**IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG**
**REPUBLIC OF SOUTH AFRICA**

**CASE NO. AR 512/11**

In the matter between:

**ZAMOKWAKHE MADONDO** FIRST APPELLANT

**SIPHOKUHLE MPEMBA MADONDO** SECOND APPELLANT

**VEZUBUHLE NDABA FUNEKA** THIRD APPELLANT

and

**THE STATE** RESPONDENT

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**APPEAL JUDGMENT** Delivered on 08 August 2012

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**SWAIN J**

[1] The appellants, with the leave of the Court *a quo* (Kruger J), appeal against their convictions on three counts of murder and two counts of attempted murder, for which they each received the following sentences:

Count 1 : Murder - Life imprisonment
Counts 2 & 3: Murder - 15 (fifteen) years' imprisonment
Count 5 : Attempted Murder - 10 (ten) years' imprisonment
Count 6 : Attempted Murder - 5 (five) years' imprisonment

All three accused were found not guilty on Count 4, being an

additional count of attempted murder.

[2] Kruger J granted leave to appeal on the basis that the convictions were based upon the evidence of a single witness, Sibongokhule Xaba, and that "another Court may come to a conclusion, that this Court reached the wrong conclusion in accepting that evidence". Mr. Kemp S C, who appeared for the appellants, submitted that this was indeed so and that the reasoning of the Court *a quo* in accepting the evidence of Xaba and rejecting the appellants' versions was flawed, for reasons which I will deal with in due course.

[3] Central to a resolution of this appeal, is a consideration of the approach to be adopted by a trier of fact, when faced with the task of assessing the evidence of a single witness. In an oft repeated *dictum,* it is said that the evidence of such a witness must be "clear and satisfactory in every material respect", and that where the witness "has an interest or bias adverse to the accused" the evidence must be approached with caution.

***R v Mokoena 1956 (3) SA 81 (A) at 85 H***

In other words, the evidence "must not only be credible but also reliable".

***S v Janse van Rensburg & Another***
***2009 (2) SACR 216 (C) at 220 G***

but it is clear that "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness"

***S v Webber 1971 (3) SA 754 (A) at 758***

and "The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told".

***S v Sauls & others 1981 (3) SA 172 (A) at 180 E – F***

[4] An assessment of the evidence of Xaba must accordingly be conducted in accordance with the above *dicta*. What is immediately apparent in the evidence of Xaba, is that he was dishonest when asked, whilst giving evidence in chief by Mr. du Preez, who appeared for the State, what his relationship was with the first appellant. His reply was

"M'Lord, we did not have any problem. The relationship between us was harmonious".

However, when cross-examined he conceded that he had testified in court, two months before the hearing in the Court *a quo,* and had alleged that the first appellant had fired shots at him. Xaba also agreed that he had been forced to leave the Msinga area in December 2007, when he laid a charge of attempted murder against the first appellant, because of his allegation that the first appellant had fired shots at him. When he was asked why, in the light of this evidence, he had not disclosed the acrimony between the first appellant and himself, having maintained it was harmonious, he replied as follows:

"I did not find it necessary for me to do so, M'Lord, because even on that occasion there had not been any acrimony between him and I".

Xaba was quite clearly being disingenuous, in suggesting that there was no acrimony between first appellant and himself as a consequence, of the first appellant having fired shots at him. The extent of his bitterness as a consequence of this incident is indicated by a passage later in his evidence, whilst being cross-examined, when it was put to him that he had not been truthful in this regard, to which he replied as follows

"Yes, especially – it is correct, especially because there had not been any argument or quarrel between us for him to have shot or attempted to shoot me. **I am not an animal to be shot at at random**".

Even though Xaba thereby sought to explain the contradiction on the basis that when he said their relationship was harmonious, he was referring to the time before the first appellant shot at him, this is quite clearly not the case. When giving evidence in the Court *a quo* in August 2011, the state of their relationship before December 2007 was obviously irrelevant. The extent of his resentment at allegedly being shot at by the first appellant, is graphically illustrated by the emphasised portion of his reply, set out above.

[5] Of greater significance than the lie itself is the reason why Xaba lied in this regard. The only reason would be to mask the bitterness and resentment he harboured towards the first appellant, which if revealed would affect his credibility.

