NOT REPORTABLE

SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 65/2011

DPP REF NO: JPV2011/0045

DATE:17/11/2011

In the matter between

THE STATE

and

MTSHENGISENI MABASA **ACCUSED**

Criminal law – trial – indictment consisting of three charges of murder and one of arson - accused pouring petrol over and setting shack alight in which three deceased persons were sleeping – all died as a result of acute severe burns – accused's defence that it was his sole intention to destroy shack and its contents rejected – held that the accused must reasonably have foreseen the presence in the shack of his erstwhile girlfriend – dolus eventualis proved -accused found guilty of murder (count 1) - no evidence that the accused should reasonably have foreseen the presence of the other two deceased persons in the shack – accused on these charges (counts 2 and 3) convicted of culpable homicide – on accused's version found guilty of arson (count 4).

J U D G M E N T

VAN OOSTEN J:

[1] The accused is charged on an indictment consisting of four charges: three of which are murder and one of arson. The accused pleaded not guilty to all the charges. In the plea explanation tendered on his behalf, it was admitted that the accused set fire to the shack mentioned in count 4 with the intention

to destroy it and its contents but it was stated that he was unaware that the shack was occupied by any person at the time as it was locked by a padlock on the outside.

[2] The charges preferred against the accused arise from one single incident. A brief summary of the facts of this matter is the following. The accused and Cebisile Goodness Nkosi (the deceased referred to in count 1 and hereinafter referred to as "Nkosi") were in a love relationship since 2008. After the passing away of her mother Nkosi and the accused moved into the shack where they lived together. The accused during this time purchased several household items for the shack, including furniture, a DVD player and a refrigerator. In late 2010 and in particular 2011 their relationship turned sour and the accused moved out of the shack to stay with his parents nearby. The accused demanded the return of his possessions but the deceased, he maintained, remained indifferent. During the late evening of 2 March 2011, the accused proceeded to the shack, poured petrol over it and ignited the shack. Nkosi and her two lady friends (the deceased referred to in counts 2 and 3) were all asleep in the shack. A portion of the shack burnt down and the three deceased sustained acute severe burns, from which they died. Community members soon arrived on the scene and the door of the shack, which had been locked on the inside, as well as the corrugated iron panel to which it was attached, were forcefully detached from the rest of the structure in order to gain access and free the deceased.

[3] A number of admissions were by consent, recorded in terms of s 220 of the Criminal Procedure Act. The admissions comprise the usual formal aspects concerning the deceased and the photographs that were taken of the scene shortly after the arrival of the police.

[4] The State called four witnesses to testify. Their evidence presented some background and detail as to the difficulties that had existed between the

accused and Nkosi as well as the events of the night in question. There were no eyewitnesses to the incident itself. Except for the issue concerning whether the door of the shack was locked from the inside or outside, I do not consider it necessary to traverse the evidence tendered by the Sate in any detail as it merely confirms the summary of the facts I have already alluded to. It is only necessary to refer in some detail to the evidence of Solomon Nkosi, who at the time resided in a shack on the premises where the incident occurred. He testified that he assisted other members of the community in an endeavour to extinguish the fire of the deceased's shack. They tried to open the door of the shack but were unable to do so as it was locked from the inside which caused them to break it open with a spade thereby enabling two of the deceased persons to exit. His evidence was not challenged in cross examination, and was furthermore corroborated by the state witnesses, Izaac Zakhele Ngobese and Thato Mokoena, who both rendered assistance in the ordeal.

[5] The accused testified in his defence as well as his cousin, Pendile Hlatswayo. Hlatswayo did not take the real dispute in this matter any further. The accused provided details concerning the deterioration of his relationship with Nkosi, since the end of 2010. Giving rise to the conflict between them, he testified, was his justified demand for the return of the items he had purchased for them which were kept in the shack. At some stage he removed the television set as well as the refrigerator which he said belonged to him. The other items he had purchased including the DVD player, a wardrobe, a sound system and small items of crockery however, after the separation, remained behind in the shack. Nkosi refused to let him have those items back which caused the ensuing conflict. Prior to the incident the police visited the shack in the presence of Nkosi to investigate accusations she had made that he had, or had wanted to, assault her. On the version of the state witnesses Nkosi summoned the police to have the accused evicted from the shack. On this occasion, the accused said, he had not mentioned to the police his demands for the return of the disputed items, as he "did not think of that". On the evening of the incident, at approximately 20h00, he telephoned the deceased, who was still at her workplace, from a public telephone. I pause to

mention that there is some dispute as to whether Nkosi, at the time, was in possession of her cell phone: Mokoena, testified that the accused had taken it from her and that he was in possession thereof as well as her identity document. I do not consider it necessary to resolve this dispute. To revert to the accused's version: he informed Nkosi that he intended burning down the shack and its contents. A few hours later he proceeded to the shack in possession of a 2 litre plastic container filled with petrol which he had obtained from a generator at his home. On his arrival, when everybody was already asleep, he noticed that there was a padlock on the outside of the door of the shack which led him to believe that the door had been locked from the outside and that there was nobody inside. He however, made no attempts to establish whether there in fact were occupants in the shack and without more ado proceeded to pour the petrol at the door and set it alight. He immediately returned home and went to sleep.

