IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO. CC 49/2021

In the matter between:

THE STATE

and

NDUMISO SICELO METHULA **Accused**

JUDGMENT

LAING J

[1] The accused has been charged with murder. It is alleged that he unlawfully and intentionally killed Ms Thandi Mbawu ('the deceased') at or near Ncerha Village 3, on or about 27 March 2020. The state indicated its intention to invoke the provisions of the Criminal Law Amendment Act 105 of 1997 in the event of a conviction.

[2] The accused pleaded not-guilty to the charge. His legal representative explained, in terms of section 115 of the Criminal Procedure Act 51 of 1977 ('the CPA'),

that the accused and the deceased had been married to each other but had divorced in 2016; nevertheless, they had continued to live with each other, under the same roof. The relationship deteriorated steadily, such that protection orders were obtained by each party against the other. This situation affected the accused mentally, physically, and emotionally. Consequently, the accused's state of mind was affected at the time of the incident; he relied on non-pathological criminal incapacity (automatism), as envisaged under section 78 of the CPA, as the basis for his defence.

[3] Various admissions were made in terms of section 220. The accused admitted the identity of the deceased and the place and date of her death. He admitted that the chief cause of her death was a stab wound to the heart. He also admitted that the post-mortem report and the injuries and observations contained therein pertained to the deceased, that she died because of such injuries, and that she sustained no further injuries from the time of her death until the post-mortem examination.

[4] The above admissions, copies of two protection orders, and a copy of the decree of divorce, were admitted as exhibits.

Case for the state

[5] The state led several witnesses, whose testimonies are summarised below.

Dr Ongama Ntloko

[6] The first state witness was Dr Ongama Ntloko, who is a forensic pathologist. He had examined the deceased on 30 March 2020 and found three incisions on the anterior chest wall, two fractured ribs, and a lacerated left ventricle of the heart. He was of the view that the cause of the fractured ribs was the application of major force to the deceased's body, using a sharp object; there would have been considerable pain. The cause of the death was a stab wound to the heart. The left lung of the deceased had collapsed, too, resulting from the piercing or laceration of her chest. He

confirmed that any wound inflicted to the chest was dangerous because this was where vital organs were located, e.g. the heart and the lungs.

Dr Rensche van Niekerk

[7] The next state witness was Dr Rensche van Niekerk, who worked as a general practitioner in the Casualty Unit at Frere Hospital. She treated the accused upon his arrival at approximately 01h20 on 28 March 2020, suffering from a two-centimetre laceration on the left-hand side of his chest. A Sgt van Rieck had requested her to examine him. There were minor blood stains on his clothing, but no evidence of abrasions or bruises. She testified that the accused had been stable at the time and had followed her instructions and commands; there was no suggestion that he did not know where he was or what was happening. She could not exclude the possibility that the wound was self-inflicted.

Ms Thembisa Dontsa

[8] Dr van Niekerk's evidence was followed by that of a Ms Thembisa Dontsa. She was a neighbour to the accused and the deceased and had known them both well. She was not aware of any incidents of abuse between the couple and confirmed that their relationship with their children was good. On the day in question, Ms Dontsa saw the accused sitting on his verandah, alone. Later that day, a Ms Dimpho Maphalane visited Ms Dontsa, crying, saying that the accused had killed the deceased. She was accompanied by the deceased's child, who was also crying. Ms Dontsa proceeded to her aunt to fetch a phone for Ms Maphalane to contact the police.

Ms Dimpho Maphalane

[9] The state called Ms Maphalane. She testified that she was from Lesotho but had found employment as a domestic worker for the deceased, commencing employment in early 2020. She resided at the deceased's house. She said that the deceased had resided with her children, A and M. The accused did not reside there but often visited, staying for two or three days at a time. Ms Maphalane described the relationship between the accused and the deceased as bad, saying that they would not greet or speak to each other.

[10] On the evening of the day in question, at approximately 18h00, Ms Maphalane saw the accused cooking *smileys* (sheep heads) at the entrance to the garage at the house. He was drinking wine, too, which was the first time that she had seen him consume alcohol. At the time, she and the deceased were in the kitchen. Ms Maphalane saw the accused enter the main house via the door from the garage and lock it behind him. He ordered her to leave and to go to her bedroom, saying that he wished to speak with the deceased. She did so but stood next to the kitchen door because she noticed something strange about his behaviour and wondered what he was up to. Ms Maphalane heard the accused ask the deceased where the keys to his room were, to which the deceased responded that she did not know, the keys were usually with him. At this, the witness saw the accused hit the deceased. He struck her in the face with his fist and she fell to the floor, her nose bleeding. Ms Maphalane spoke to the accused from outside the kitchen, begging him not to hit the deceased and saying that she would look for the keys. The accused told her that he had ordered her to go to her bedroom. She still refused to go. He attempted, unsuccessfully, to lift the deceased off the floor before going to a drawer from which he removed a knife. He returned to the deceased with the knife and dragged her across the floor to her bedroom. At this stage, Ms Maphalane went to her own bedroom. She heard the deceased crying in a loud voice and pleading for Ms Maphalane to help her and heard the accused asking the deceased why she went around sleeping with men from Gauteng. The crying suddenly stopped.

[11] Ms Maphalane went to the deceased's bedroom where she saw her lying on the floor. She was not moving. The witness offered to call an ambulance, but the accused ordered her to return to her bedroom and to throw her phone out of the window or else he would stab her. He was on his feet at the time, approximately three

to four metres away from her, and held the knife in his hand. The knife was blood-stained. There were no injuries on the accused.

