

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER : SS15/2015

DATE : 22 FEBRUARY 2017

5 In the matter between:

THE STATE

and

LINDANI NAKANI

Accused

10

J U D G M E N T

BOQWANA, J

INTRODUCTION

15 The accused was arraigned for trial before this Court on an indictment in respect of a charge of murder, read with the provisions of the Criminal Law Amendment Act 105 of 1997 (“the Criminal Law Amendment Act”) on the basis that the offence he is charged with is mentioned in Part I of Schedule 2
20 of the Criminal Law Amendment Act, in that the death of the deceased was planned or premeditated.

The State alleges that on or about 3 July 2014 and at or near 24995 N2 Gateway, Delft, in the district of Bellville, the
25 accused unlawfully and intentionally killed Busiswa Centane
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Rwayi ("the deceased"), an adult female person, by shooting her with a firearm.

The State was represented by Mr Moeketsi throughout the trial.

5 For the greater part of the trial the accused was not legally represented, up until the close of his case. At the commencement of the trial the Court took some time to explain to the accused his right to legal representation and that should he not be able to afford to pay for his own lawyer he may be
10 assisted at the State's expense by approaching Legal Aid. The accused advised the Court that he wished to conduct his own defence. The Court explained to him the seriousness of the offence that he faced, the complexities that may arise during the trial and the reliance of the State on the applicability of the
15 minimum sentence of life imprisonment in the event that the accused were to be found guilty of the offence. The Court also explained that it would be in his best interest to exercise his right to legal representation, as complex issues of law and fact may arise in this case. The accused advised the Court that he
20 was aware of the seriousness of the case and had elected to conduct his own defence and pleaded with the Court to proceed with the matter. The Court proceeded on that basis. The Court reminded the accused of his right to legal representation at various stages throughout the trial.

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At the plea stage the accused was unsure whether to plead guilty or not guilty. Having listened to the accused it was evident that he was not admitting to all the elements of the offence that he was charged with by the State. In that regard
5 the Court entered a plea of not guilty.

In his plea explanation the accused informed the Court that he acted irrationally and did not think straight as a reasonable person should have. Mr Moeketsi then asked the Court to
10 ascertain from the accused what he meant by that explanation, so as to ensure that the Court was not dealing with a case of pathological criminal incapacity and furthermore the State had to be clear as to what the defence of the accused was in this instance. Having enquired from the accused it was unclear
15 from the explanation he offered at that stage whether a mental illness or defect or any other reason was present necessitating the referral of the accused for mental observation. The Court allowed the matter to proceed on the basis that if it became apparent during the trial proceedings that there was a basis to
20 refer the accused for mental observation the Court would make a determination at that appropriate stage.

EVIDENCE

The State called 17 witnesses in total. The accused testified
25 in his defence and also called two witnesses. The Court
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explained the rights of the accused, the manner in which the proceedings would unfold and the law throughout the various stages of the proceedings. A trial-within-a-trial was held in respect of the part of the evidence of a State witness, Colonel
5 Jacobus Fredericks ('Fredericks'). Both parties applied for hearsay evidence to be admitted regarding certain witnesses, I deal with those issues later.

THE STATE'S CASE

10 The State's first witness was Nonyameko Manengela ('Manengela'). Manengela testified that she was a member of the SAPS stationed at Delft Police Station. She has been a member of the South African Police Service ("SAPS") for 6 years. Her function involved assisting people and attending to
15 complaints in the Delft area. On Thursday 3 July 2014 she was on duty at work. She got a call from radio control at 10:49. At the time she was with Constable Ndzotyana, who was the driver driving a police van. They were on duty attending to complaints. The call related to a shooting at the
20 N2 Gateway at 24 Section. At this stage they were not far from the police station and were still patrolling. They immediately went to the place from where the complaint came. They saw a silver Toyota Yaris motor vehicle alongside the house. The driver's side of the motor vehicle was open and
25 the road was full of people. Manengela noticed a lady lying on

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the road. This lady was red by her stomach with blood. She quickly called an ambulance. When the ambulance arrived the lady was certified dead.

5 She noticed bullet cartridges in the street alongside the Toyota Yaris vehicle and alongside the house. She called all the necessary people to come to the scene, such as the photographer, IPID and the morgue van. The morgue van came and took the body to the mortuary. Constable
10 Vuyolwethu Mini ('Mini') who was the photographer came to the scene of crime. Mini photographed the scene and took the cartridges with him. Manengela could not state what IPID stood for except that the first letter stood for independent. The IPID would be called in situations where a police official
15 or a State official was involved in a shooting and not in all shootings. When she saw the lady who was lying on the ground she noticed that the lady could not move. She could however not make a decision on her own that the lady was dead. She could recall that there were 13 cartridges that she
20 found.

In cross-examination she testified that they received the complaint from the radio controller. When she got to the scene she did not see the suspect but she got information from the
25 police station that the suspect was a police official and
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therefore she had to call the IPID. The cartridges were alongside the house and the vehicle was also alongside the house. She testified further that nobody gave any information about what happened when they tried to ask.

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The next witness was Mini who testified that he worked for the SAPS at Delft Service Point Local Criminal Record Centre ("LCRC"). He has been working for the SAPS for 7 years. He joined the LCRC in January 2010. As a member of the LCRC
10 his duties involved working as a photographer, draughtsman, videographer and lifting of fingerprints at crime scenes. To be a member of LCRC he underwent training at various training institutions.

15 On 3 July 2014 he was on duty where he attended a crime scene. Whilst he was outside doing his duties he was called via the SAP radio and was informed that there was a crime scene at the N2 Gateway at Delft that he had to attend as a photographer. When he reached the crime scene it was
20 already cordoned off. The first person that he met was a female police person wearing police clothing and her name was Constable N V Manengela ('Manengela'). He asked her about what happened and she explained what she heard when she got to the scene. He asked her to point out where the
25 crime scene started and where it ended and all the evidence

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that could be found. He then took his scene report where he made notes of the crime scene and drew a rough sketch of the crime scene on it. After that he made notes on the same report. He then went to the vehicle that he was using and took
5 out the cones. He placed the cones alongside the exhibits that he had marked at the crime scene. He drew a rough sketch of the crime scene and took photographs. After the crime scene was pointed out to him by Manengela, he saw the deceased female lying in the road and a Toyota Yaris, silver in colour,
10 standing in front of the house. The door of the Toyota Yaris motor vehicle was open. Alongside the motor vehicle on the ground were cartridge cases and bullets. Other bullets were inside the motor vehicle. At the scene of crime he would make a mark showing which point belongs to which exhibit. In this
15 instance point C was a cartridge case. He collected the exhibits and took photographs of what time the exhibits were taken. He then placed the exhibits in a bag at each point of the crime scene. After he finished placing each exhibit in a bag he took the exhibit bag and started taking photos of the whole
20 crime scene standing at a distance. He also took a photograph of each exhibit close by. He then picked up all the exhibits and placed them in a large bag which he marked with a case number, the station, the charge and the LCRC reference numbers. Manengela informed him that he had to go to the
25 Delft Police Station where she said the suspect's motor vehicle

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was. Manengela informed him that there was also a firearm in the motor vehicle in the front. He went to the Delft Police Station after he received that information. When he was there he took photos of the motor vehicle on the inside and of a
5 firearm. As he entered the gate of the police station there was an Avanza motor vehicle, white in colour, and there was a police officer standing next to the motor vehicle. He approached the police officer and introduced himself and told the policeman what he was doing there. The police officer
10 introduced himself as Colonel Fredericks. Fredericks is the one who pointed out the Avanza that was facing him and there was a firearm inside. There was a magazine next to it and the firearm itself had another magazine inside. Without touching anything on the inside of the motor vehicle he took
15 photographs of the motor vehicle. Thereafter he took photographs of the firearm and the magazine that were found inside the vehicle. The magazine that was alongside the firearm was empty. He noticed that the magazine did not have bullets because it had holes.

