IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A171/2021

DPP REF NUMBER: SA 47/2021

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED.

19 Apnl 2022

DATE SIGNATURE

In the matter between:

WELILE MICHAEL NTAMO APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

LUKHAIMANE AJ:

[1] The appellant was convicted on charges of murder and defeating the administration of justice by the Regional Court Benoni. He was sentenced to 18 years imprisonment on the murder charge and 5 years imprisonment on the count of defeating the administration of justice. The sentences were ordered to run

concurrently.

[2] Leave to appeal was granted by the trial court on conviction and sentence in respect of both counts. However, during the hearing, it transpired that only the murder conviction and sentence are being appealed.

The facts

[3] The appellant was convicted of killing one Shonisani Vincent Thavhakhulu (the deceased) by hitting him with an unknown object on 23 November 2017 during a night shift at their workplace. The deceased was employed as a security guard and his identity and cause of death were admitted upfront.

[4] Mr Mkhwanazi (Mkhwanazi), a colleague of both the deceased and appellant testified that they were working the night shift on the evening of 23 November 2017 to 24 November 2017. Mkhwanazi was in a different department to the appellant, who was an acting supervisor. Mkhwanazi testified that teatime for the night shift was 21h00 whilst lunchtime was sometime closer to midnight and they knocked off at 05h20 the next morning. Shortly before teatime, Mkhwanazi went to appellant's department to borrow a forklift – there appears to have been only one forklift in the company.

[5] Mkhwanazi further stated that he recorded the time he went to borrow the forklift as he was supposed to pause his machine and this cannot be done for a very long time. Although he offered proof of this, it was never asked for. He testified that from a distance of about 60 metres, he could observe the appellant holding a steel rod or some steel rod(s) that are approximately 20mm in diameter and 1 metre in length. He further stated that it looked as if the appellant and the deceased were arguing, with the appellant appearing to be blocking the deceased from leaving and at some stage it appeared as though the deceased was blocking some blows from the appellant. When Mkhwanazi got close, the appellant warned him not to get involved as he would send people to Mkhwanazi's house 'to kill him'.

[6] He testified that he did not see anyone else in their vicinity and when he returned approximately 5 to 7 minutes later, appellant and the deceased were both gone from where he saw them. Later on, the appellant approached Mkhwanazi and told him that his phone was missing and requested Mkhwanazi to phone his number. Mkhwanazi obliged and when he phoned the number, it rang but they could not hear nor locate. Mkhwanazi also confirmed that staff charged their cellphones in the tea room.

[7] Mkhwanazi further denied that he assaulted the deceased or took part in any assault on the deceased. He confirmed that his boots were taken by the police on 24 November 2017. Mkhwanazi was often implored upon by the court to answer questions forthrightly as questions often had to be repeated to him to elicit a direct answer.

[8] Two witnesses testified at the trial within a trial to determine the legal status of appellant's statement which situation was brought on by appellant indicating that he does not understand IsiZulu, whereas the proceedings up to that stage were being translated into IsiZulu. Captain Monashane (Monashane) testified that he was called to the Actonville Police Station to take a statement from the appellant. He testified that the conversation with the appellant went well, they understood each other. He indicated that he was aware that the appellant was Xhosa speaking, even though his rights were explained to him in IsiZulu. He also read the appellant his constitutional rights which he had in a pro forma and the appellant understood[1].

[9] Warrant Officer Mthethwa (Mthethwa) testified that he was the arresting officer and that when he executed the arrest, he warned the appellant that he was arresting him for murder. He testified that they recovered a cellphone 3 metres from the deceased's body. They took it back to the police station and whilst they

[1] Exhibits D and E

were there, the phone rang indicating that a call was coming through from one Mkhwanazi. He then proceeded to the appellant's home after getting his address from his workplace. They found the appellant with his wife. Mthethwa further testified that the appellant was shivering and sweating when he saw them. Upon being asked where his phone was, he indicated that he lost it at his workplace. He further told the appellant that he is investigating a murder case in relation to the deceased. After the appellant confirmed the colour of his cellphone, he then informed him about his constitutional rights in IsiZulu, as IsiZulu and IsiXhosa are similar. After he provided them with his cellphone number, they called it and it rang. Mthethwa then asked the appellant to tell him what happened at the workplace. When the appellant started explaining, he asked him to stop as with his rank, he cannot take such a statement which sounded like a confession.