[6] On the evidence as a whole the factual dispute this Court is required to determine, indeed, is a narrow one, and is this: was the accused or should the accused reasonably have been aware that the shack was occupied by Nkosi and the two other deceased persons at the time of setting it alight. The accused's denial of having been aware of at least the presence of Nkosi in the shack is transparently false and is therefore rejected. The evidence of the state witnesses, in particular the unchallenged testimony of Solomon Nkosi I have referred to, is corroborated not only by two other state witnesses but also by the photographs taken of the shack and the detached door and panel after the incident, clearly depicting a chain connected with a locked padlock, attached to the inside of the door. On this very score the accused's evidence is contradictory and he moreover, seemingly as a last resort, misleadingly maintained that there must have been two locks: one on the outside and one on the inside. This is so inherently improbable that it cannot be accepted as reasonably possibly true and it is rejected as false. The accused's reliance on the sole intention to damage and destroy the shack and its contents, when considered on the evidence as a whole, similarly cannot be accepted as reasonably possibly true (see *S v Hadebe & others* 1998 (1) SACR 422 (SCA)

at 426 f-h; *S v Shackell* 2001 (4) SA 1 (SCA) para 30). I say so for the following reasons: manifestly absent from the accused's version is any reference to a specific request, at any time, to Nkosi for the return of his possessions. The accused merely, in seemingly vague and general terms, described her attitude towards his demands as indefferent. But it goes further: Ngobese, the brother of Nkosi, testified that the accused was, on two occasions prior to the incident, reprimanded by him and others about his aggressiveness towards and abuse of Nkosi, which led to promises made by the accused to amend his ways. On none of these, which quite obviously afforded him the opportune time for doing so, did the accused raise his demands. One would furthermore have expected the accused to have reported his concerns to the police when they were at the shack investigating Nkosi's allegations of assault or to evict the accused, which, as I have indicated, he failed to do. On the accused's version there was ample opportunity for him to remove the items, which he did not avail himself of. He did, as I have alluded to, remove certain items from the shack: why the remaining items were not removed at the same time or even thereafter, on his version, remains a mystery. And, finally, as correctly submitted by counsel for the State, he could quite simply have gained forced entry to the shack on the evening in question to remove his possessions, well aware, if he is to be believed, that Nkosi was absent. In cross examination the accused tendered the following transparently artificial explanation for his failure to do so: such conduct, he maintained, would have resulted in Nkosi reporting the matter to the police. Instead, he resorted to the extreme of burning down the shack and its contents which had been well planned in advance. The accused, as for his demeanour, was an unimpressive witness: he was evasive on material aspects and I am left with the clear impression that the reliance on the demand for his possessions was much by way of afterthought. For all these reasons I reject the accused's version as false.

[7] The evidence shows that the accused was over possessive and extremely jealous following the separation. The promises he had made to desist from his abusive conduct came to nothing. His persisted in his aggressive behaviour

which was solely directed towards Nkosi and not the meagre possessions that, according to him, were still in the shack. Based on the accepted facts I accordingly find that the accused, when he set the shack alight, at least, should reasonably have foreseen that it was occupied by Nkosi. He is therefore guilty, on count 1, of murder on the basis of having formed the requisite intention in the form of indirect intention (*dolus eventualis*) and having reconciled him with the ensuing result.

[8] The foreseeability test also applies as for the two other deceased persons referred to in counts 2 and 3. In my view the facts of this matter fall short of proving reasonable foresight. The last witness for the State, Bongi Ntsomi, who was a friend of Nkosi, testified that the accused telephoned her the morning after the incident and threatened her that, referring to the burning of the shack, the same was going to happen to her as he had done to them. Although this evidence might faintly point to knowledge by the accused that there were persons in the shack at the time, I am not inclined to place any reliance on it as the witness may well have been motivated to say this in view of the bad relationship that, according to her, had existed between her and the accused. There is no evidence to show that the two deceased persons were present on any other basis than, at best, visitors for that particular evening. The exact reason for them being present is simply unknown. The accused therefore could not have known, and therefore could not reasonably have foreseen, their presence in the shack. On the other hand the accused was undoubtedly and as correctly conceded by counsel appearing on his behalf, negligent in failing to take any steps in order to establish whether anyone was present before igniting the shack. The accused therefore, on counts 2 and 3 is guilty of culpable homicide. Lastly, on count 4, the accused on his version alone is guilty of arson.

[9] In the result the accused is found guilty on:

9.1 count 1 of murder, as charged;

9.2 count 2, of culpable homicide;

9.3 count 3, of culpable homicide; and

9.4 count 4, of arson, as charged.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE STATE	***ADV (MS) P MARASELA***
COUNSEL FOR THE ACCUSED	***ADV (MS) M LEOTO***
DATE OF JUDGMENT	***17 NOVEMBER 2011***