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Fredericks removed the bullets from the magazine in front of him as he was preparing to place the exhibits in exhibit bags. He separated the exhibits from each other so they could be taken for storage to the Delft Police Station. Fredericks
25 opened the firearm by pressing the release button, cocked the

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firearm, locked it whilst it was open to make sure it was on safety and that there was no bullet inside, so that it could be taken to Delft. That is the procedure that is needed to be followed according to the teachings that Mini had received
5 from the police.

According to his observations there were no bullets in the chamber of the firearm. The magazine had 15 bullets in it. The type of firearm that he was talking about was a Z88 9mm
10 pistol. And this firearm is used by police officers as a firearm that can fit on the waist of a police officer. As a member of the LCRC and as a police officer he had knowledge of firearms and of this particular firearm and how it was used. According to his knowledge and training, the firearm was designed to
15 carry 15 rounds of bullets; however it is possible that it could carry 16 bullets in total. That would happen when it is cocked and a space is left for another bullet to fit. By putting an extra bullet in the space one would make it possible for it to carry 16 bullets. After he took the photograph and Fredericks had
20 checked that the firearm was safe, it was placed in the exhibit bag. He wrote a note in his scene report. The exhibit bag was taken by Fredericks and it was sealed. He made Fredericks sign along the entry that he made.

25 After everything was done Mini went to another crime scene

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because it was a busy day. After he finished with that crime scene he went to the office where he opened the cupboard (or locker) and placed the exhibits in the cupboard. He locked the cupboard to make certain of the safekeeping of the exhibits -
5 he did that because the person in charge of the storage had gone home already.

The following day on 4 July 2014 he took out the exhibits and went to the person who was in charge of the storeroom, Benita
10 Valerie Pietersen ('Pietersen').

Pietersen took a register that was referred to as the SAP459 and registered all the exhibits that were going to be stored according to the LCRC. Pietersen wrote down each and every
15 exhibit that he gave to her and that all happened in front of him. He signed on the register itself to say that she had written down all that he had given to her. Pietersen also signed to confirm that she had received the exhibits from him. After that she took the exhibits and locked them in storage
20 where they would stay until they were taken to the Forensic Science Laboratory in Platteklouf.

He took the exhibits to the Platteklouf Forensic Laboratory himself. He wrote everything that he did in the docket he used
25 to write statements about the exhibits that were in
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safekeeping. He typed a statement himself and double checked that what was in the statement coincided with the exhibits. He then signed at an appropriate place and attached the statement to the exhibit bag.

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Mini further testified that the photos that he took were downloaded and placed on a CD. The CD and the docket with the photos were placed with the SD card which was sent to him by the downloader. When he received the CD and the docket
10 he placed them onto the computer and compiled a photo album. After compiling a photo album he deposed to an affidavit relating to the crime scene. He did not do an affidavit about what he did at the police station in relation to the motor vehicle he found there.

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Photos 1 to 35 were crime scene photos and photos 36 to 43 were photos that he took at the police station. Photo 41 is a photograph that had a magazine with holes where one would see the bullets. During his testimony he marked with a red
20 pen and wrote the letter Y, indicating that the holes were in the magazine in photo 41. He testified that photo 42 was a firearm which had a magazine inside and the firearm appeared to be on a safety mode. The affidavit relating to the crime scene as well as key to the photo plan and photos were
25 handed in as exhibit "A". Mini further referred to a forensic

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affidavit which detailed the exhibits that he collected on 3 July 2014 at the scene at 24995 N2 Gateway, Delft. The forensic investigation affidavit was handed in as exhibit "B". Mini read into the record the contents of the affidavit relating to exhibits 5 1 to 19, which related to cartridge cases and bullets that he collected at the crime scene. He indicated that there was a typing error in relation to exhibits 17, 18 and 19 respectively which stated that the relevant cartridge cases were found on the ground next to the door of the house. He indicated that 10 the relevant statement should read as 'found on the ground next to the house'. According to Mini, exhibits 1 to 19 were put inside a forensic bag with number PA3000904653 until they could be taken to the Ballistic Unit in Panorama.

15 On 4 July 2014 he booked exhibits 1 to 19 into the Forensic SAP459/416/2014 register at CR and CSM, Delft Service Point and placed it in the exhibit room for safekeeping until it could be sent to the Ballistic Unit in Panorama. On 15 July 2014 he sealed exhibits 1 to 19 into forensic exhibit bag PA3000904653 20 and took it by hand to the Forensic Science Laboratory in Panorama.

In cross-examination he testified that he received police basic training from 12 January 2009 to June 2009. He then attended 25 Philippi Police Academy and started working in Maitland Police

Station where he completed his police training. In January 2010 he went to the LCRC in Bellville. He was sent for training as a crime investigator in Paarl where he received training to lift fingerprints, take photos and videos. He completed his training in the same year. In June of the same year he started visiting crime scenes doing investigations. He then specialised in lifting fingerprints up to January 2014. In February 2014 photographers and fingerprint lifters were combined as a unit and he started working as a photographer at crime scenes, which is what he still does. Based on the training he received as a police officer a firearm is not supposed to be left in the manner that he found in the white Avanza, as it posed a danger to anyone who came across it. A firearm must be kept in a holster placed at the waist of the police officer or in the safe. He conceded that questions must be asked regarding the manner in which the firearm in question was found in the vehicle.

The next witness was Pietersen. She testified that she has worked at Delft Service Point as an exhibit clerk since 1 November 2012. The Service Point is part of the SAPS, but she is not a police officer. Her duties are to receive exhibits, book them in the 459 register, sign for them and put them in a store room. She had the keys of the store room. The police individual who brought the exhibits to her would sign for the

exhibit, and the same will happen when exhibits are booked out of the store room.

She referred to an extract of the exhibit register, SAPS459,
5 which was handed in as exhibit "C". The register contains information about the exhibits: when they were received by her and from whom and how many she received and what the exhibits were and where they were taken, by whom, and when they were taken. In this instance the register recorded that
10 she received one bag containing bullets and cartridges and there were 19 exhibits in number that were given to her by Mini. Mini took the exhibits to the laboratory in Platteklouf and he signed to that effect.

15 The next witness was Mandlakhe Cyprien Ntshingila ('Ntshingila'). Ntshingila testified that he was the police officer working for the SAPS Railway Police. He has been working for the SAPS for 26 years, having started in 1990. He started in Kwazulu-Natal at the police and in 2004 came to
20 Cape Town to work for the Railway Police. He is a section commander who patrols on the trains. He knows the accused and the accused was part of his team, he was the accused's supervisor.

25 On 3 July 2014 he was on holiday at his Kwazulu-Natal home
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when he received a telephone call from the accused at approximately 11 o'clock, saying that he had shot his girlfriend. He did not ask what led to that because he was not sure what really happened. The accused informed him that he
5 was at Delft Police Station. Ntshingila then informed his commander and told him to go there. The accused advised him that he was in the company of Fredericks.

In cross-examination he testified that he did not know how to
10 answer a question in relation to how the accused was when he called him, all he could say was that he spoke softly. He had not experienced any problems with the accused as a person who worked under his supervision, they got on very well. He conceded that the accused felt at ease speaking to him about
15 his personal issues and in particular his situation at home.

