170/2017) [2017] ZASCA 083 (02 June 2017)

Bench: Leach, Saldulker, Zondi and Mathopo JJA and Coppin AJA

Heard: 4 May 2017

Delivered: 02 June 2017

Summary: Sentence: premeditated murder: prescribed minimum sentence: in terms of the Criminal Law Amendment Act, 105 of 1997: what constitutes substantial and compelling circumstances: effect of failing to take into account certain aggravating factors: prescribed sentence not to be lightly deviated from: to be imposed if it is not disproportionate to the crime, the criminal and the needs of society.

ORDER

On appeal from: Gauteng Division, Pretoria, of the High Court, (Makgoka J sitting as court of first instance):

1 The appeal is upheld;

2 The sentences imposed by the trial court are set aside and replaced with the following:

a) On count 1 (murder) accused no 1 is sentenced to life imprisonment;

b) On count 2 (murder) accused no 1 is sentenced to life imprisonment;

c) The sentences of life imprisonment are to run concurrently.

d) Under s 282 of the Criminal Procedure Act, 51 of 1977, the above sentences are antedated to 1 February 2016.

JUDGMENT

Coppin AJA (Leach, Saldulker, Zondi and Mathopo JJA concurring):

[1] This is an appeal brought by the Director of Public Prosecutions (DPP) in terms of s 316B of the Criminal Procedure Act[1] against the sentences imposed on the respondent by the Gauteng Division, Pretoria, of the High Court (the trial court), in respect of two counts of murder on 1 February 2016. Leave to appeal to this court was granted on petition. The only issue on appeal is whether the trial court erred in finding that there were substantial and compelling factors in respect of both counts, justifying a lesser sentence than the prescribed minimum sentence of life imprisonment.

[2] The respondent, who was accused no 1 in the trial court, was convicted of murdering her husband, Mr Nzimeni Bednock Sithatu (Mr Sithatu), a school teacher, on 21 February 2012 (count 1). She was also convicted (together with

[1] Criminal Procedure Act 51 of 1977.

a co-accused) of murdering Mr Dumisani David Ngubeni (Mr Ngubeni) on 16 May 2012 (count 2). Mr Ngubeni was implicated in the murder of Mr Sithatu.

[3] The minimum sentence of life imprisonment applied to both counts[2], but the trial court found that there were substantial and compelling circumstances justifying the imposition of a lesser sentence in respect of the two counts. The trial court, consequently, imposed a sentence of 20 years' imprisonment on the respondent in respect of each count and ordered the sentences to run concurrently. Resultantly, the respondent was sentenced to an effective term of 20 years' imprisonment for both the murders. In contrast, the respondent's co-accused, who was only convicted in respect of count 2, was sentenced to life imprisonment. The trial of a third accused, Mr Nhlapo Motsamai Mahlasela (Mr Motsamai), who had also been implicated in both murders, was separated from that of the respondent and her co-accused, after he was diagnosed with schizophrenia.

[4] The DPP contends, in essence, that the trial court had misdirected itself in a number of respects in concluding that there were substantial and compelling circumstances which justified the imposition on the respondent of lesser sentences than the prescribed minimum sentence. Counsel for the respondent, on the other hand, argued in support of the correctness of the trial court's findings in respect of the substantial and compelling circumstances and submitted that the sentences imposed were 'just and fair'. I shall revert to these arguments.

[5] An outline of the facts is necessary as background. It was established at the trial that the respondent had approached various individuals with a request that they undertake the task of killing Mr Sithatu and essentially told them that she wanted him killed for financial reasons. Before Mr Sithatu's actual killing on 21 February 2012, the respondent had told one of them, Mr Sabelo Hadebe (Mr Hadebe) that she had not been successful in her effort to poison Mr Sithatu with 'tiger's liver' or 'crocodile liver'. She also made promises to one of them,

[2] As contemplated in s 51, Part 1 of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997.

Mr Thabo Mokoena (Mr Mokoena) to obtain a firearm to facilitate Mr Sithatu's murder.