[12] The witness also testified that she had seen the accused crush his phone and that of the deceased. This happened in the deceased's bedroom.

[13] Ms Maphalane stated that she had gone to her bedroom and thrown her phone under the bed. The accused followed her. He noticed that the window was open; he proceeded to close the window and draw the curtains before leaving her bedroom and shutting the door behind him. Ms Maphalane left the house and went to a neighbour to report the matter and to borrow a phone to call the police. When the police arrived, she accompanied them inside the house; they found the accused lying on the floor, next to the deceased.

[14] The witness described how the incident had left her shaken and disturbed. It ended her employment and broke the close bond that she enjoyed with the children of the deceased.

AM

[15] The state applied for the appointment of an intermediary in terms of section 170A to lead the evidence of the accused's minor daughter, A. The application was granted. A said that she was 11 years old and had been staying with her uncle, aunt, and cousins, in Cape Town. She attended a local primary school.

[16] A testified that her parents never used to talk to each other, they used to fight frequently. On the day of the incident, she was playing outside; her mother was inside the house with the domestic worker, Ms Maphalane, and her father was cooking in the garage. Her brother, M, was playing with his friends elsewhere. The accused called A and asked her to fetch her brother, which she did, returning to the house only to find that the door was closed. Upon her knocking, the accused opened the door and instructed A to go and play again, before closing and locking the door. She found this strange. A then heard her mother screaming. She wanted to enter the house but was

unable to do so because the door was locked. The screaming continued for a short while, after which Ms Maphalane ran outside, crying, and telling A that the accused had stabbed her mother. A then went to the neighbour's house and the police arrived thereafter.

MM

[17] The state made a further application for the appointment of an intermediary to lead the evidence of the accused's minor son, M. Similarly, this was granted.

[18] M testified that he was 12 years old and resided and attended school in Cape Town. He described his relationship with the accused as good. He confirmed that his parents had become divorced but still stayed together in the same house. He also indicated that the accused had had a girlfriend, Amanda, about whom his mother had known.

[19] On the day of the incident, M went off to the park to play with friends, leaving his mother with Ms Maphalane inside the house. The accused was cooking *smileys* inside the garage. His sister, A, called him at the request of the accused and he followed her back. The accused was inside the house. He unlocked the door upon their arrival but simply told them to go and play. M found this strange. The accused seemed angry at the time.

[20] M returned to the park. However, he was summoned shortly afterwards by a friend who arrived on a bicycle, saying that his sister and the domestic worker were crying. He went back to the house and saw that both his sister and the domestic worker were indeed upset and that a police van was parked outside. Ms Maphalane informed M that the accused had stabbed his mother.

Mr Sipho Mangengelele

[21] The next witness for the state was Mr Sipho Magengelele, who was the father of the deceased. He indicated that he had enjoyed a very good relationship with the accused prior to the incident and helped him to build the house at Ncerha Village 3, in the Kidds Beach area.

[22] At some point, his daughter informed him that the accused had pursued several extramarital relationships, which led to arguments and eventually to her falling out of love with the accused. The deceased subsequently obtained a protection order against him after he started assaulting her. When Mr Magengelele confronted the accused about this, he told him that he, too, had obtained such an order; however, he never provided details about any assaults that may have been carried out by the deceased. The couple divorced shortly afterwards; nevertheless, they continued to stay in the same house, despite not having been on speaking terms. Subsequently, the deceased and her children came to live with him in Mdantsane, only to return later to Ncerha Village 3.

[23] On the day of the incident, Mr Magengelele received a telephone call to the effect that his daughter was hurt. He went to the house at Ncerha Village 3 with a neighbour and a friend, where they had encountered a large crowd of people, the police, and ambulance personnel. He was taken inside the house by a W/O van Rieck, who requested him to identify the body of the deceased, which he did. He was terribly upset. He was then taken, at his request, to the accused, who was detained inside a police van. When Mr Magengelele asked the accused what had happened, the latter merely asked him, in turn, what had happened and the whereabouts of the deceased.

[24] A certain friend of the accused, Mr Luthando Pikoli, was at the house. He spoke to Mr Magengelele and informed him that the accused had visited him in Amalinda earlier in the day, leaving with *smileys* and alcohol. The bottles that were found at the house were almost empty. It was Mr Magengelele's opinion that the accused had not been able to give him an account of what happened because he had consumed the alcohol.

[25] Early on the following morning, said Mr Magengelele, the accused's father and brother had arrived from Gqeberha. They proceeded together to the police station in

East London where they found the accused, who again asked Mr Magengelele the whereabouts of his daughter. It seemed to Mr Magengelele that the accused was suffering from a hangover. The accused's father said that he should be released because he was not 'OK'.

[26] A few weeks' later, Mr Pikoli returned to Ncerha Village 3 and provided Mr Magengelele with a letter from the accused, addressed to the family. The contents of the letter were placed on record, which amounted to an apology for his actions and a plea for forgiveness. Mr Magengelele stated that he did not know how he would ever forgive him.

Sgt Luzuko Magungwana

[27] The state called Sgt Luzuko Magungwana. He testified that he had received a complaint about domestic violence at about 18h30 on the date in question and proceeded to the address with his colleague, W/O Vumani Rungqu.