[6] A similar deceit is revealed in the evidence of Xaba concerning his relationship with the third appellant. When asked in evidence in chief, what his relationship was with the third appellant, he replied

"There was no problem between him and I at all".

However, he also stated that the deceased and he were in constant contact by telephone and the reason he was in Tugela Ferry on the day of the shooting, was because the deceased had

"..... requested me to fetch him, because of a fear for his life, because there is an occasion that an attempt was made on his life by Funeka, who had attempted to shoot him".

Funeka is the third appellant. I find it inconceivable Xaba did not harbour ill-feelings towards the third appellant as a consequence of this, although it may be that it was true that there was no direct hostility between the third appellant and Xaba.

[7] What this evidence reveals is that Xaba, on his evidence, had good cause to harbour ill-feelings towards the first and third appellants. Xaba quite clearly had grounds to be biased against the first and third appellants. As regards the second appellant, Xaba likewise said he did not have any problem with him and stated

".....he was not close to me however, because I only knew him generally".

He said at the time of the shooting he recognised the second appellant, but had however forgotten his name. He had however

seen him again "quite some time" after the shooting in Gauteng, during September 2009, the shooting having occurred in July 2008. He said that the second appellant came from the same area of Msinga, but he did not see him regularly. He stated that when he saw him again in Gauteng he remembered his names. When asked whether he remembered his full names he replied "Yes, those that I think I know him by". He said merely seeing the second appellant again jogged his memory and the first name he remembered was Mphemba. He then applied his mind and then remembered "the second name, that is the middle name". In the statement Xaba made he says the names of the second appellant are Siphokuhle Mphemba Madondo, which are the names of the second appellant appearing on the record. It is therefore clear that the first name he remembered was in fact the second appellant's second name. What is strange is that when his memory was jogged he did not remember second appellant's surname, despite the fact that he said he had grown up with the first and second appellants and was able to identify the first appellant, and name his as Zamokwakhe Ntsebe Madondo, from the outset. I find it grossly improbable that the name of the second appellant that he would first remember, would be what is in fact his middle name and not his surname. In my view, what this again reveals is his distressing lack of honesty. In this regard, I respectfully disagree with the view of Kruger J that there was nothing improbable about Xaba suddenly remembering all three of the second appellant's names "given the fallibility of human memory".

[8] A further distressing example of Xaba's dishonesty is that he stated when cross-examined, that he had never left the Msinga area

because of fear. However, when it was put to him that in the other proceedings referred to above, he testified that he was forced to leave the Msinga area in December 2007 and flee to Kimberley for fear of his life, he replied "Yes, indeed I did leave ,M'Lord".

[9] A further concern with the evidence of Xaba, is that he stated that after he had witnessed the shooting, he quickly returned to his vehicle, which was parked near the police station, to go home. When he was asked why he did not immediately report the identity of the assailants to the police, he initially said he "first went to make a report to my people at home". When he was asked why this was so, he replied "I went to first report at the deceased's family". Later he said that he did not report the incident "because they do not do satisfactory work at the police station in question", being Tugela Ferry. He said he had told the deceased's family that he had witnessed the shooting, but did not tell them who the culprits were. He agreed that he had only reported the identity of the assailants, to the police in April 2009, when he had made a statement. He initially proffered as an explanation for the inordinate delay in reporting the matter, the fact that the police at Tugela did not do a satisfactory job, but later when pressed to explain the delay he stated the following

"The reason M'Lord, is that at that stage and all along I did not have the contact number for the police in Pietermaritzburg and I had no confidence or trust in the police from Tugela".

He then agreed that when he was contacted by the police from Pietermaritzburg, regarding the matter where he had laid a charge of attempted murder against the first appellant, only then did he make a

statement in the present matter.

[10] What is immediately apparent is that the reasons advanced by Xaba, as to why it took nine months for him to implicate the first and third appellants directly, and the second appellant indirectly, are grossly improbable. What is also of grave concern is that he only did so, after the first appellant had allegedly fired at him, causing him to lay a charge of attempted murder against the first appellant. The real danger consequently arises that Xaba falsely implicated the first appellant in the present case, in retaliation for the alleged attack upon him by the first appellant, and implicated the third appellant, in retaliation for the alleged prior attack upon the deceased. As regards the second appellant, it is not without significance that he was only named by Xaba some months after he had implicated the first and third appellant, under circumstances which I have described as grossly improbable.