[6] By 21 February 2012 the respondent had successfully enlisted the assistance of three men for performance of the gruesome task, Mr Motsamai, Mr Ngubeni, (who is the deceased in count 2) and Mr Mbuso Nicolas Mdluli, (Mr Mdluli), who testified against her at the trial. In the early evening of that day, with the co-operation of the respondent and under the pretext that they were coming to borrow money from her, Mr Ngubeni and Mr Mdluli went to the matrimonial home in Rooikoppen, Sakhile, Standerton, in order for Mr Ngubeni to identify their intended victim, Mr Sithatu. The plan was to return later to kill him and make it seem as if he had committed suicide by hanging. Later that evening, when Mr Sithatu was asleep, after the respondent had given him sleeping tablets, and on her prompting, the three men went back to the matrimonial home, where they, together with the respondent, executed their plan successfully. The respondent was present throughout. Afterwards, the respondent summoned neighbours to the scene, feigning surprise and ignorance at the circumstances of Mr Sithatu's death.

[7] Mr Sithatu's body was found hanging by the neck, from a rafter in the bathroom of the house. The bed was without a sheet or covering, pillow cases had been stripped off and there were pension or insurance documents on the bedside table. The cause of Mr Sithatu's death was found to be consistent with hanging.

[8] Mr Ngubeni had left the scene with a plastic bag containing incriminating evidence, inter alia, a blood spattered bed cover, pillow case and the gloves that were used. This, it turned out, was the precursor of his demise at the hands of the respondent, her co-accused and Mr Motsamai, when he used the bag's contents to blackmail the respondent and attempted to extort more money from her for his role in Mr Sithatu's killing.

[9] By 16 May 2012 the respondent, recently widowed, had moved into a shack in the yard of her parental home in Sakhile. She lured Mr Ngubeni to her

place with promises of payment and when he arrived, she together with her co-accused and Mr Motsamai, killed him inside the shack, by brutally and repeatedly stabbing him in the neck. They cleaned the scene and burned items of clothing and a carpet behind the shack. Mr Ngubeni’s body, which was wrapped in a blanket, was then dumped on a bank of the Vaal river in Sakhile.

[10] Death threats made by the respondent to her neighbour, Mr Bongani Nhlapo (Nhlapo), who witnessed the happenings at her home on 16 May 2012, proved to be the undoing of the respondent and her surviving cohorts.

[11] Mr Nhlapo, out of fear for his life and prompted by a friend, went to the police and made a statement. The arrest of the respondent and her cohorts followed. This also led to the discovery of Mr Ngubeni's body. The cause of Mr Ngubeni's death was found to be 'multiple incised wounds on the neck'. Expert evidence was led at the trial to the effect that there would have been a substantial loss of blood as a result of the infliction of those injuries. Upon a visit to the respondent's home, shortly after the respondent's arrest, a policeman found what he thought to be, a new carpet, on the floor of the shack.

[12] Despite the overwhelming evidence against her, the respondent doggedly maintained that she was innocent of wrongdoing. She tried to give an impression of having been a doting wife, who cooked and cared for her husband, attending to his needs, including seeing to it that he took his medication. She denied contracting persons to kill him, dismissing it as fabrication. Of significance, she testified that two weeks before his death she discovered, after having had insight into his personal file at a medical facility, that he was taking antiretroviral medication (ARV's) and was infected with the human immunodeficiency virus (HIV) and that a week before his death she established that she had also been infected and was HIV positive. She ascribed her infection to her husband, but did not raise it as a reason for killing him and maintained her innocence throughout.

[13] The respondent, similarly unconvincingly, denied any involvement in the murder of Mr Ngubeni. According to her, they had a long standing love

relationship. She testified that on 16 May 2012 Mr Ngubeni had been upset when he found that she had employed two men to assist her to move furniture and with settling in at her new home. She testified that this was soon resolved and that after Mr Ngubeni had eaten a meal with her and the two men in the shack, he left. She denied threatening Mr Nhlapo. Notwithstanding, the evidence against her was overwhelming and her conviction for both murders was inevitable and clearly correct.

[14] In respect of the sentence, the DPP called Mr Sithatu's brother who testified about the hurt and loss caused by the slaying of Mr Sithatu, who had three brothers and two sisters. He was a teacher at the local school and was 37 when he died. Earlier in the trial Mr Andrew Sipho Ngwenya, a local councillor and friend of Mr Sithatu, testfied that Mr Sithatu's death was a great loss to him and he described Mr Sithatu, in the context of his work as a teacher, as 'a gifted , brilliant person'. Mr Sithatu was supporting a daughter from his previous marriage and she was 2 years old at the time of his death. Mr Sithatu's family relied on him and besides resulting in a loss for his family, his death caused his mother to become ill.