[28] Upon their arrival, they met the domestic worker, Ms Maphalane, who alleged that the accused had assaulted the deceased. The officers were taken to the garage, where they discovered that the door was locked. All the remaining doors to the house were locked, too. Ms Maphalane took them to the deceased's bedroom, where Sgt Magungwana was able to gain access to the house through a sliding door; it was secured with what appeared to have been a coloured necktie, which Sgt Magungwana severed. Upon their entry into the bedroom, the officers found the deceased lying on the floor, on her back, and the accused lying next to her on his stomach. A silver knife lay between them. The accused appeared to have been snoring. There was no response from the deceased when the officers called her; the accused simply sat up and looked at the deceased when Sgt Magungwana asked him what had happened. Thereupon the officers inspected the deceased and ascertained that she was not breathing. They noticed a chest wound on her and saw, too, that there were blood stains on the accused's clothing. On closer inspection, said Sgt Magungwana, they had observed a wound on the upper left side of the accused's chest.

[29] Despite resisting at first, the accused was handcuffed by the officers, who called the police station, requesting an ambulance. In the meanwhile, Sgt Magungwana inspected the house and saw a trail of blood from the kitchen to the bedroom. Throughout this time, the accused did not respond to any questions put to him. Sgt Magungwana confirmed that only the accused and the deceased had been inside when the officers entered the house. He also confirmed that he had found two cellphones next to the accused; they were broken, as if smashed with a stone. He noticed, too, a smell of alcohol but could not say whether this had come from the accused or whether it permeated the house in general.

W/O Vumani Rungqu

[30] W/O Vumani Rungqu was the next state witness. He was on patrol with Sgt Magungwana when they received a complaint about domestic violence.

[31] They met Ms Maphalane outside the house and heard that the accused was assaulting the deceased, whereupon they tried to enter but found that the doors were locked. They managed to enter via a sliding door once Sgt Magungwana cut the twine that was allegedly used to secure it. W/O Rungqu was adamant that all the doors to the house had been locked, even the windows. Upon entry, they discovered the accused and the deceased lying on the floor, with a silver knife lying between them. He confirmed that the deceased had been lying on her back, the accused was lying on his stomach, snoring; there was blood on the deceased's chest. The accused did not respond when they woke him up and asked what happened; however, it had been W/O Rungqu's impression that the accused was simply being uncooperative. He also offered some resistance when they attempted to handcuff him. The accused had sustained a small wound on the left of his chest, which received treatment when the ambulance personnel arrived.

[32] When asked about the accused's sobriety, W/O Rungqu said that he was unsure. There was a smell of alcohol inside the house; he could not say whether this had come from the accused. Later, the officers took the accused to the Kidds Beach

police station where they explained to him his constitutional rights; the accused appeared to understand and signed the notice presented to him.

Sgt Vuyo van Rieck

[33] The following state witness was the investigating officer in the matter, Sgt Vuyo van Rieck. He was called to the crime scene by W/O Rungqu and Sgt Magungwana at approximately 19h00, where the officers pointed out the deceased, next to whom lay the accused, who was handcuffed. Sgt van Rieck observed a wound over the deceased's heart. There was also a small wound on the accused. He went on to testify, in detail, about what had been conveyed to him by Ms Maphalane. Furthermore, he alleged that when he had attempted to find out what happened from the accused, the latter merely looked at him; he could not be certain about whether the accused heard him properly but assumed that either he was drunk or he was simply exercising his right to remain silent.

[34] In the days that followed, Sgt van Rieck established from staff at the state mortuary that the deceased sustained three wounds: one on each breast and one over the heart. He also returned to the accused while he was being detained at the Fleet Street police station in East London so that Sgt van Rieck could formally charge him. At the time, the accused refused to provide a statement.

Sgt Nombuliso Nqambi

[35] Sgt Nombuliso Nqambi testified next. She indicated that she was summoned to the house at about 20h20 on the date in question and took the photographs that appeared in the police album. In that regard, she confirmed that a lounge or sitting room and another room, possibly a study, separated the kitchen from the garage. Moreover, it was possible to have seen the garage door from the kitchen, provided that the inter-leading door was open.

[36] The defence subsequently submitted a section 220 admission to the above effect, bringing Sgt Nqambi's role in the proceedings to an end.

Ms Zandile Makitiwana

[37] The state called Ms Zandile Makitiwana. She attended the same school as the deceased and renewed her acquaintance with her in 2008, after which they became close friends. The deceased introduced her to the accused, as the former's boyfriend, in 2009.

[38] Ms Makitiwana said that the pair had become married in 2010 and stayed in a flat in Southernwood, East London, together with their children. Initially, their relationship was very good, but tensions emerged over time. A source of friction was their respective parenting styles in relation to the deceased's daughter, Amanda, born of a prior relationship. Nevertheless, said Ms Makitiwana, the pair had usually managed to resolve their differences.

[39] To the best of her knowledge, the deceased was responsible for the payment of the children's school fees. The accused took care of their transport needs and bought them food.

[40] Ms Makitiwana went on to describe the deceased's sources of income. She was initially employed by Sanlam but subsequently ventured into the buying and selling of up-market clothing. This developed into a successful business and involved trips to China to obtain supplies. Ms Makitiwana assisted the deceased by managing orders and modelling the designs. The deceased would, from time to time, bring back clothing for the children, the accused, as well as her domestic worker, Ms Maphalane. In addition, the deceased was a member of Ms Makitiwana's *stokvel*, which yielded a good revenue over time.

[41] The divorce was primarily an arrangement between the parties for purposes of gaining access to pension funds so that they could start a business. After the divorce, however, the pair did not remain together. The accused commuted between East

London and Gqeberha, where he had a girlfriend. He would stay with the deceased when in East London, but they never shared a bedroom.

[42] The accused, said Ms Makitiwana, had on occasion confided in her that his relationship with the deceased was not healthy and that the two of them would often argue. Nevertheless, it appeared to Ms Makitiwana that the pair was able to resolve their differences. She strongly refuted the accused's plea explanation to the effect that he had been in an abusive relationship with the deceased.