A question relating to an application by the accused for a transfer to the Eastern Cape was put to him. He recalled the issue of the transfer but could not comment about what
20 happened after the application was sent, as that was something beyond his involvement. He testified that a committee dealing with transfers had sat and approved the accused's transfer but they were waiting for authorisation. It is not clear why there was a delay for him to be released. In
25 re-examination Ntshingila testified that the accused had told

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him that he had moved out of his home because the situation was not pleasant and was staying at the Pinelands Police Barracks. He had informed him that things were not pleasant with the person he was staying with, which person was a
5 woman. This conversation took place between 2013 and 2014.

The State then called Arnolene Elana Eshla Joseph ('Joseph') as its next witness. Joseph testified that she was a forensic officer at Tygerberg Mortuary. Her duties were to collect the
10 bodies at crime scenes. She would then take them to the Forensic Pathology Service at Tygerberg. They get to know about the bodies when they receive a call through Metro Control. They will then go directly to the scene after receiving the details of the scene. On 3 July 2014 she was on duty
15 when she received a call from Metro Control. She was with her colleague Friedel Arendse, who was the driver of the vehicle that they used to go to the scene. When they arrived at the scene they first saw a Constable, whom she could not remember, who took them to the body that was lying in the
20 street. He told them what happened and they received a declaration of death, where the individual was certified through Metro Ambulance as deceased. The body was lying on the ground with bloodstains and with full clothes on. It was covered with a blanket. They took the blanket off from the
25 body and the floor. The blood was by the stomach. They then
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contacted Joseph's superior via radio at Control to say that they had received the body. The superior gave them the WC number that the computer generates. The WC number is for the identification of the deceased and for the post mortem.

5 After they had tagged the body they bagged it and placed it on the stretcher. They tightened the stretcher so that the body could not move and placed it in the back of the vehicle which they use to transport the bodies to the mortuary. The body sustained no further injuries. At the mortuary they offloaded
10 the body and put it in the fridge. The vehicle they were using was a "*bakkie*". Joseph's affidavit in terms of Section 212 of the Criminal Procedure Act 51 of 1977 ("The Criminal Procedure Act") was admitted as an exhibit, stating the time that they had received the body, which was 15:02, the name of
15 the constable that they received the body from, which was Constable Manengela, and the details of the WC body tag number, which was WC/14/1552/14. The rest of the affidavit confirmed the evidence that Joseph's had already given.

20 The next witness for the State was Wayne Jeremy Claassen ('Claassen'). He testified that he was employed by the Department of Health, Pathology, as a Senior Forensic Officer. He has been employed at the Pathology Unit for 9 years. His duties were to attend at the crime scene and assist the
25 pathologist with the post mortem. He does so by removing the

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deceased's body out of the refrigerator and pointing it out to the pathologist. After the autopsy is done, the body is sealed in a body bag. An affidavit in terms of Section 212 of the Criminal Procedure Act, deposed to by Claassen, was handed in as exhibit "E", where Claassen had stated that he removed a body of an adult female that was marked with body tag number WC/14/1552/14 out of the refrigerated storage. He pointed out the body to Dr Estavao Afonso, the authorised person who performed the post mortem examination on WC/14/1552/14. After the post-mortem examination, the same body was returned to the refrigerated storage by him. Whilst the body was in his custody it sustained no further injuries or wounds.

Another affidavit in terms of Section 212 (7) and (8) of the Criminal Procedure Act, belonging to Claassen, was also handed in as Exhibit "F". In this affidavit Claassen stated that on 7 July 2014 in performance of his duties he received an exhibit bag with serial number PA6002038142 containing projectile (left hip). PA600203814 containing projectile (left buttock). PA6002038139 containing projectile (left buttock inferior). PA6002038141 containing projectile (left abdominal wall), a corduroy jacket, trousers and black vest, for ballistics. The exhibits are marked WC/14/1552/14 from Dr EB Afonso of the Forensic Pathology Laboratory Tygerberg and they were

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sealed. On 7 July 2014 he handed the exhibits, still marked with WC/14/1552/14, to Warrant Officer Serfontein from Parow SAPS stationed at Franzi Van Zijl Drive, Tygerberg. He handed the exhibits to Warrant Officer Serfontein in his office
5 at the mortuary. Serfontein was based at the mortuary only for exhibit purposes and for documentation from the SAPS side. He was asked by the prosecutor whether he knew where Warrant Officer Serfontein was. He responded by saying that it came to his attention that Serfontein had resigned, he did not
10 know when he resigned. This came to his attention at the end of last year. Warrant Officer Serfontein was sick and did not come back. At this point he did not know of his whereabouts. What normally happened was that the elements would be handed over by the warrant officer to the investigating officer
15 dealing with the specific case.

The next witness was Fredericks. Fredericks was stationed at Ravensmead SAPS. He has been working for the SAPS for 29 years. He worked at Delft as an Operation Commander before
20 he was transferred to Ravensmead. His sole responsibility was to visit crime scenes. He has people working under his command.

On 3 July 2014 he was on duty and dressed in full uniform and
25 driving a marked vehicle, numbered 811. He was driving a

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“bakkie” on his way from the police premises towards Delft South. As he was leaving the premises he noticed a white Toyota Avanza pulling into the police station very fast. At that moment the vehicle stopped next to the vehicle he was driving, where he was seated by the driver’s side. At the time he was with a passenger. He saw the accused that is in court jumping out of his vehicle. He had a brown leather jacket. He pulled up his hands and made some remarks. I revert to the issue of the remarks later on.

10

When the accused got out of the vehicle he immediately noticed that the accused was a police officer, as he knew where the accused was stationed. When he looked at the window from the driver’s side he noticed a Z88 black pistol that was lying in front on the passenger seat of the white Toyota Avanza. He tried to calm the accused down while his right hand was on his shoulder. After that he requested the keys to the vehicle which were given to him. He made sure that the doors of the vehicle were properly locked and that was done in the accused’s presence. He also explained to the accused that he was a commissioned officer and if he could willingly point at the crime scene where the incident took place. The accused fully agreed with him and he also mentioned that he wanted to see his girlfriend.

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At this point, I stopped the proceedings and enquired from Mr Moeketsi whether the evidence being led was not entering into the terrain of confessions and admissions as provided for in
5 Sections 217; 218; 219 and 219A of the Criminal Procedure Act. A debate ensued on this issue. After due deliberations, and the fact that the accused was not legally represented, it was unclear whether he objected to the leading of this evidence. Having explained the applicable provisions of the
10 Criminal Procedure Act and the requirements of section 35 of the Constitution of the Republic of South Africa, Act 108 of 1996, to him, the accused stated that he objected to the leading of that evidence because he was not in his 'sober senses' when he made the utterances he did to Fredericks.

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I accordingly ruled that a trial-within-a-trial be held in respect of both the utterances made by the accused to Fredericks and the pointing out as a measure of caution, in view of the lack of clarity as to what the nature of the evidential material that
20 would be led by the State was. At one point Mr Moeketsi, for the State submitted that the evidence constituted a confession but then urged the Court to allow the leading of the evidence and make the determination after the case whether or not the evidence is admissible (although he later submitted that those
25 were admissions). That in my view was an inappropriate

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manner of dealing with this evidence, as an enquiry had to be conducted on whether the pointing out was done freely and voluntarily and within the provisions of section 35 of the Constitution. Included in this enquiry were utterances that
5 Fredericks stated the accused made when the accused stopped and approached him.

A trial-within-a-trial commenced and Fredericks testified that the accused made utterances to him and when he did so he
10 was normal and sober. He initially was talking very fast but he calmed him down. He told him he was a commissioned officer and the accused was not allowed to tell him anything if he did not want to because it could later be used as evidence. He then asked him if he could point out the crime scene willingly
15 which he did. He conceded that he did not explain any of the Constitutional Rights of the accused before the pointing out took place. He only informed the accused of his rights at the police station.