[15] In the trial court, in respect of sentencing, counsel for the respondent mentioned certain personal circumstances of the respondent from the bar and the respondent also gave evidence. She stated that she wanted 'to extend peace' to her late husband's family. She explained that by that she meant that she was asking forgiveness from them for what happened. When questioned, she did not admit killing either her husband, or Mr Ngubeni, but her answer was: 'Yes, I am saying as I listened to the witnesses as they were testifying it appeared that I am involved there so my name is being mentioned there. That is why I said that I must ask for forgiveness'. In response to a follow up question she stated: 'I do not admit that I killed them but I am sorry about what happened. That is why I am saying that I am asking for peace'.

[16] The respondent is a first offender. At the time of the murders she was 27 years old and at the time of sentencing she had reached the age of 30. She had completed matric and obtained a N5 qualification. She had no children and

when she was eighteen years old, her mother passed away and she and her younger brother were raised by her grandmother who was unemployed. She became like a mother to her sibling. She did not experience parental love because her mother, while alive, drank alcohol. When she was staying at her grandmother's place she was compelled to work to earn money to buy what was required for school. She met Mr Sithatu in 2008 and they subsequently got married and lived together as husband and wife until his death in 2012. She sold clothing for a living and earned R2 000 to R3 000 a month. She had been in prison awaiting trial for about three years and eight months. The respondent also testified that she was a Christian and a member of the Potter's House Church.

[17] The trial court held that the same circumstances that were substantial and compelling in respect of count 1 also applied in respect of count 2, because the murder of Mr Ngubeni was 'a snowball effect' of the murder of Mr Sithatu. It held that the motive or reason for killing her husband was that he infected her with HIV, even though this was not the evidence of the respondent at all. It held that there was no evidence that the motive was financial and that it could reasonably be expected from the respondent not to have informed any of those whom she had approached to kill her husband, of her real motive. The trial court also seemed to have had doubts about whether the respondent had shown remorse, despite the respondent's dogged denial of any wrongdoing. The trial court was of the view, that '. . . remorse is a process, and not an event that can be measured by a single act, during the trial' and that '[f]or some it might take a while for reflection . . . '. Referring to *S v Nkomo*,[3] the trial court concluded that for that reason it had to be very slow to conclude that a lack of remorse was an indication of a lack of prospects of rehabilitation. The respondent's personal circumstances, her intelligence and manipulativeness seemed to have impressed the trial court as qualities which would 'doubtlessly' have resulted in the respondent playing 'a positive role in society' if she was given an opportunity.

[3] *S v Nkomo* 2007 (2) SACR 198 (SCA) para 30.

[18] The trial court held that all the circumstances, including her personal circumstances, clean record and her HIV status, as well as the time she had spent in prison awaiting trial, justified a lesser sentence than the prescribed minimum sentence in respect of both counts of murder. The trial court then imposed the sentences, which served concurrently amounted to a total of 20 years' imprisonment, and which, according to the DPP do 'not instil confidence in the criminal justice system.'

[19] The DPP's counsel correctly submitted that the trial court did not give sufficient consideration to weighty aggravating circumstances, such as the planning of the killings and the respondent's personal involvement in them.

[20] The submission by the counsel for the respondent that those aggravating circumstances were 'neutralised' by the cumulative mitigating factors, has no merit and is based on a misconception of the weight of the alleged mitigating factors. The respondent planned the killing of her husband long before the fateful day of his death. As early as November or December 2011 the respondent asked individuals to kill her husband for payment. She had tried killing him by poisoning and through the use of a firearm. The actual killing was executed according to a plan and with her active participation.

[21] The killing of Mr Ngubeni was also planned. She enticed him to her home with promises of payment. The deed was probably executed there and the incriminating evidence was destroyed. She was probably present when he was killed inside her shack and apparently did not shrink from cleaning the bloodied scene after the murder.