[43] It was Ms Makitiwana's testimony that the deceased obtained a protection order against the accused after he began to assault and ill-treat her. She admitted that he had obtained an order against her in turn.

[44] The death of the deceased had a major impact on Ms Makitiwana, who described her as a kind and very sociable person.

[45] The state closed its case.

Case for the defence

[46] The defence presented the evidence of the witnesses described in the paragraphs that follow.

Ms Amanda Mbawu

[47] The first defence witness was the accused's stepdaughter, Ms Amanda Mbawu. The deceased had been her mother. She stated that she had met the accused in about 2008, when she was eight years old. She stayed in a hostel for her primary school years, before joining the accused and her mother in Southernwood, and later Ncerha Village 3, during her high school years. Ms Mbawu described their relationship as

'average'. She was close to the accused, who was like a father to her, whereas her mother was stricter and placed limits on her social activities. It was Ms Mbawu's view that her mother and the accused had shared various financial responsibilities.

[48] Ms Mbawu left home after completing her schooling and moved to Cape Town for her tertiary education. She maintained her relationship with the accused. She managed to forgive him for what happened after having grown in her faith and after having received support from her pastor. She benefitted from FAMSA counselling, too.

[49] The witness said that she had confronted the accused about why he killed her mother. He explained that he had been confused, he did not know what happened on the day in question. This made Ms Mbawu angry; the accused's explanation did not make sense to her.

[50] Ms Mbawu testified that she had never been particularly close to her mother. She admitted that her mother had never had much time for her but, nevertheless, loved and cared for her. In contrast, she was closer to the accused, who fetched her from school, took her to his workplace, and bought items for her. He was a 'go-between' when she and her mother clashed.

[51] She stated that she had been unaware that her mother and the accused obtained protection orders against each other. When confronted by the details of her mother's death, Ms Mbawu conceded that the accused killed her mother. She was not of the view that his conduct could be described as that of someone who had been confused at the time.

The accused

[52] The defence called the accused to testify on his own behalf. He described how he had met the deceased in 2006. He was the manager of a furniture store in Fort Beaufort, and she was employed by Sanlam. They moved to Gqeberha in 2008 and to East London in 2009. The accused said that, initially, their marriage had been good. It produced two children, and the accused enjoyed a positive relationship with his stepdaughter, Ms Mbawu. They eventually bought a site at Ncerha Village 3 and

began construction of their house. The pace of construction was hampered, however, by the availability of capital, leading the couple to agree on a plan to divorce. This would allow them to draw down on their pension funds and to use the proceeds to complete the house and to start a business. They would then re-marry.

[53] The divorce went ahead in 2014. As fate would have it, the deceased lost her employment over this time, compelling the couple to secure further loans to fund construction costs. They were finally able to take occupation of the house in late 2017.

[54] Problems began soon afterwards. The couple began to fight more frequently, resulting in periods of little or no communication between them. They obtained protection orders against each other and the deceased, in due course, moved out of the house to stay with her parents in Mdantsane. The accused described how, on a particular occasion, the deceased had returned to the house and ripped up the accused's clothing and broken his watch. On another occasion, the accused came home to discover that the deceased had forced open the doors to various rooms and removed furniture and the jacuzzi.

[55] The accused denied that he had ever physically abused the deceased. He said that they had both gone to the Magistrates' Court on numerous occasions to deal with alleged infringements of the orders. He was eventually persuaded by a magistrate to allow the deceased to move back to the house in late 2019 but they slept in different bedrooms. They led entirely separate lives, without meaningful interaction. The deceased would insult the accused if ever they had any form of contact. Throughout this time, the couple, despite their considerable differences, continued to fulfil their responsibilities towards their children.

[56] Over this period, the accused started a relationship with his girlfriend. He admitted, in testimony, that he had been surprised to learn from Ms Mbawu's evidence that the deceased, too, started an extra-marital relationship.

[57] Turning to the day of the incident itself, the accused described how he had planned to cook *potjiekos*. He bought *smileys*, gathered firewood, and commenced cooking inside the garage. The accused entered the main house to go to his bedroom from time to time, always locking the door behind him when he exited and placing the

key next to those for his motor vehicle, on top of a refrigerator that stood in the passage. He poured himself a tot of gin and listened to music.

[58] At some point, the accused went inside but was unable to find the key to his bedroom. It was not on top of the refrigerator. He concluded that the deceased had taken it, especially considering previous incidents when she entered his bedroom without his permission. The accused found the deceased in the kitchen with the domestic worker, busy cooking. She was drinking, too. He asked Ms Maphalane to leave the kitchen and asked the deceased the whereabouts of the key. She turned and looked at him before retorting, 'Don't ask me sh*t!'. He became angry and an argument ensued. The accused testified that he remembers nothing of what happened after that, only returning to full consciousness the next morning, when he found himself in a holding cell at the police station.

[59] The accused stated that he had been unable to understand what happened. He learnt of the deceased's passing from a police officer. This was confirmed by family members when they visited him; they told him that he had killed her. He was emphatic that he had no recollection of the incident.

[60] Mr Pikoli subsequently informed him that he had gone to the house, seen the body of the deceased, and spoken to him in the back of the police van. When Mr Pikoli asked the accused what had happened, the latter answered that they should go and eat the meat, it was cooked. When Mr Pikoli enquired further, the accused merely laughed, causing onlookers in the vicinity to grow angry. The accused was adamant, however, that he could not remember the conversation with Mr Pikoli and could not remember having been in the back of the police van.