20 In cross-examination of the trial-within-a-trial he testified that the accused was the one who came to him, when he entered the police station and made utterances. He stopped the accused from speaking further and said he was a commissioned officer. He once again admitted to not having
25 explained the accused's constitutional rights. The accused did

not lead any evidence during the trial-within-a-trial and elected to remain silent.

During argument of the trial-within-a-trial, Mr Moeketsi
5 submitted that there were two issues under consideration. The first being the utterances at the police station, which in his view were made voluntarily when the accused approached Fredericks. According to him, Fredericks was minding his own business or his work, when he was just approached by the
10 accused. The manner in which the utterances were made by the accused was just spontaneous. Fredericks testified that the accused was in his sober senses. He was normal according to his observation when making the utterances he did. Mr Moeketsi accordingly submitted that the utterances are
15 admissible and should be found as such.

The second issue related to the circumstances surrounding the pointing out. In this regard, he submitted that the accused ought to have been informed, amongst others, that he was not
20 compelled to do the pointing out and about the implications thereof as well as his other constitutional rights. He submitted that the pointing out cannot be admissible.

The accused on the other hand contended that it could not be
25 said that he uttered those words in his sober senses because

the situation was abnormal, which is an issue around which the whole case revolved. According to him Fredericks might not have known the accused's condition when he uttered those words. Therefore, the utterances could not be admitted.

5

Having considered the evidence and the submissions made by the State and the accused in respect of the trial-within-a-trial I ruled the pointing out to be inadmissible as conceded by the State. As regards the utterances made by the accused at the
10 police station when he approached Fredericks, I took a more cautious approach and made a provisional ruling that the utterances made by the accused to Fredericks prior to the pointing out of the crime scene were inadmissible at that stage, and that I would revisit this ruling at the end of the trial,
15 once I had had a look at the entire evidence. I later corrected the statement and required the State to address me on this issue before the end of its case, which it did, so that the accused could know what the ruling was before the close of the State's case (being mindful of the observations of the court
20 in S v Molimi 2008(3) SA 608 (CC) at paras 41 and 47).

I took a more cautious approach particularly because the accused was not legally represented and I wanted to have an opportunity to listen to other evidence by the State and take a
25 decision after having listened to all of the evidence of its case.

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The accused had indicated during argument that the context of the utterances should be taken along with other evidence because the point that he was not in his 'normal and sober senses' when making such utterances to Fredericks was the
5 issue around which the whole case centred. In *S v Muchindu* 2000(2) SACR 313 (WLD) at 316f the court held that:

*"A ruling on admissibility in a trial-within-a-trial is interlocutory, and may be reviewed at the end of the trial
10 in the light of later evidence."*

See *S v Mkhwanazi* 1966(1) SA 736 (A) at 742(H)-743(A). The court held further in *Muchindu* at 316g:

15 *"This principle in itself shows that subsequent evidence in the main trial may decisively affect the determination of the issues in the trial-within-the-trial. If subsequent evidence may, why not also earlier evidence?"*

20 I must stress that I did not wait until the end of the trial, heeding to the warning in *Molimi supra*. In *S v Ndhlovu and Others* [2002]3 ALL SA 760 at para 19 the court referring to *S v Ramavhale* 1996(1) SACR 639 held that:

25 *"Ramavhale makes clear that unless the State obtains a*

ruling on the admissibility of the hearsay evidence before closing its case, so the accused knows what the State case is, he or she cannot thereafter be criticised on the basis of the hearsay averments for failing to testify. It also suggests, rightly, that unless the court rules the hearsay admissible before the State closes its case, fairness to the accused may dictate that the evidence not be received at all. (Own emphasis)

10 Ndhlovu was criticised in Molimi by holding that the admission of evidence late in the trial was not prejudicial to the accused. The principles stated above, were emphasised further in Molimi as follows at para 38:

15 “... The Supreme Court of Appeal correctly acknowledged that vague provisional rulings ‘may be prejudicial to an accused. It conflates the admissibility of the evidence with its weight and may leave an accused unfairly in a state of uncertainty’. The court nevertheless found that
20 the inexplicit and late admission of the hearsay evidence was not prejudicial to the applicant.”

The court in Molimi went on further to state at para 41:

25 “A timeous and unambiguous ruling on the admissibility

of evidence in criminal proceedings is, as correctly contended by the amicus, a procedural safeguard.” (Own emphasis)

5 Before the close of the State’s case the State applied to have the utterances admitted and for the Court to make a ruling on this issue, because the utterances were made spontaneously and voluntarily. According to the State, the accused jumped out of the vehicle and started talking to Fredericks. It was a
10 spontaneous action from the accused and it could not be said that the words he uttered were not made voluntarily.

According to the State, the accused appeared normal and in his sober senses. He was also not intoxicated. The State
15 contended that the argument that the accused was not in his sober senses fell away. The issue that the utterances were not done in terms of the Constitution was also diminished because if one had regard to s 35 of the Constitution, a police officer has a duty to explain constitutional rights to a detainee
20 or an accused person. In this instance, when the accused approached Fredericks, Fredericks did not know what the accused had done or was going to tell him. He had no knowledge of the particular incident that the accused was involved in. It was therefore impossible for him to say “stop,
25 don’t speak” and start informing the accused about his rights.

Under these circumstances, it could not be said that the accused's rights to a fair trial were infringed. According to the State, having given a provisional ruling, the Court could after listening to the rest of the evidence of the State make a ruling
5 that the utterances were admissible, and in any event there is nothing like a provisional ruling.

The accused on the other hand submitted that he could not think normally like a reasonable normal person when he made
10 those utterances and those utterances were stated without him being informed of his Constitutional Rights. According to him, Fredericks had admitted that he was taught as a policeman that obtaining evidence in a manner violating the constitutional rights of the accused may be inadmissible in a court of law.
15 The accused further submitted that a person under a traumatic situation cannot be regarded as acting out of his will or voluntarily. He therefore disagreed that the utterances were voluntary and submitted that they must be considered inadmissible. Furthermore, leaving the firearm in the manner
20 he did in the vehicle, as a trained policeman, showed that he was not in his normal state of mind.

Having considered the evidence and submissions made before the end of the State's case I ruled that the utterances were
25 admissible and reasons were reserved. For convenience I
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deal with my reasons at this juncture even though the ruling was, in terms of the sequence, before the State closed its case after the witnesses for the State had testified, but for the recall of one witness, which I deal with shortly.

5

When the accused approached Fredericks, he simply got out of his vehicle, threw up his hands and started talking. Fredericks had no idea what the accused was going to say. He was going about his work and minding his own business when the
10 accused started speaking. I am of the view that the words were indeed made voluntarily and spontaneously most importantly. The accused was not asked questions prior to making such utterances. There is also no evidence that he was threatened or induced by promise or threat by a person of
15 high authority before making the utterances to Fredericks. There is also no evidence that he was intoxicated. The accused does say he was not in his normal and sober senses. Whilst I view the utterances made as an admission as opposed to a confession, due to the fact that the accused had open to
20 him a defence, even though the utterances amounted to an admission of certain facts which could be incriminating against him, I considered a factor that is ordinarily taken into account in confessions, which is whether the accused was in his sound and sober senses when making those utterances. According to
25 DT Zeffert *et al*, South African Law of Evidence (formerly /NY

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Hoffmann and Zeffert), 2003 at 478:

5 *“The test is whether the accused was in sufficient possession of his or her understanding as to have known what he or she was saying. It has been pointed out that this does not require that an accused be in a state of quiet serenity free of physical or mental discomfort, and confessions have been admitted despite the fact that they have been made in a great temper, or in pain after*
10 *suffering a bullet wound, or in the state of nervous excitement.”* (Own emphasis)

It should be accepted that the accused was emotionally and psychologically distressed when he uttered those words. He
15 may have uttered the words without having reflected on the situation that had occurred. That however does not make the utterances involuntary.