[10] The appellant testified that Monashane spoke IsiZulu mixed with another language and therefore he did not understand him. The appellant says Monashane hardly spoke to him, he just told him (appellant) what he did. The appellant denied giving the statement and instead alleged that he was made to sign a document which had been pre-prepared. He indicated that he does not understand IsiZulu well. He alleged further that his constitutional rights were not explained to him on arrest and when the statement was prepared.

[11] The trial court was satisfied that the appellant's statement was freely and voluntarily made and that his constitutional rights had been explained. Further, at the end of the trial-within-a-trial, the magistrate stated the following[2]:

> *"I find that the accused before court attempted to "pull the wool over the court's eyes" by what he said. As indicated on what appeared before the court, he clearly does have a command of the Zulu language sufficient to have understood what happened. He was dishonest with regards to the allegation that he did not receive any rights or that his rights were never explained to him.*

[2] Trial Record page 141 - 143

I find that he did indeed receive rights, and that it was explained to him by Warrant Officer Mthethwa, as well as Captain Monashane, and that he exactly knew what he was doing when he deposed to a statement to Captain Monashane. I further find that his allegation that Captain Monashane just wrote or he never told Captain Monashane what happened is farfetched in the circumstances, and therefore I find that the admission of the confession which is in issue here would not affect the fair trial rights of the accused.

Just one last aspect, and that is the rights with regards to the legal representation, and that is that it is argued that the rights were not explained to him because of the fact that it does not make sense that at one stage he elected to proceed with making a statement, and the next, two hours later or so, he indicates that he wishes to not make a statement and rather speak to his attorney, the following:

All of us that sit in courts of law, be it prosecutor, an attorney, an interpreter, even clerks of the court and presiding officials hear the strangest of things on a daily basis in courts, people do and say things that we cannot fathom, and which is inexplicable. If there was a change of heart, we would know why or why not, and then in one document a person says that he is willing to continue and an hour or two hours later he says he wants an attorney – we cannot say why that happened or why it did not happen.

On the fact of all the evidence that was presented to the court, I find that the accused, as I stated earlier, was not honest in all respects. I find that, as I indicated, he understood the language that was busied, and further find that his rights were explained sufficiently for him to understand, and lastly, I then rule this confession to be admissible."[3]

[12] Thereafter, the appellant's statement was read into the record as follows[4]:

"I, Welile Michael Ntamo, would like to state that I am an African male resident at 3364 Malva Street, Extension 2, Geluksdal, employed at Naledi Foundry, Lincoln

[3] Trial Record p
[4] Trial Record page 143 - 144

Road, Benoni, as an acting supervisor.

On Thursday, the 23 November 2017, at about 21:00 during the night, I was on duty when me and Mr Mkhwanazi and the deceased, who was a security, we were arguing about something which he, the deceased, wanted to report us, me and Mr Mkhwanazi, to management, which led to our dismissal from work if the management knows about it.

The deceased insisted that he will report us, and we fight with him. Me and my co-worker, Mr Mkhwanazi, took an iron steel and beat him on his head. We did not realise that he will die. After we realised that he is dead, we tried to hide him between the sand. That is all I want to state."

[13] The state closed its case after the statement was read into the record.

[14] The appellant testified that he was on duty on the evening of 23 November 2017. He did not know the deceased, only used to see him at the gate as he was a security officer. He never had a problem with the deceased. He indicated that he never saw the deceased on 23 November 2017. He knows Mkhwanazi who works in another department. He denied that he hit the deceased and does not know why Mkhwanazi would say that he did. He indicated that he put his phone on a charger in the tearoom as they normally do but when he went to check it around 22h00 it was not there. He asked around for assistance to locate it, including from Mkhwanazi and when the number was called, the phone just rang but they could not locate it. He confirmed that the phone in evidence was his.