[61] The accused explained that he had been sober when he searched for his bedroom key. He consumed only a single tot of gin and was planning to share the meat and drink with Mr Pikoli later, in Amalinda. He said that he could not recall whether the doors of the house were locked, but he usually locked the door to his bedroom. He would have closed the door to the garage, while cooking, to keep the smoke out of the adjoining study.

[62] When asked about how he felt about the passing of his wife, the accused admitted that he could not comprehend how he could have killed her; he always hoped that their relationship would improve. He had become alienated from both the deceased's as well as his own family. The accused confirmed that he had written letters to the families and to his friends, including Mr Pikoli, apologising for what happened. He accepted that he was responsible for the death but did not know how it could have occurred.

Reopening of state's case

[63] The state subsequently applied to reopen its case for the admission of an expert report compiled by Ms Raylene Flanagan. This comprised a psychological assessment of the accused. The application was not opposed. The contents of the report were admitted in terms of section 220 of the CPA, but not the assessment itself or the conclusions reached. In that regard, the accused denied that he was a person who lost his temper easily but conceded that the conduct of the deceased on the date of the incident had angered him. He said that the killing of the deceased had been a spontaneous reaction.

Continuation of case for the defence

[64] The defence resumed its case and called its next witness.

Mr Luthando Pikoli

[65] Mr Pikoli indicated that he had known both the deceased and the accused for several years. On the date of the incident, he and the accused were in telephonic contact with each other about meeting up after the latter finished cooking *smileys*. Before they could do so, however, Mr Pikoli received a call from his ex-girlfriend to say

that the accused had stabbed the deceased. He left immediately for the accused's home and came across members of the community gathered outside the premises. He introduced himself to the police officers who were present and was taken to the accused, who was in the back of a police van. Upon seeing Mr Pikoli, the accused allegedly said, 'The meat has been cooked, let's go.' When Mr Pikoli asked him whether he knew where he was, the accused said that he was at home. To this, Mr Pikoli pointed out that he was in the back of a police van, at which the accused laughed, asking why that would be so. Mr Pikoli explained to him that he had killed the deceased. The accused responded by asking why he would do so, before speaking no further.

[66] Mr Pikoli described the accused as having been confused. He could not comment on his state of sobriety but remarked that a tot of gin would not have had any impact on the accused.

[67] Shortly afterwards, the father of the deceased, Mr Magengelele, arrived. He went with Mr Pikoli to the police van and repeatedly asked the accused what had happened. The accused, however, just looked at Mr Magengelele and said nothing. On the following day, Mr Pikoli visited the accused at the Fleet Street police station in the company of Mr Magengelele and others. A police officer informed them that he had been unable to obtain a statement from the accused because he was not 'in his right senses'. He, nevertheless, took them to the accused, who asked the whereabouts of the deceased before remaining silent. Mr Pikoli said that the accused had been sober but still appeared to have been confused.

[68] The defence closed its case.

Reopening of defence's case

[69] The defence later applied to re-open its case for the procurement and possible admission of an additional expert report regarding the psychological assessment of the accused. The application was not opposed.

Mr Iain Reid

[70] Upon the resumption of proceedings, the court heard testimony from a clinical psychologist, Mr Iain Reid. He stated that he had been instructed to provide opinion evidence regarding whether the accused was able to appreciate the unlawfulness of his conduct and to act accordingly. He confirmed his finding that this had indeed been so.

Issue to be decided

[71] The accused, at the commencement of the trial, indicated in terms of section 115(1) of the CPA that the basis of his defence was non-pathological criminal incapacity (automatism), as envisaged under section 78. Whether the state, at the end of the trial, successfully rebutted such defence is the key issue for determination.

[72] A secondary issue is whether the offence was premeditated. This is more relevant to possible sentencing proceedings than the merits of the matter, but the evidence in relation thereto has a bearing on the defence, as shall be explained.

[73] It is necessary, at this stage, to consider the principles that apply.

Legal framework

[74] The provisions of section 78 of the CPA deal with mental illness or intellectual disability and the impact thereof on criminal responsibility.

[75] More particularly, sub-section (1) provides that a person who, at the time of committing an offence, suffered from a mental illness or intellectual disability that made him or her incapable of appreciating the wrongfulness thereof or of acting in

accordance with such appreciation, shall not be criminally responsible for the offence in question.

[76] The provisions of sub-section (2) address the procedure to be followed when it is alleged that the accused is not criminally responsible for the offence charged. To that effect, a court shall, where there is an allegation or appearance of a mental illness or intellectual disability, direct that the matter be enquired into and reported on by the panel described in section 79(1)(b) if the accused has been charged with a serious offence such as murder. In the absence of any allegation or appearance of a mental illness or intellectual disability, the court has a discretion whether to make the directive mentioned. That is precisely the situation here.

[77] In the present matter, the defence indicated at the commencement of the trial that it was not yet ready for an expert report to be compiled in view of the potential or actual involvement of several witnesses in the proceedings. The court was satisfied that no prejudice would be caused to the accused by allowing the trial to proceed. In due course, two independent psychological assessments were conducted, resulting in expert reports that were both admitted to the record, and which require consideration.

[78] Du Toit (et al) observes, with reference to other writers, that the defence of non-pathological criminal incapacity means that:

> 'if an accused at the time of committing the unlawful act, and as a result of a cause *unrelated to mental illness*, either was unable to distinguish between right and wrong… or was unable to act in accordance with the distinction between right and wrong, he must be acquitted on the basis of lack of criminal capacity.'[1]

[79] The learned writer went on to remark that the defence does not displace the onus, which continues to be borne by the state. The situation changes, however, when the accused relies on a pathological disturbance of his or her faculties.