In my view, the accused was aware of what he was saying
20 albeit suffering from emotional discomfort. According to the observations of Fredericks, he appeared normal, although initially he was talking very fast. This should be expected from a person who had just experienced a traumatic encounter.

25 As regards Frederick’s failure to explain the constitutional /NY

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rights to the accused, he had no knowledge about the incident and what the accused had done before he came. According to s 35 of the Constitution, a duty arises to inform a person of the rights listed in that section, who is arrested, detained or is an accused. In this case, Fredericks did not know that the accused was a suspect when he got out of his vehicle, raised his hands and started talking. He could therefore not immediately stop him and promptly inform him of his constitutional rights. That was impractical and impossible. Neither can it be said that the utterances were made in violation of the accused's constitutional rights nor that they should have been made after his constitutional rights were explained to him. It could not be said that the admission of the utterances rendered the trial unfair or was detrimental to the administration of justice.

The opposite is however true when it comes to the pointing out which the State correctly stated was inadmissible. In that case Fredericks knew that the accused was a suspect and ought to have explained his constitutional rights before proceeding to the pointing out.

Ultimately the accused and the State were not left to 'range around vaguely' on the question of the ambit of the admitted evidence as the ruling was unequivocally made before the end

of the State's case. It would not have been in the interest of justice to exclude that evidence, and the accused could still raise his defence. The essence of it is to ensure that the accused knows what evidence is admissible or inadmissible
5 before the end of the State's case.

To cure whatever prejudice, after the utterances were ruled admissible, Fredericks was recalled as part of the main trial, to allow for questioning on the words which he said the accused
10 said to him. I deal with this evidence here for convenience, although it was led at the end of the State's case.

RETURNING TO THE MAIN TRIAL:

Fredericks testified that the accused uttered the following
15 words:

“Colonel you must arrest me now, I just killed my ex-girlfriend. We both came from Bellville Court, she had an interdict against me and that I must hand in my firearm
20 that was the instruction from the court.”

Fredericks was cross-examined by the accused. He was asked about the statement he made during his evidence, when he said ‘he further explained’ as to what had led to the further
25 explanation by the accused. He stated that he did not ask for

any further explanation from the accused, the accused spoke continuously. The words he mentioned were the accused's precise words. He testified that he did not know the personal life of the accused. He could not determine the accused's
5 state of mind, to him the accused appeared fine. He emphasised, however, that he was not a psychologist.

Continuing with Fredericks' other evidence in the main trial, Fredericks testified that he went to the police station with the
10 accused where he informed him about his rights and that he was being arrested for murder. The vehicle that the accused drove to the police station was still in the yard at the station.

He took a statement in the presence of the accused. During
15 the taking of the statement the accused requested to phone Colonel Ntshingila, his superior. He did not know what the conversation between the accused and Ntshingila was about, as he was busy with the statement. After writing his statement he waited for the photographer. When the photographer came
20 he went to the vehicle that the accused had driven to the police station and explained to the photographer about the vehicle and about the firearm that was lying in the vehicle. The photographer took photos of the firearm. He then requested the photographer if he could handle the firearm after
25 he had taken the photos. At the time his hands were covered

with surgical gloves. He picked up the firearm and saw that there was still a magazine in the firearm; he placed the firearm on safety. He took out the magazine. Whilst he was opening the firearm there was a bullet in the chamber that fell out. He
5 counted the bullets in the magazine and there were 13 rounds of a 9mm firearm. The firearm was then safe to handle as he placed it on safety.

He also picked up a magazine, that was empty, that was lying
10 on the passenger side because it was an exhibit. He took the firearm, two magazines, 14 9mm rounds and also the identify document of the accused and placed it in a forensic bag, which he sealed in the presence of the accused.

He handed the exhibit in at the SAP13 register under 2505.
15 The accused was present at the time the photographer took photographs of the vehicle and when the exhibits were taken, and was also present when Fredericks took the photographer to the vehicle. The 9mm firearm belongs to the SAPS. When booking exhibits into the SAP13 he hands them in and the
20 person in charge would have to record that the evidence had been handed in by a particular person. SAP13 is an official register book of the SAPS. He testified that the photographs on photo 13 to photo 43 of exhibit "A" were photographs of the vehicle that the accused drove to the police station. He
25 testified that photo 40 was a photo of the firearm and the

empty magazine which was on the passenger side.

An extract of the SAP13 register was handed in as exhibit "G".
Fredericks testified that he completed the information from
5 column one to four which recorded information such as the
serial number, the date on which he handed in the exhibits, the
place where the exhibits were kept, which is the police station,
the CAS number, the charge and that the exhibits were
captured on the CAS system, information that he handed in a
10 9mm Z88 pistol with serial number Q053330, 2 9mm
magazines; 14 9mm rounds and 1 police ID card. There is
also information indicating that the exhibits handed in, in the
SAP13, were captured. Also information about himself, that he
found the exhibits in the vehicle of the suspect, details of the
15 accused and Fredericks' signature that he handed in the
property in the exhibits.

There is also a signature of the community service centre
member who received the exhibits. There is also an indication
20 that the exhibits were being received by the investigating
officer and sent to the laboratory. There is also information
that the firearm was transferred over to the firearm register
16/97.

25 A clerk working in that section wrote about the transferring of
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a firearm but he could not say who it was. From his experience as the head of Vispol it is his duty to go through the SAP13 to see that the firearm corresponds with the book itself.

5

He testified that a PR test was done by members of the LCRC to find out if the accused person handled the firearm. This is called a residue test. He could not say who did the PR test, but it was done on the accused. It was not done by the person
10 who took the photos. The time he was approached by the accused who drove his vehicle to the police station was at 10am. He recognised the accused as a police officer because he had worked at the section of Railway Police for about 26 years. The accused was stationed at Bellville Railway Police.

15

There was lack of clarity as to the name of the supervisor whom the accused requested to call, whether it was Captain Ntingila or Ntshingila, and this is probably an issue of the language and pronunciation by Fredericks.

20

He knew that the accused wanted to speak to Ntshingila because that is what the accused told him. He did not know what the accused and Ntshingila spoke about. He confirmed that the motor vehicle depicted in photographs 36 and 43 was
25 the accused's.

In cross-examination he testified that the accused was a disciplined member, very neat in his uniform and his private vehicle that he drove was very neat inside and outside. When
5 he asked the accused whether he was in possession of the firearm, the accused answered in the affirmative and when he looked through the window he saw the firearm in the front seat. He also testified that in terms of the Firearms Control Act 60 of 2000 ('the Firearms Act') the firearm should be on the person,
10 that is, in the person's possession and specifically in the holster. The firearm was lying in the vehicle, which meant that it was in the control of the accused. If the accused was found to be negligent he could be charged internally for carelessness. Each and every police officer is trained to
15 handle a firearm and how to keep it safe. The police officer must see to it that the firearm is safe and that the key of the safe is in his or her control. In terms of the Firearms Control Act the safe should have two keys and any officer who wants to possess a firearm afterhours should make an application for
20 that and the safe is then inspected. The police officer knows what the procedure is and how to handle a firearm and where the firearm should be kept. The accused appeared to be normal when he approached him at the police station. When asked further in cross-examination whether or not it was
25 normal for a person who had the training of the accused to
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leave the firearm in such an unattended manner, he responded that because the accused knew the procedures pertaining to the safekeeping of the firearm, as a police officer he could have been charged internally for his behaviour. When asked
5 whether the accused's firearm was seized at any stage at Delft Police Station before the incident took place, his answer was that he had no knowledge of police officers having visited the accused's house and having taken his firearm from his possession. The person who reported the matter to him was
10 the accused. There is a possibility that someone could have notified the police like a member of the public or anyone. He did not dispatch any member of the police while he was at the station. It is possible that the people that were at the scene first received a complaint without his knowledge and he did not
15 monitor the police radio at that stage because he was outside the vehicle having a conversation with the accused that morning.