[15] The appellant testified that he never had a problem with Mkhwanazi and when the latter came to borrow the forklift, he gave him the keys (there was blood found on the forklift although it was never confirmed whether it was human or not). The latter indicated that Mkhwanazi is the one that used the forklift that night, however he cannot confirm if he was the only one. Under cross-examination, the appellant denied any altercation with the deceased. The appellant indicated that he was in the company of two other colleagues the entire night (he named them but they

were not called to testify).

Findings of the trial court

[16] The conviction of the appellant was based on the following:

a) The content of his statement, which was found to have been freely and voluntarily made before Monashane and therefore admissible.

b) He was implicated by Mkhwanazi who indicated that he observed what looked like an altercation and an assault on the deceased by the appellant.

Grounds of Appeal

[17] The appellant's grounds of appeal were as follows:

a) The confession statement should have been excluded due to the language barrier between the appellant and Monashane and the fact that he was not afforded the opportunity to indicate and choose to have a lawyer present.

b) Mkhwanazi was a poor and evasive witness whose evidence should have been rejected by the court.

c) The learned magistrate misdirected himself in finding that the state proved the guilt of the appellant beyond a reasonable doubt on the strength of the evidence led.

d) The appellant's mitigating factors constitute compelling and substantial circumstances.

e) The learned magistrate misdirected himself in imposing a custodial sentence of 18 years imprisonment on the murder count without granting the state and

defence an opportunity to address him on possible increment of the sentence from the minimum of 15 years.

CONVICTION

The confession

[18] It is also trite that section 217 of the Criminal Procedure Act, 1977 (CPA)[5], as amended, is applicable when dealing with the admissibility of extra curial confessions and admissions made by persons who are suspects and accused in criminal matters. Section 217 of the CPA deals with the admissibility of a confession against an accused.

[19] It is common cause that Monashane was a commissioned officer who may take a confession as provided for in section 217(1)(a) of the CPA and was called to the Actonville Police Station from his own station as he was not involved in the investigation but only for purposes of taking down the confession.

[20] The appellant assails the admissibility of the confession based on the fact that there was a language barrier between himself and Captain Monashane and that he was not afforded the opportunity to indicate and choose to have a lawyer present.

[21] The appellant testified that Monashane already knew everything, implying that he wrote down the statement. Monashane testified that although he was aware that the appellant was Xhosa, they used Zulu to communicate as the two languages are similar. At that time, the appellant was already in possession of a proforma that is usually given to a suspect explaining his rights. Monashane testified that he also read the rights to the appellant in line with the form used to take down a confession. Thereafter, he took down the statement, read it back to the appellant who signalled that he understood. Thereafter, the statement was signed and the appellant's fingerprint affixed on the form.

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[5] Act 51 of 1977

[22] Parts of the statement were confirmed by the scene where the deceased was found buried and the post mortem on the deceased.

[23] The trial court found it interesting that the appellant only started having a language issue when Captain Monashane was testifying. Up to then, the proceedings had been conducted in IsiZulu with the appellant sometimes conferring with his legal representative. This was also not mentioned as a ground why the confession should be inadmissible by the court a quo.

[24] I have perused the pro forma warning statement form used by the police, Exhibit G and find that it mentions the rights of the suspect/accused person as provided in section 35(1) of the Constitution of the Republic of South Africa, 1996[6] and these are stated in the form, e.g. the right to remain silent; the consequences of not remaining silent; not to be compelled to make an admission or confession that could be used as evidence against that person and also affirming an accused person's right to a fair trial. Therefore, on the evidence, the appellant had his rights to legal representation explained to him at least twice. The fact that Monashane neglected to indicate in the appropriate space does not detract from the fact that all the other answers were provided to the relevant questions by the appellant in acknowledging the explanation of his rights. It was also further never placed in dispute that the statement was freely and voluntarily made.