[1] Du Toit (et al), *Du Toit: Commentary on the Criminal Procedure Act* (Jutastat e-publications, RS 61, 2018), at ch13-p32. Emphasis added.

[80] In *S v Calitz*,[2] the erstwhile Appellate Division, per Eksteen JA, held that:

> 'Where the court has to do with a mental disease or mental defect in the form of a pathological disturbance at the time of a commission of a crime, psychiatric evidence fulfils an indispensable function, but where the matter concerns a non-pathological condition at the time of the commission of a crime, psychiatric evidence does not fulfil such an indispensable function because the trial court is itself in a position, on the basis of the accepted facts, to decide whether the defence raised has on all the evidence been made out; and that applies also in respect of the concept of temporary mental incapacity.'[3]

[81] The Appellate Division addressed the subject at about the same time, too, in *S v Wiid*,[4] where Goldstone JA affirmed the principle that the onus rests on the state to rebut the defence. He emphasised, nevertheless, that a foundation must be laid in the evidence for the defence to be raised successfully. If there was a reasonable doubt that the accused had criminal capacity at the time of the commission of the offence, then he or she should be given the benefit of the doubt.[5]

[82] The defence in the present matter relied specifically on the defence of sane automatism. Although no clear distinction was made in argument, the court understands this as a sub-category of the main defence, viz. non-pathological criminal incapacity.

[83] The Supreme Court of Appeal dealt with the concept in *S v Humphreys*,[6] where Brand JA described it as follows:

> 'If the appellant was indeed not conscious of his actions, the defence available to him would be that he did not act voluntarily. Since it is a trite principle of our law that a voluntary act is an essential element of criminal responsibility, the appellant would indeed be entitled to an acquittal if his actions were attributable to mechanical behaviour or muscular movements of which he was unaware and over which he had

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[2] 1990 (1) SACR 119 (A).
[3] At 127A-C; see, too, the translation provided in the headnote.
[4] 1990 (1) SACR 561 (A).
[5] At 564A-G; see, too, the translation provided in the headnote. The principles were confirmed in *S v Kalogoropoulous* 1993 (1) SACR 12 (A).
[6] 2013 (2) SACR 1 (SCA).

> no control. Since this type of involuntary behaviour is more reminiscent of the activities of an automaton rather than a human being, the defence has become known as one of "automatism"…'[7]

[84] The principles that apply to the defence of non-pathological criminal incapacity, in general, are applicable to sane automatism. In *S v Potgieter*,[8] the erstwhile Appellate Division held, per Kumleben JA, that the reliability and truthfulness of the accused were crucial factors in laying a factual foundation for the defence in question.[9] The Appellate Division held further, per Scott JA, in *S v Cunningham*,[10] that an onus rests on the state to establish the voluntariness of the accused's conduct. In doing so, the state is assisted by the natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. The learned judge went on to say that:

> 'Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged *actus reus* and, if involuntary, that this was attributable to some cause other than mental pathology.'[11]

[85] The relevant provisions of the CPA and the relevant principles arising from the case law, as discussed above, constitute the basic legal framework within which the present matter must be considered. This will be done in the paragraphs that follow.

Evaluation of witnesses

[86] The key state witness was Ms Maphalane. As a former employee of the deceased, with whom she had enjoyed good relations, it would be reasonable to

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[7] At paragraph [8].
[8] 1994 (1) SACR 61 (A).
[9] At 73B.
[10] 1996 (1) SACR 631 (A).
[11] At 635I-J and 636A.

assume that Ms Maphalane was prone to an inherent bias against the accused. He was the cause of her loss of employment and the ending of a close relationship that she enjoyed with the deceased's children. Nevertheless, she was a credible witness and there were few contradictions in her testimony. Other witnesses, particularly Sgt Magungwana and W/O Rungqu, corroborated material aspects thereof, especially regarding the accused's having locked the doors of the house prior to the incident and having destroyed his cellphone as well as that of the deceased. Ms Maphalane was a reliable witness, too, because she had been in the immediate vicinity at the time of the incident; she witnessed the commencement of the altercation, heard the commotion from the deceased's bedroom, and witnessed the outcome. Despite intense cross-examination, Ms Maphalane was cogent and consistent in her explanation of what happened.

[87] The accused was also reliable, overall. He was a satisfactory witness and did not dispute, in general, the chain of events that led to the altercation, but maintained throughout his testimony that he could not remember what had happened during the altercation itself or afterwards. His credibility, however, was undermined by the testimonies of other witnesses. In that regard, Mr Magengelele was adamant that the accused had been drunk when he confronted him in the back of the police van; although the police officers did not go so far as confirming this, they all stated that they had smelt alcohol. Ms Mbawu said that the accused's assertion that he had been confused at the time had not made sense.

[88] The only witness to have supported the accused's version was Mr Pikoli. He testified that the accused had seemed confused when he spoke to him, both in the back of the police van and at the police station on the following day. As counsel for the state suggested, however, Mr Pikoli's bias in favour of the accused, a close friend, would have eroded his credibility considerably.

Discussion

[89] The court will, at this stage, proceed to deal with the key issue for determination, viz. whether the state has successfully rebutted the defence of non-pathological

criminal incapacity. It will thereafter deal with the issue of premeditation. As already mentioned, the issues are intertwined to some degree.

Rebuttal of defence

[90] Mindful of the authorities to which the court referred, earlier, it must be reiterated that the state bore the onus to rebut the defence of non-pathological criminal incapacity (automatism). There are several areas of focus that arise in relation thereto from the evidence.