The next witness, Valericia Leslie-Ann Van Wyk ('Van Wyk'),
20 testified that she was employed at the Delft Police Station. She is not a member of the SAPS but a SAP Admin Clerk seeing to all SAP13 exhibits in the SAP13 office. She does not receive exhibits or dispose of exhibits. She carries over all the firearms from the original transfer, i.e. the original
25 SAP13 register, to the firearms register. She was referred to
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an extract in SAP13 firearms register marked as exhibit "H". In the document is the detailed description of the exhibit handed in, which is a 9mm Z88 pistol with serial number Q053330; 2 9mm magazines and 14 9mm rounds and one
5 police identification card. The document also contains the name and address of the finder and the circumstances under which and the place where the exhibits were found or seized, the suspect or the owner and the signature of the person handing in exhibits and the signature of the community service
10 member. In the document it is written that the finder of the exhibits was Lieutenant Colonel Fredericks of Delft SAPS. It is stated that the exhibits were found in possession of the suspect and the suspect is Lindani Nakani, 36 years old. The signature of the person who found the exhibits is also
15 contained in the document. The document also contains Van Wyk's signature because the firearms register was transferred from the original register, which is the SAP13 register. Transfer means the carrying over of the firearm out of the original SAP13 register to the firearm register. In this instance
20 it will be transferred from exhibit "G", which is an extract for the SAP13 register, to exhibit "H", which is an extract of the SAP13 firearms register. All firearms that are booked in the SAP13 register must be transferred to a separate firearms register and that is what transfer means, to keep proper
25 control and proper record of firearms because the firearms
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differ from other exhibits. When they go to the laboratory and come back they need to be booked back in the firearms register.

5 The next witness was Martinus Johannes April ('April'). April testified that he was stationed at the Delft SAPS, working as an SAP13 exhibit official pertaining to all firearms and ammunitions found. His duties entailed receiving exhibits from the Community Service Centre ('CSC') which are then booked
10 by the members of the SAPS into exhibit registers and to make sure the exhibits are dispatched to the laboratory and returned to where they originated from as per instructions given to him. He has worked for the SAPS for 13 years and has been performing the duties of an SAP13 officer for the same number
15 of years. His handwriting appeared in column five and column six of exhibit "H". In column 5 entry 97 he wrote that on 8 July 2014 he booked out the firearm to a Mr Lamla Dalisi of IPID Investigations and dispatched it to the Platteklouf Laboratory. The document also contains the signature of the investigating
20 officer and the date that he entered, 1 September 2014, which is when he received the firearm or the exhibit bag from the Platteklouf Laboratory. He received the exhibits back from the laboratory in Platteklouf and not from the investigating officer. On 21 September 2014 he received a disposal order to transfer
25 the firearm to Bellville Railway SAPS, to dispose of the firearm

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because it belonged to that unit, he had to dispose or transfer it to that unit. He handed over the items to Captain Erasmus of Bellville Metro SAPS. The signature of Captain AC Erasmus appears on number 4 column 6 of the document. The thick
5 black line appearing in the document simply indicates that he inspected the SAP13 register so that his commander could see which exhibits are completely out of the register. This is the practice that they use in their office to cancel it out. The accused did not have any cross-examination for this witness.

10

The next witness called by the State was Mogamat Sedick Davids ('Davids'). Davids testified that he is employed at Imperial Logistics and Woolworths. During 2014 he was a driver still working for Imperial Logistics Registration Services,
15 still at Woolworths. On 3 July 2014 he came from work out of nightshift between 10 and 11 o'clock and went straight to bed. In about a quarter of an hour at home in bed he heard gunshots. He could not count how many gunshots he heard, but it was a lot. It was about 10 to 15 shots. He stood up and
20 opened the door and saw over the road there were people standing around a vehicle. He opened the door and went to the scene. He saw a woman behind the driver seat behind the steering wheel of the driver seat and could not see that she was shot because he could not see the wound. He saw the
25 hands of the woman, the arm and the body. He could not see

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there were bloodspots on her body and on the arms. There were a lot of people there, they tried to put the woman on the passenger seat and then tried to start the vehicle.

5 They said they want to take her to hospital but they could not start the car. He did not recognise any of the people that were trying to start the vehicle. As they started the vehicle they asked him to take her to hospital and then he walked away to his house. As he walked he looked around and saw them
10 carrying a woman behind him to his house where the vehicle was standing. He turned around and told them that he could not take the woman in his vehicle to the hospital or day hospital because she was badly hurt. When they saw that he was not going to take the woman to a doctor or hospital they
15 just left her there in the street.

A few minutes later after that, a white vehicle came down the road and someone got out and felt the pulse of a woman. He, that is the driver of this vehicle, said she is gone and he got
20 back into the vehicle and drove off. He did not see the registration number of the vehicle but he thought it was a private vehicle. By that time he was already inside the house standing behind the security gate until the police came and cordoned off the area. He knew this person that he saw sitting
25 behind the driver's seat (and badly injured) from seeing her

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and not by name or on a talking relationship. While the people were busy trying to render assistance she was still alive. There were no intervals between the shots, it was from one to however number, it was like “*ba-ba-ba-ba* finish and *klaar*”. He
5 recognised the woman as the person who resided at the house where the vehicle was. The house depicted in photos 9 and 10 where there is a vehicle is the house where the deceased lived. The vehicle that is depicted in photo 1 is his vehicle. Davids marked photo 1 with a letter B with a red pen to depict
10 his motor vehicle, which is blue and white in colour.

In cross-examination Davids testified that he lived at an address in Magalies Street. His house was about three houses from the deceased’s house. He started staying at that address
15 in 2013. He never noticed any other person in that house. He did not see who committed the act to the deceased. When he came out he did not see any act happening and did not know who committed that act. He confirmed that he did not know what happened except what he heard.

20

The next witness was Mogammad Shamiel Kariem (‘Kariem’). Kariem testified that he is currently employed by the Provincial Government of the Western Cape, Department of Health
25 Division, at Tygerberg Hospital. He has been in the employ of

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the Department since 2008. As an employee of the Department of Health he is a Senior Paramedic having been designated in the rank in 2013 in December. His duties are to provide primary healthcare and emergency assistance to victims or patients in need, so in this particular case his core duty was to assist a gunshot victim. On arrival the patient was code blue and was deceased. His core duty was to declare the patient dead. He therefore filled out a declaration of death form. When he arrived at the scene the patient was lying on the road on her back. He walked up toward the patient; she was pale, obviously deceased, and had most likely bled internally or externally. He viewed the patient's injuries and the patient had sustained gunshot wounds towards the abdomen and thoracic region on the left-hand side. Information came via the community. Any community member phones into the dispatch centre. Depending on the nature of the case involved they send the most senior and most qualified ambulance personnel to the scene and those would be the paramedics if it is a gunshot wound. What they basically do is to assist at the scene. If any medical assistance is needed they will initiate it. If not they will do a declaration of death on scene. If the patient had signs of life they will make their way to the hospital. They would attach a heart rate monitor as confirmation along with other techniques they use to listen for a heart sound, breathing as well as looking at the general

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presentation of the patient. Once they establish this, they will fill out 2 forms, which are the patient report form (which they log) and the declaration of death which they hand over to the SAPS. A declaration of death was handed in as exhibit "J".