[25] IsiZulu and IsiXhosa languages are often said to be 80% identical. Both languages belong to the Nguni branch. In linguistic terms, it might take some effort for IsiZulu speakers and IsiXhosa speakers to understand each other when reciting complex poetry, but as far as everyday conversation is concerned this should not be an issue. Therefore, this court accepts that given that both Monashane and the appellant were not first language IsiZulu speakers, they would actually have made more effort in their conversation to ensure that they understand each other.

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[6] Act 108 of 1996

[26] Therefore, the court cannot accept as reasonably true that the appellant had difficulty in conducting an intelligible conversation with Monashane, just as for a significant part of the proceedings in the trial court, he managed to follow in IsiZulu and confer with his legal representative during that part of the proceedings. Therefore, the confession was correctly admitted into evidence.

Mkhwanazi was a poor and evasive witness whose evidence should have been rejected by the court.

[27] It is conceded by both parties that Mkhwanazi did not fare very well during cross-examination. His evidence is peppered with several interventions from the learned magistrate trying to get him to respond to the questions asked and not to give information that he thinks is relevant. Reading through the record, one senses the exasperation of the trial court having to repeatedly request him to answer the questions asked. However, it is not correct for appellant to conclude that the trial court did not treat his evidence with caution.

[28] From the investigative process (where Mkhwanazi was taken in for questioning and his boots taken by the police), Mkhwanazi was initially treated as a suspect. The appellant's confession also makes him an accomplice to the murder of the deceased, however he was never charged or held and during his testimony tried to distance himself from any assault on the deceased. The appellant's confession corroborates aspects of Mkhwanazi's evidence; that there was an argument with the deceased, followed by an assault with iron rod(s). The post mortem points to the injuries the deceased suffered and the appellant could never adequately explain why his cellphone was found in the vicinity of the deceased's body. The contradictions in Mkhwanazi's evidence; i.e. when he became aware that the deceased's body had been found, why he would assist the appellant look for his phone when he earlier threatened to get people to go to his place and kill him; whether or not he saw the appellant assault the deceased are immaterial

[29] One other issue raised by the appellant is that on the night in question, the forklift (which had some blood on it) was only used by Mkhwanazi. Mkhwanazi admits using the forklift and offered a record of when he did that, however this was not pursued further. Besides, as the police did not determine whether the blood on the forklift was human of not, the issue surrounding the use of the forklift becomes moot.

[30] In his own defence, the appellant offers a bare denial which is contradicted by the state's witnesses, the post mortem report and his own confession.

[31] As there was no direct evidence linking the appellant to the deceased, the trial court applied the well-known principles in R v Blom[7] i.e. whether the only reasonable inference that the court can draw from the proven facts is that the appellant is indeed the perpetrator[8].In the circumstances, no other conclusion can be reached except that the trial court found correctly, that the only reasonable finding to be drawn from the established facts was that it was the appellant who had killed the deceased. Reference was also made to section 209 of the CPA which reads as follows[9]:

> *"An accused person may be convicted of any offence on the single evidence of a confession by such an accused that the committed the offence in question, if such confession is confirmed bin a material respect or where the confession is not so confirmed if the offence is proved by evidence other than such confession to have been actually committed.'*

[32] I can therefore find no fault with the trial court's reasoning and conclusion that the state proved beyond reasonable doubt that the appellant had killed the deceased. On that basis, I recommend that the appeal against the conviction be dismissed.

Sentence

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[7] 1939 (AD) 188
[8] Record page 191 - 192
[9] Record page 192

[33] The trial court considered the provisions of the CPA relating to prescribed minimum sentences and then concluded that given the gruesome nature of the murder, the minimum sentence be increased from 15 years imprisonment to 18 years imprisonment[10]. It is so that murder is a serious offence and therefore calls for a sustained period of direct imprisonment.

[34] There are limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court and these have been distilled and set out in many judgments[11].

[35] It is trite that in determining an appropriate sentence, the personal circumstances of the accused, the nature of the offence(s) committed, and the interests of the community must be considered[12]. Regard must also be had to amongst other things, the main purposes of punishment[13], namely deterrence, prevention, reformation and retribution[14]. The sentence must also be blended with a measure of mercy.