[11] When all of the above is considered, it is quite clear that the evidence of Xaba was not clear and satisfactory in every material respect. Xaba was biased against the appellants and was neither a credible, nor reliable witness. Xaba was dishonest and I am not satisfied that he told the truth concerning the killings.

[12] I accordingly respectfully disagree with the conclusion of Kruger J that the evidence of Xaba, could be relied upon and was credible. In this regard, Kruger J found that the evidence of Xaba was not

seriously challenged and in particular his evidence identifying the appellants as the persons responsible for the shootings, was not challenged and concluded that as a consequence ".....it does not render his evidence unacceptable, nor does it mean that he is not telling the truth". In reaching this conclusion Kruger J, with respect, misdirected himself as the following was put to Xaba

"You see, Mr. Xaba, my instructions are that the accused were never there near the Spar".

If however, I have misconstrued the words of Kruger J and he intended to convey that Xaba's identification of the appellants, was not shaken in cross-examination, the fact remains that Xaba's testimony remains unacceptable, for the reasons set out above. The fact that the reliability of the identification was not shaken in cross-examination because Xaba said he knew the appellants, it was broad daylight, he had a good vantage point and he saw their faces as they walked back to their car after the shooting, can have no bearing upon the serious shortcomings in the credibility of his evidence, which was revealed in cross-examination.

[13] I also respectfully disagree with the conclusion of Kruger J that the versions of "accused Nos 2 and 3 were not put to the witness Xaba and Inspector Dlamini, save to say that they were not present". It is difficult to see what else could be put to these witnesses as the appellants defence was that of an alibi and the first appellant and second appellant, could not remember where they were on the day of the shooting. The third appellant stated that he was at the taxi rank in Pretoria at

the time of the shooting, but it is difficult to see how putting this to these witnesses would have been of significance, particularly as Dlamini, the Investigating Officer, by clear implication accepted when giving evidence, that the appellants had told him when he questioned them after they had been arrested, that they were not in the Msinga area, at the time of the shootings. Although it is correct as referred to by Kruger J, that the appellants denied instructing their Counsel that Inspector Dlamini had fabricated the statement of Xaba to implicate them, because he had no other witness in the case, I respectfully differ as to the weight to be attached to this apparent contradiction, in the context of the clear shortcomings in the evidence of Xaba. For the same reason I do not regard the observations of Kruger J of Xaba's demeanour, as being of significance.

[14] As regards the appellants' evidence, it is trite that they bore no *onus* to establish their alibis and if reasonably possibly true they were entitled to be acquitted. The evidence of the appellants' alibis must be considered in the context of a proper evaluation of the merits and demerits of the State and defence witnesses, as well as the probabilities of the case

**R v Hlongwane 1959 (3) SA 337 (A) at 340 H – 341 A**

***S v Guess 1976 (4) SA 715 (A) at 718 H – 719 A***

When considered on this basis and with particular regard to the conclusions I have reached as to the shortcomings in the evidence of the single State witness, I am satisfied that the evidence of the

appellants is reasonably possibly true and that the State failed to prove their guilt on all of the counts beyond a reasonable doubt. The convictions accordingly cannot stand.

The order I make is the following:

1. The appeal succeeds and the convictions and sentences imposed are set aside in respect of all three appellants.

2. The following verdict will be substituted for the verdict of the Court *a quo*

> "Accused Nos. 1, 2 and 3 are found not guilty on all of the counts".

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**K. SWAIN J**

**I agree**

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**GYANDA J**

**I agree**

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**LOPES J** ***Appearances /***

***Appearances:***

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| **For the Appellant** | : | Mr. K. J. Kemp S.C. |
| **Instructed by** | : | Hulley & Associates<br>C/o Mastross Incorporated<br>Pietermaritzburg |
| **For the Respondents** | : | Mr. R. du Preez |
| **Instructed by** | : | Director of Public Prosecutions<br>Pietermaritzburg |
| **Date of Hearing** | : | 03 August 2012 |
| **Date of Filing of Judgment** | : | 08 August 2012 |