5 Kariem noticed entrance and exit wounds on the patient. They are trained to find these wounds. He confirmed the person depicted on photo 5 and 6 was the patient that he declared dead on 3 July 2014. The accused had no cross-examination for this witness.

10

The next witness for the State was Benedict Terence Hill ('Hill'). Hill testified that he was a member of the SAPS stationed at the Ballistic Section of the Forensic Science Laboratory in the Western Cape. As a member the SAPS he
15 had 12 years' service and had been working in the ballistic section of the Forensic Laboratory for 6 years and 9 months. His duties included identification and examination of ammunition, fired exhibits and firearms. They also do crime scene examinations where they attend crime scenes and
20 process the crime scenes. Part of it is also microscopic individualisation of exhibits. All testimonies and consultations are part of his daily tasks. His position is that of a Forensic Analyst. He underwent 3 years in service training covering all his work, has passed all the training and has been declared
25 competent to exercise his duties. He has been regarded as an

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expert on ballistics. He deposed to an affidavit regarding his examination and findings, which he signed. In regard to this matter he read his affidavit into the record stating amongst others that on 3 July 2014 during the performance of his
5 official duties he examined a silver Toyota Yaris sedan with registration number CA525710 at 24995 N2 Gateway Section 24 Delft in respect of Delft CAS140/07/2014. The intention and scope of his investigations comprised vehicle examination and scene reconstruction photography. He noted various holes
10 appearing in the backrest of the driver's seat, marked A, the centre console also known as the glove box, marked B, entrance and exit holes at the front passenger seat, marked C, a bullet entrance hole inside of front passenger seat, marked D, a bullet exit hole in the side of the front passenger seat,
15 marked C1 and a bullet exit hole in the side of the front passenger seat, marked D1. One fired bullet retrieved from underneath the driver seat, and the bullet retrieved from inside the centre console, was sealed in forensic bag numbers PA50007119000 and PA50007119001 respectively.

20

Upon completion of the observations mentioned above he came to the conclusion that the hole that was found in the backrest of the driver seat was caused by the bullet being fired from the front and outside to the rear of the vehicle from the
25 driver's side to the passenger side with a downward trajectory

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and the end of the bullet path unknown.

The holes appearing in the side of the front passenger seat were caused by the bullets being fired from the rear and
5 outside to the front of the vehicle at the driver's seat to the passenger's side with downward trajectory and the end of the bullet path unknown.

Other holes appearing in the side of the front passenger seat
10 were connected and caused by a bullet being fired from the rear and outside to the front of the vehicle at the driver's side to the passenger's side from a downward trajectory and the end of the bullet path unknown. The damage (the entrance hole) mentioned in the central console or the glove box could
15 be connected to either of the holes caused by the entrance of the bullet in the side of the passenger seat.

The direction and trajectory of the bullet that caused the hole appearing in the centre console could not be determined with
20 certainty.

Hill attended the autopsy performed on the black female by Dr Afonso with reference WC 14/1552/2014 at Tygerberg Forensic Pathology Service on 7 July 2014.

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The intention and scope of this forensic examination comprised the terminal ballistics.

During the autopsy he observed and documented the following:

- 5 1. Multiple wounds with the appearance of bullet entrance and exit wounds on the right arm of the deceased.
2. Multiple wounds with the appearance of bullet entrance and exit wounds on the right and left side stomach area of the deceased.
- 10 3. Multiple wounds with the appearance of bullet entrance and exit wounds on the back and buttocks of the deceased.

The conclusion that can be drawn from the observations made during the autopsy, is that the wounds were caused by shots
15 from the right side to the left side of the deceased.

On 7 July 2014 during the performance of his duties he received 2 sealed evidence bags from case administration of the ballistic section as follows:

- 20 1. One sealed evidence bag with number PA5000711901 containing the following exhibit:
 - 1.1. One 9mm calibre fired bullet marked by him
 128646/14/1.
2. One sealed evidence bag with number PA5000711900
25 containing the following exhibit:

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2.1. One 9mm calibre fired bullet marked by him
128646/14/2.

On 11 July 2014 he received six sealed evidence bags from
5 case administration of the ballistic section, namely:

1. One sealed evidence bag with number PAB000238695
containing the following exhibits:

1.1. One 9mm parabellum calibre Z88 semi-automatic pistol
with serial number Q053330, with two magazines.

10 1.2. Fourteen 9mm parabellum calibre cartridges not marked
by him.

1.3. One SAPS identification card with ID 7809185928089
and parcel number 70629048 not marked by him.

1.4. One sealed evidence bag with number PA6002038139
15 containing one 9mm calibre bullet marked by him
128646/14/3.

1.5. One sealed evidence bag with number PA6002038140
containing one 9mm calibre fired bullet marked by him
128646/14/4.

20 1.6. One sealed evidence bag with number PA6002038141
containing one 9mm calibre fired bullet marked by him
128646/14/5.

1.7. One sealed evidence bag with number PA6002038142
containing one 9mm calibre fired bullet marked by him
25 128646/14/6.

1.8. One sealed evidence bag with number PA6002038145 containing three 9mm calibre fired bullets marked by him 128646/14/7-/9 individually.

5 The intention and scope of the forensic examination comprised:

1. The examination and identification of fired bullets;
2. Firearm mechanism examination;
3. Microscopic individualisation of fired bullets.

10

He examined and visually inspected the cartridges and found that they each consisted of a cartridge case primer and bullet and were designed and manufactured to be fired a centre fire firearm.

15

He examined and tested the pistol and found that it functioned normally without any obvious defects. Ammunition used for test purposes was marked as 33OTC1 and 33OTC2 on the cartridge cases and 33OTP1 and 33OTP2 on the bullets and
20 was fired in the pistol. He examined and tested the mechanism of the pistol and found it to be self-loading but not capable of discharging more than one shot with a single depression of the trigger. He also found that the device was manufactured and designed to discharge centre fire
25 ammunition.

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He examined the fired bullets and compared the individual and class characteristic markings transferred to them by firearm components during the firing process, using a comparison
5 microscope and found the bullets were fired from the firearm.

The conclusions arrived at were based on facts established by means of an examination process which required knowledge and skill in forensic ballistics. On 11 July 2014 he sealed the
10 exhibits in the evidence bag with number PA5000159242K and filed it in the case file with lab 128646/14.

Exhibits and the test mentioned were sealed in an evidence bag with number PA5000159235 and filed in the case file with
15 lab 128646/14.

The exhibits were sealed in an evidence bag number PW4000438051 and handed over to the case administration of the ballistic section.

20

He retrieved the fired bullets underneath the driver's seat. With the exhibits there is normally a covering letter attached to the evidence bag and the investigating officer's particulars are usually on there. He is not certain who brought the exhibits
25 but there was a covering letter with the exhibits that were

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forwarded to the laboratory in Platteklouf.

He was referred to a letter handed in as an exhibit "L" which he confirmed to be the letter accompanying the exhibits. He was not sure who wrote the letter but it appeared that the letter was signed on behalf of the investigating officer by a person with the name of Lamla Tyhahlisu. He also deposed to an affidavit which he read out in court as part of his evidence. In the affidavit he stated that he received a sealed bag with number PA3000904653 from the case administration of the ballistic section containing a number of items, being:

- 1.1 One 9mm parabellum calibre fired cartridge case marked as 128646/14/CS1.
- 1.2 He received sealed bag PA5000659887 containing one 9mm calibre fired bullet marked by him 128646/14/CS2.
- 1.3 He also received one sealed evidence bag number PA5000659886 containing one 9mm parabellum calibre fired cartridge marked by him 128646/14/CS3.
- 1.4 There were various other 9mm fired bullets that he referred to and cartridges. It is not necessary to go through each of them because the evidence was not challenged by the accused and it is apparent on the record.