[36] It was conceded during argument by the appellant that his personal circumstances as stated below did not amount to substantial and compelling circumstances for the trial court to hand down a lesser sentence than the prescribed minimum sentence and therefore could not have been accorded any more weight than that done by the trial court:

- he was 52 years old at time of sentencing
- he had been employed at the same company for 12 years and was dismissed due to this offence
- he has a previous conviction of assault that was 27 years old at the time of sentencing
- he was married in 1995 which marriage subsists - with three children all

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[10] Section 51(2) of Act 105 of 1997
[11] S v Pieters 1987 (3) SA 717 (A) at 727F-H; S v Malgas 2001 (1) SACR 469 (SCA) para 12; Director of Public Prosecutions v Mngoma 2010 (1) SACR 427 (SCA) para 11; and S v Le Roux & others 2010 (2) SACR 11 (SCA) at 26b-d.
[12] The so called Zinn triad; See S v Zinn 1969 (2) SA 537 (A)
[13] R v Swanepoel 1945 AD 444 at 455
[14] S v Rabie 1975 (4) SA 855 (A) at 862

unemployed and all above 21 at time of sentencing

- he was the sole breadwinner for his family
- he went to school up to Grade 10.

[37] The appellant's bone of contention regarding the 18-year imprisonment sentence handed down is that it was handed down without any prior indication to both the state and the accused that there was an intention to impose a sentence above the prescribed minimum sentence so that the necessary arguments may be advanced on behalf of the appellant. Although the learned magistrate in judgment refers to some earlier instance where he brought it to the attention of the defence that he is considering handing down a sentence more than the minimum prescribed sentence, a careful perusal of the record does not indicate that this was the case. The Supreme Court of Appeal in Mokela v The State[15] per Mthiyane, Maya and Bosielo JJA, underscores the importance of granting both the accused and the State the opportunity to address the court on sentencing as follows:

> *"[14] It is generally accepted that both the accused and the State have a right to address the court regarding the appropriate sentence. Although s 274 of the Criminal Procedure Act uses the word 'may' which may suggest that a sentencing court has a discretion whether to afford the parties the opportunity to address it on an appropriate sentence, a salutary judicial practice has developed over many years in terms whereof courts have accepted this to be a right which an accused can insist on and must be allowed to exercise. This is in keeping with the hallowed principle that in order to arrive at a fair and balanced sentence, it is essential that all facts relevant to the sentence be put before the sentencing court. The duty extends to a point where a sentencing court may be obliged, in the interests of justice, to enquire into circumstances, whether aggravating or mitigating which may influence the sentence which the court may impose. This is in line with the principle of a fair trial. It is therefore irregular for a sentencing officer to continue to sentence an accused person, without having offered the accused an opportunity to address the court or as in this case to vary conditions attached to the sentence without having invited the accused to address him on the critical question of whether such conditions ought to be varied or not (my underlining).*

[15] 2012 (1) SACR 431 (SCA)

See Commentary on the Criminal Procedure Act at 28-6D."

[38] It is correct that the trial court invited both the appellant and the state to address the court on sentencing, however there was no indication to the parties that the learned magistrate was considering increasing the sentence from the prescribed minimum.

[39] Apart from the appellant's personal circumstances, the trial court took into account the following factors regarding the deceased[16] in sentencing the appellant:

- the deceased had two children, aged between 4 and 11 at the time of sentencing
- his wife was unemployed
- although the deceased was not permanently employed at the time, he could still financially assist and provide for his family
- at sentencing, the family had still not been able to perform certain traditional ceremonies, 3 years down the line due to their financial circumstances
- the impact on the parents of the deceased
- the interests of the community in what was effectively the killing of a whistle-blower.

[40] Taking all this into consideration, the trial court handed down an effective 18 year imprisonment sentence on the murder count[17].