[22] Further, counsel for the DPP correctly submitted that the trial court also erred in finding that the respondent's motive for killing her husband was because he had infected her with HIV. This was never the respondent's version. To the end she denied ever killing him. She portrayed herself as a caring wife. Besides the fact that the trial court was not at large to speculate about motive, the respondent, on her version, only discovered her husband's HIV status about two weeks before the killing and her own HIV status

approximately a week before that. But she had already evinced the intention to kill her husband as early as November or December 2011 and had taken active steps from then to achieve that objective.

[23] According to at least three of the individuals whom she had approached to kill her husband, she had given financial or monetary reasons for wanting to do so. She told Mr Mokoena that her husband had refused to exclude his mother and daughter as beneficiaries from his insurance. To a Mr Hadebe she said that she did not love her husband and only wanted his money and that she would get the money if he died because he had made 'her the beneficiary in all things'. To Mr Mdluli, she had said that, unless her husband was killed, she would lose everything as he was in the process of leaving her. The contention by the respondent's counsel that these were 'mutually destructive' versions is erroneous. These were not different versions of the same event. In any event, their essence is not different. The benevolent interpretation the trial court gave these intimations, namely, that it was reasonable for her not to tell them of the true reason why she wanted him killed, was a misdirection, particularly, because as pointed out earlier, on her own version, she would not have known of her HIV status when she spoke to Messrs Mokoena and Hadebe in about November or December 2011. The trial court thus also erred in finding that there was no evidence that the respondent's motive for killing her husband was financial.

[24] On behalf of the State Ms Thandi Priscilla Mosia testified that Mr Sithatu had obtained a protection order from the magistrate's court in Standerton in February 2012[4]. The order interdicted the respondent from removing any property from their matrimonial home and sought to prevent the respondent from committing any act of domestic violence or getting the help of any person to commit any act of domestic violence. Mr Sithatu gave details of the domestic violence in his application, which was admitted in evidence as an exhibit, stating that he found the respondent in their matrimonial bed with another man; that they discussed the incident and that she apologised and he forgave her. After two days her family came to remove her from their home and on each

[4] The protection order was obtained in terms of the Domestic Violence Act 116 of 1998.

occasion when she returned to the house, she removed some things on the instruction of her family. His complaint, in essence, was that they were married in community of property and that she was wrongfully depleting their joint estate. This application shows that it was not Mr Sithatu's intention to leave her, because he states in the application that '[i]f ever she is intending for divorce she must follow the correct procedure through court'. It is also supportive of the conclusion that her motive for his murder was financial greed.

[25] As submitted by the appellant's counsel, the trial court also erred in giving insufficient weight to the respondent's lack of remorse. Even though there is a possibility that a convicted person who has not shown any remorse at the time of sentencing, may do so in the future, a sentencing court cannot speculate in that regard and, in effect, downplay the seriousness of the absence of remorse. At the time of the sentencing, on 1 February 2015, more than three years had passed since the murders and she still did not appreciate and acknowledge the wrong that she had done. On the contrary, despite the overwhelming evidence against her, the respondent persisted with her denial of any involvement in the murders. She clearly exhibited no insight into her wrong doing. In *S v Matyityi* [5] it was stated that:

'[r]emorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error… In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence.'

[26] It was also correctly submitted by counsel for the DPP that the trial court erred in finding that because Mr Ngubeni's murder was 'a snowball effect' of the murder of Mr Sithatu, the same circumstances that justified the imposition of a lesser sentence in respect of count 1 also applied in respect of count 2. Certain of the circumstances, or factors, taken into account in respect of count 1 could not have been mitigating in respect of count 2. That Mr Sithatu may have infected the respondent with HIV could not possibly serve as mitigation for the murder of Mr Ngubeni. In any event, the approach adopted by the trial court was wrong. It ought to have weighed the circumstances against the facts

[5] In *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 13.

of each of the counts separately, in line with the determinative test laid down in *S v Malgas*,[6] (*Malgas*). In order to determine whether the minimum prescribed sentence is just, a sentencing court must consider whether in light of the circumstances of the particular case the prescribed sentence is disproportionate to the crime, the criminal and the needs of society.