[91] The first area of focus pertains to the conduct of the accused prior to the incident. There was nothing untoward in his cooking of the *smileys* in the garage or in his consumption of a tot of gin, which, as Mr Pikoli remarked, would have had no impact on him. It was, however, the accused's subsequent entering the house and locking of the doors, as observed by Ms Maphalane, that suggests that he anticipated the confrontation that would follow shortly thereafter and introduces the element of premeditation. The children confirmed that the accused had locked the doors, before and after instructing them to go and play. The police officers confirmed that Ms Maphalane had led them to a locked house after the incident. The accused never denied this, saying only that he could not recall whether he had locked the doors; he admitted that he would have at least closed the door to the garage to keep the smoke out of the adjoining study.

[92] The reasonable inference to be drawn is not so much that the accused locked the doors because he wished to prevent the deceased from escaping as that he did not wish the children to see what would occur when he confronted the deceased, as he did. Furthermore, he instructed Ms Maphalane to leave the kitchen and go to her bedroom. She commented, in testimony, that this had seemed strange; he and the deceased never spoke to each other. Again, this invites the inference of premeditation, that he anticipated and indeed planned a confrontation; the accused did not wish Ms Maphalane to be present when this happened.

[93] The second area of focus concerns his conduct at the start of and during the incident. The accused insinuated that the deceased had taken his bedroom key. He admitted, in testimony, that he had entered and left his bedroom at various times while cooking, returning the key to the top of the refrigerator. Access to his bedroom had clearly been a sensitive issue between the couple, especially after previous incidents when the deceased had allegedly destroyed or damaged personal items of the accused. It is implausible, therefore, that the deceased would have risked an altercation with the accused by removing the key from the top of the refrigerator. It is also implausible that Ms Maphalane would have done so; she heard the commotion that ensued in the kitchen when the accused enquired about the whereabouts of the key and she would surely have indicated straight away that she knew where it was, to protect the deceased, with whom she enjoyed a good relationship. The accused used the issue of the missing key as a pretext for the confrontation that followed.

[94] There are other troubling aspects to the accused's conduct at the start of and during the incident. When Ms Maphalane called out, saying that she would look for the key, the accused responded immediately, saying that he had ordered her into her bedroom. He also entered the kitchen unarmed, needing to open a drawer and remove a knife before inflicting the wounds. He then dragged the deceased to her bedroom and demanded to know from her why she went around sleeping with men from Gauteng. This was not the conduct of a person who was unaware of what he was doing. The incident was not a sudden, involuntary reaction; it was an altercation that began in the kitchen, involved the accused's intelligible interaction with both the deceased and Ms Maphalane and the search for a weapon, and ended in the bedroom. It cannot be said that the accused, at the time, had no appreciation for or control over his actions.

[95] The third area of focus was his conduct immediately after the incident. He destroyed his cellphone and that of the deceased, as witnessed by Ms Maphalane and corroborated by the police officers. Although the futility of such actions is obvious, it would have hampered efforts on the part of Ms Maphalane or anyone else to contact the authorities. The accused, moreover, ordered Ms Maphalane to throw her cellphone away, but not before she managed to hide it under the bed. He subsequently entered her bedroom, closed the window, closed the curtains, and closed the door. This

suggests an attempt to threaten or intimidate her, to limit her response to what had just happened, to frustrate any steps on her part to seek help. Upon Ms Maphalane's exiting the house, the accused, importantly, locked the door behind her before returning to the bedroom and lying down next to the deceased. This cannot, in any way, be described as involuntary behaviour.

[96] Regarding the small laceration on the accused's chest, there was no evidence at all that the deceased had been in possession of a weapon or had wrested control of the knife from the accused and stabbed him with it. Ms Maphalane was adamant that she had not seen any injuries on the accused immediately after the incident. Dr van Niekerk, moreover, was unable to exclude the possibility that the laceration had been self-inflicted. The wound was undoubtedly intended to suggest, clumsily, that there had been a violent struggle in which the deceased had attacked and wounded the accused. If anything, it serves merely to demonstrate that the accused was very much aware of what was happening around him at the time.

[97] A further aspect to be mentioned is the accused's written apology to the family of the deceased. There was no indication at all, as counsel for the state pointed out, of automatism or anything else at the time that might have given rise to non-pathological criminal incapacity. This would have been expected in the accused's letters if such circumstances had been present.

[98] Concerning the deceased's possible provocation of the accused, Ms Maphalane testified that she never heard anything to that effect. Even if there had been provocation, as the accused asserted, in terms of which the deceased had retorted 'Don't ask me sh*t!' to his asking the whereabouts of the key, then this would not have justified his resulting conduct. The Supreme Court of Appeal, in *S v Eadie*,[12] clearly rejected the defence of provocation; a person can only claim to lack self-control when he or she is acting in a state of automatism.

[99] The only remaining evidence to be considered, in relation to the question of whether the state has rebutted the defence of non-pathological criminal incapacity, are the expert reports of the clinical psychologists. These were admitted as evidence and

[12] 2002 (1) SACR 663 (SCA).

were, in the end, uncontested. To that effect, Ms Flanagan concluded, *inter alia*, as follows:

> 'The sequelae for automatic behaviour includes the person acting in horror after an offence and should attempt looking for assistance, *they should have amnesia for the period of the offence (and not for certain parts) but should have recollection of the events preceding and subsequent events.*'[13]

[100] The expert went on to observe:

> '[Mr Methula] stated that he does not have any recollection of stabbing the deceased, but when he was confronted with the facts of the case, he could recall speaking to the helper, by telling her to go to her room, this was during the offence, he was also unable to recall subsequent events after the offence, he could only recall what occurred the following day and this is not normally the sequelae for automatism.'