[41] The appellant failed to verbalise or display any remorse for his conduct. He maintains his innocence of the murder charge that he has been convicted of. The death of the deceased, at his workplace, by a colleague, ostensibly to prevent him from telling on the appellant or his workers for something untoward that they did, was characterised as a vicious assault where the frontal head fracture ran up to the vertex to the occipital skull – i.e. from the front to the back of the head[18]. His

[16] Record page 206 - 207
[17] Record page 209
[18] Record page 205

body was disposed of outside on the grounds of his workplace. The trial court then found that taking all factors into consideration, there was justification to depart from the minimum sentence prescribed for the murder charge. Whilst these circumstances do not point to anything above what would call for the minimum sentence, the trial court then stated that it is drawn to the prior conviction for assault handed down on 26 October 1990 for which the appellant was sentenced to 4 months imprisonment or a R600 fine not because of the charge itself but because of the circumstances of the matter. In that instance, the appellant had been convicted of assaulting a person responsible for wage payments in the workplace as he was unhappy with the salary payment[19].

[42] It appears that the learned magistrate misdirected himself on sentencing by treating the murder charge as falling within the ambit of section 51(2)(a)(ii) of the CPA by virtue of the fact that the appellant had a previous conviction of assault under comparable circumstances, and thereby treating him as a second offender. The relevant part of section 51(2)(a) of the CPA reads as follows:

> *'51(2) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in –*
>
> *(a) Part II of Schedule 2, in the case of –*
>
> *(i) a first offender, to imprisonment for a period not less than 15 years;*
>
> *(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years.'*

[43] In Mokela v The State[20] at paragraph 6, it is stated that:

> *"[6] It is a clear requirement of s 51(2)(a)(ii) that for the appellant to attract a minimum sentence of imprisonment of not less than 20 years, the State had to prove that he is a second offender of robbery with aggravating circumstances. This is the jurisdictional requirement necessary to trigger s 51(2)(a)(ii). All that the State proved in this case is that the appellant had previous convictions amongst*

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[19] Record page 204 - 205
[20] 2012 (1) SACR 431 (SCA)

others for rape, robbery, theft, assault and escaping from lawful custody. In terms of s 51(2)(a)(ii) it is not sufficient that the appellant has a previous conviction for robbery. The conviction must be robbery with aggravating circumstances. Robbery and robbery with aggravating circumstances are two different offences calling for different sentences.'

[44] The Supreme Court of Appeal in *S v Malgas* 2002(1) SACR 469 (SCA) at paragraph 25(1), laid down the determinative test to establish whether or not there are substantial and compelling circumstances to deviate from minimum sentences:

> *"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."*

[45] Further to that, in *Malgas* it was stated that in determining whether the prescribed sentence is proportionate to the particular offence, the trial court looks to the offence in the context of whether the circumstances render it unjust and disproportionate to impose the sentence. In this context the "offence" as stated *S v Dodo* 2001(3) 382 (CC) at paragraph 3 "consists of all factors to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender." If on consideration of the sentence it would be unjust and disproportionate, then the court is obliged to impose the lesser sentence.

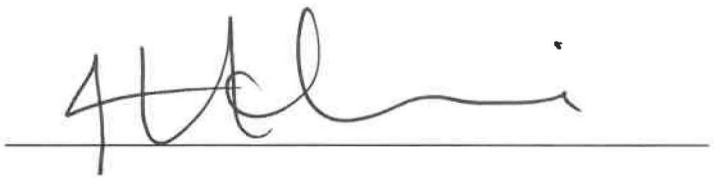
[46] Whilst comparative case law is not binding on the court, widely divergent sentences for similar cases are not ideal in any criminal justice system[21].

[21] See *S v McMillan* 2003 (1) SACR 27 (SCA) at paragraph 10

[47] In the result the following order is made:

[47.1] The appeal on conviction is dismissed.

[47.2] The appeal on sentence on the murder charge is upheld. The sentence of 18 years imprisonment is set aside and substituted with a sentence of 15 years imprisonment which is antedated to 10 December 2020. The sentence is to run concurrently with the 5 years' imprisonment sentence on Count 2, defeating the administration of justice.



MA LUKHAIMANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

JS NYATHI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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