[27] As held in *Malgas*[7] confirmed in *S v Dodo*,[8] and explained in *S v Vilakazi*,[9] even though 'substantial and compelling' factors need not be exceptional they must be truly convincing reasons, or 'weighty justification', for deviating from the prescribed sentence. The minimum sentence is not to be deviated from lightly and should ordinarily be imposed.[10]

[28] Contract killing has always been regarded as a severely aggravating circumstance and an abomination. [11] *In S v Ferreira & others* Marais JA, albeit in a dissenting judgment, describes a pre-meditated and deliberate desire to kill as 'the most offensive . . . known to the law. . . ' and describes a contract killing for reward, as one which 'in the eyes of most reasonable people' constitutes 'an abomination which is corrosive of the very foundations of justice and its administration'.[12] It is therefore imperative for the courts to consistently send out a clear message that such crimes shall be severely punished.

[29] There is, in my view, also a disturbing disparity between the sentence of the respondent, as the planner and co-executioner of the two murders, and the life sentence which was imposed on her co-accused, who was only convicted of the murder of Mr Ngubeni. The general principle is that if justice is to be done and seen to be done, where a number of people are convicted of the same crime, there ought to be reasonable uniformity in respect of the sentences imposed on them, due regard being given to respective mitigating

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[6] *S v Malgas* 2001 (1) SACR 469 (SCA) paras 22 and 25.
[7] *S v Malgas* para 25.
[8] *S v Dodo* 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) para 11.
[9] *S v Vilakazi* [2008] ZASCA 87;2009 (1) SACR 552 (SCA) para16.
[10] *S v Malgas* para 25.
[11] See *S v Mlumbi en 'n ander* 1991 (1) SACR 235 (A) at 251G-I; *S v Ntshangase* 1992 (2) SACR 141 (A) at 145A-C; *S v Ferreira & others* 2004 (2) SACR 454 (SCA) para 33.
[12] *S v Ferreira & others* above para 65.

and aggravating circumstances.[13] The respondent's role was a leading one and the sentence should have reflected the seriousness of what she had done.

[30] Compared to the nature and the seriousness of each of the two murders, those factors that were put forward as justifying a lesser sentence than the minimum sentence for the respective counts of murder - including the respondent's age, clean record, the period of her incarceration awaiting trial, her background and her educational achievements - do neither, singularly, nor cumulatively constitute substantial or compelling circumstances that render the minimum sentence of life imprisonment unjust. The trial court therefore misdirected itself in concluding that there were substantial and compelling circumstances present in this case.

[31] The respondent's background is not unique and could not have been a justification for her callous deeds for which she showed no remorse. There are many persons with similar and more challenging backgrounds who do not resort to crime and who live as upright citizens, respecting the law and the rights of their fellow human beings. The murders were callous, premeditated and motivated by greed.

[32] In light of all the circumstances, consisting of all factors relevant to the nature and seriousness of the respective crimes and relating to the respondent which could have a bearing on the seriousness of the offences and the respondent's culpability[14], the minimum sentence of life imprisonment, in respect of both counts, was not disproportionate and should have been imposed in respect of both murders. Those sentences are not unjust.[15] Indeed, life imprisonment, in light of all the circumstances, is the only appropriate sentence on each count. As pointed out by this court in *S v Mashava*,[16] by operation of law, these sentence are to run concurrently.

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[13] *S v Dombeni* 1991 (2) SACR 241 (A) at 245c-d.
[14] *S v Malgas* above para 25.
[15] *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo & others* [2009] ZASCA 72; 2009 (2) SACR 361 (SCA) para 22.
[16] *S v Mashava* [2013] ZASCA 200; 2014 (1) SACR 541 (SCA).

[33] The appellant has been in custody since before her trial and it is in the interest of justice that these sentences be antedated to 1 February 2016 when sentence was imposed in the trial court.

[34] In the result:

1 The appeal is upheld;

2 The sentences imposed by the trial court are set aside and replaced with the following:

a) On count 1 (murder) accused no 1 is sentenced to life imprisonment;

b) On count 2 (murder) accused no 1 is sentenced to life imprisonment;

c) The sentences of life imprisonment are to run concurrently.

d) Under s 282 of the Criminal Procedure Act, 51 of 1977, the above sentences are antedated to 1 February 2016.

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P Coppin

Acting Judge of Appeal

APPEARANCES:

For the Appellant:	A Coetzee Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein
For the Respondent:	J M Mojuto Instructed by: Legal Aid South Africa, Pretoria Legal Aid South Africa, Bloemfontein