[101] It is clear that Ms Flanagan found no basis for the defence raised. The same conclusion was reached by Mr Reid, who remarked:

> 'The following facts do not support the presence of a sane automatism. 1.) There was ongoing mutual provocation in the relationship, and her swearing at him on the day does not appear to constitute an extreme, out of the ordinary provocation. 2.) He was found by police, asleep and snoring next to his wife's body. In the case of automatism, the perpetrator would be in a state of high emotional arousal and would typically be shocked by their actions and attempt to seek help for the victim. 3.) Automatism is generally characterised by a brief dissociative period where the period of amnesia is of short duration and for the incident only. The perpetrator is typically of clear consciousness prior to and immediately after their actions. Mr Methula reports a blanket amnesia lasting from just before his wife's murder until he woke up the following morning (approximately 12 hours). He is unable to recall been taken to Frere Hospital for stitches, interacting verbally with others or been interviewed at the police station. Such an extended period of amnesia is not consistent with automatism.'

[13] Sic. Emphasis added by Ms Flanagan.

[102] The expert continued, saying that there were insufficient grounds upon which to explain the accused's actions in terms of sane automatism. He concluded by saying that, in his opinion, the accused was able to appreciate the wrongfulness of his actions at the time and to act in accordance with such appreciation.

[103] In *S v Hadebe and others*,[14] the Supreme Court of Appeal, per Marais JA, referred to the decision in Moshephi and others v R,[15] where the court described the correct approach to be followed in relation to the evaluation of evidence.

> 'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'[16]

[104] The principles, above, were reiterated in *S v Trainor*,[17] where the Supreme Court of Appeal, per Navsa JA, emphasized that a conspectus of all the evidence is required.[18]

[105] If the court, in the present matter, considers properly the totality of evidence presented, including the expert reports, then it is satisfied that the accused was fully in control of his actions at the time of the incident. He was able to distinguish between right and wrong and was able, but failed, to act in accordance therewith. There was,

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[14] 1998 (1) SACR 422 (SCA).
[15] (1980-1984) LAC 57.
[16] At 59F-H.
[17] 2003 (1) SACR 35 (SCA).
[18] At paragraph [9].

ultimately, nothing in the evidence for the defence to demonstrate that the state had failed to discharge the onus.

[106] The remaining issue for determination is whether the offence was premeditated.

Premeditation

[107] As a starting point, it is trite that there must be evidence that the offence was premeditated, as emphasised by the Supreme Court of Appeal in *S v Makatu*,[19] per Lewis JA. Subsequently, in *S v Raath*,[20] Bozalek J, writing for a full bench, dealt as follows with the subject of premeditation:

> 'Planning and premeditation have long been recognised as aggravating factors in the case of murder… However, there must be evidence that the murder was indeed premeditated or planned… The concept of a planned or premeditated murder is not statutorily defined. We were not referred to, and nor was I able to find, any authoritative pronouncement in our case law concerning this concept. By and large it would seem that the question of whether a murder was planned or premeditated has been dealt with by the court on a casuistic basis. The Concise Oxford English Dictionary 10ed, revised, gives the meaning of premeditate as "to think out or plan beforehand" whilst "to plan" is given as meaning "to decide on, arrange in advance, make preparations for an anticipated event or time". Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may have been conceived and planned over months or even years before its execution. In my view only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is "planned or premeditated". In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal

[19] 2006 (2) SACR 582 (SCA), at paragraphs [12] to [14].
[20] 2009 (2) SACR 46 (C).

> importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was "planned or premeditated".'[21]

[108] Importantly, the Supreme Court of Appeal, in *S v Kekana*,[22] addressed the period between forming the intention to murder and the carrying out of such intention. It found, per Mathopo AJA, that time was not the only consideration because even a few minutes were enough to carry out a premeditated action.[23]

[109] Turning to the present matter, the state referred to the sequence of events on the day of the incident itself to contend that the accused's murder of the deceased had been premeditated. The accused's entering the house and locking the doors, instructing the children to continue playing outside, and ordering Ms Maphalane to leave the kitchen were certainly indicative of his anticipation of the confrontation with the deceased. His insinuation that she had taken his bedroom key was, moreover, indicative of a planned confrontation. But the court is not convinced that the evidence goes so far as to demonstrate that the accused planned to kill her. Why do so when his children were in the nearby vicinity? Why do so when Ms Maphalane was in the house at the same time?

[110] Other inferences can be drawn from the evidence. The accused may, on the one hand, simply have wished to deal with the rumours of the deceased's relationships with other men and to bring these out into the open. He may, on the other hand, simply have been spoiling for a fight. The premeditated murder of the deceased is not the only available inference.

[111] Furthermore, as counsel for the defence intimated, the accused confronted the deceased unarmed. It was only after her retort, 'Don't ask me sh*t!' that he struck her and searched for a weapon. The most likely inference to be drawn is that the deceased's retort so enraged the accused that it led to the conduct that followed. As already remarked, however, this does not, in the absence of further evidence, serve as the basis for the defence relied upon.

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[21] At paragraph [16].
[22] 2014 JDR 2139 (SCA).
[23] At paragraph [13].

Conclusion

[112] In the circumstances, the court is persuaded that the accused unlawfully and intentionally killed Ms Thandi Mbawu. The court finds, therefore, that the accused is guilty of the offence of murder. There is insufficient evidence, however, to find that the murder was premeditated.

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JGA LAING
JUDGE OF THE HIGH COURT

APPEARANCE

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Date of delivery of judgment:	29 April 2024.