The intention and scope of this forensic examination comprised the examination and identification of fired cartridge cases and fired bullets and microscopic individualisation of fired cartridges and fired bullets.

5

On 28 July 2014 he found in ballistic case filed with lab 128646/14 also with Delft CAS140/07/2014 and a sealed evidence bag with number PA5000159235M containing two 9mm parabellum calibre fired cartridge cases marked 33OTC1
10 and 33OTC2 respectively and three 9mm calibre fired bullets marked 33OTB1, 33OTB2 and 128646/14/1 respectively.

He examined the fired cartridge cases and fired bullets and compared the individual and class characteristic markings
15 transferred to them by firearm components during the firing process using a comparison microscope and found the cartridge cases mentioned were fired in the same firearm as the test cartridge cases. The bullets were fired from the same firearm as the test bullets.

20

The conclusion was established by means of an examination process which required knowledge and skill in forensic ballistics.

25 The exhibits and tests were disposed on 30 July 2014 where
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the exhibits were sealed in an evidence bag with number PA50001592218 and filed in the case file with lab 128646/14. On 30 July 2014 the test and the exhibits were sealed in an evidence bag with number PA50001592221 and filed in the
5 case file LAB 128646/14.

The exhibits comprised of 15 fired cartridges and 4 fired bullets. The 4 fired bullets could have been together as ammunition, bullets in the cartridge cases. The bullets were
10 fired by the firearm, but before they were fired they could have been together as ammunition components, but all of them were fired from the same firearm.

He came to the conclusion that the 19 exhibits that he
15 received, the firearm cartridge cases and the fired bullets, were compared with the test he made on exhibit "K" and they were fired from the same firearm.

The firearm that he received, examined and investigated was a
20 9mm Z88 semi-automatic pistol according to the description in exhibit "K". This firearm is mostly used by members of the SAPS. When it is loaded, a magazine can load 15 cartridges and if one loads that magazine into a weapon one can also load one round into the chamber of the weapon. So in total a
25 fully loaded firearm under normal circumstances can have up

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to 16 rounds ready in the firearm to fire. If it is proven that there was only 1 firearm and 2 magazines on the scene, then he would agree with the question that was put to him by the prosecutor that if a firearm carries 15 rounds, the fired
5 cartridges that were collected could have been fired from the empty magazine that was found next to the firearm.

He could not say whether all the shots were fired from the specific magazine at once but it was possible. The accused
10 did not have any cross-examination for this witness.

The next witness for the State was Bongeka Mhambi ('Mhambi'). Before the commencement of this witness' evidence the prosecutor indicated that he would apply to the
15 Court for the admission of hearsay evidence in terms of the Law of Evidence Amendment Act 45 of 1998 ("The Law of Evidence Amendment Act") Section 3(1)(c), in respect of evidence of certain of the witnesses he would like to call. I ruled that such evidence must be dealt with as and when the
20 State sought to lead the evidence of the particular witness. Save to state that having enquired from the accused and having explained the requirements of the law with regards to the admissibility of hearsay evidence, he indicated that he had no objection to this witness, Mhambi, being called, because
25 she was well acquainted with the relationship between the
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accused and the deceased and would reveal exactly what took place. I decided that the State should address me on the admissibility of this evidence in view of the fact that the accused was not legally represented. I still required that the
5 State should satisfy the Court that it was in the interest of justice that this evidence be admitted. The Court provisionally allowed the evidence with the view to allowing the State to satisfy the Court that all the requirements in terms of the relevant section 3(1)(c) had been met at the end of the State's
10 case. I deal more fully with the issue of hearsay evidence later in the judgment.

Mhambi testified that the deceased was her friend and her manager at the Refugee Centre at Home Affairs. They met in
15 2010 when Mhambi came to Cape Town. She knew the accused because the accused was her friend's boyfriend. According to her knowledge the relationship between the accused and the deceased started in 2010. She came to know about this relationship because she was informed by the
20 deceased of a young man that she was in a relationship with. She first saw the accused in 2010 when he came from work. They met at the KFC where they picked the accused up with the deceased's vehicle. The deceased told her that she looked up to the accused. The accused and the deceased
25 stayed together at Kensington from 2010. According to what
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she was told by the deceased their relationship started off well. Mhambi stayed in Bellville while the deceased lived in Kensington. She would normally get a lift from the deceased who would drop her off in Kensington and then she would take
5 a taxi home. Before catching a taxi they would sit together and talk for about an hour and from there she would go home and then meet the deceased the following day. The deceased informed her that the accused would complain about why it took her so long for her to get home, questioning how long it
10 took from Maitland to Kensington. The deceased informed her that the accused told the deceased that she valued friends more than him. In 2011 the deceased fell ill and she landed up in hospital. Mhambi met the accused at the hospital a couple of times until the deceased was discharged. The accused and
15 the deceased continued with their relationship and they still stayed together at Kensington. In 2012 they moved to Delft. During the course of 2012 they would have their arguments and the accused left Delft towards the end of 2012 to live at the barracks in Pinelands.

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An example of their arguments happened when a relative of the accused passed away in the Eastern Cape. They wanted to go to the burial with the deceased's vehicle. They first had to service the vehicle before they left and the accused had
25 promised that he would pay to have the vehicle serviced. The

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deceased informed the accused that since the kilometres were close to have the vehicle serviced for free at a Toyota dealership, he did not have to pay. They left for the Eastern Cape without servicing the vehicle with the deceased saying
5 that she will only service the vehicle when they returned. The accused gave money that was to be used to service the vehicle to the deceased and when they came back from the Eastern Cape he had no money with him. It is then that the argument started that she did not support him at the stage when he had
10 to go to the funeral. The deceased told her that the accused insulted her saying she was evil. This incident took place in 2012. There is a stage where the accused went to their workplace in 2012 when they were about to knock off from work. As she was already out of work she heard someone
15 calling her and it was the accused standing next to the Avanza. She learnt from the deceased that the reason the accused had moved out was because of the arguments that they normally had.

20 When the accused came to the workplace in 2012 he inquired from her where the deceased was. She informed him that the deceased had left the workplace earlier because she had to go to the Eastern Cape. The accused informed Mhambi that he was going to take Mhambi home. Whilst they were on their
25 way back home he informed her that he had caught her friend,

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the deceased, with a man at their house. She then enquired from the accused about what the accused saw the deceased doing with this man because according to the deceased the man was just a friend of hers. The accused informed Mhambi
5 that her friend had not told her the truth.

In 2013 she was told by the deceased that the accused punctured the tires of her vehicle. She came to know about this because the deceased would drive from Delft to Parow to
10 pick her up for work. The deceased told her she had to take a taxi to work because the tyres of her vehicle were punctured. The deceased told her that she suspected the accused because the accused wanted to get her stressed out. The accused had been complaining about the man he found with
15 her in the house stating that he did not believe that the man was not her boyfriend. At one point, the deceased sent Mhambi pictures of her legs on the phone. She asked the deceased what had happened and the deceased told her that the accused assaulted her by trampling on her legs during an
20 argument about the boyfriend.

The deceased informed her that she was afraid that if she went to the doctor a case might be opened and she was reluctant to do that. The deceased did not open a case but went to work
25 with pants on so as to hide the injuries from their colleagues.

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One day as they were at work the accused went to their place, Mhambi just greeted and left with the deceased. This was in 2013 after the assault had taken place. When the deceased came back from meeting with the accused she informed
5 Mhambi had that the accused had come to apologise to her.

Still in 2013, the deceased informed her that the accused had gone to see her at their home to show her documents that he wanted to be transferred to the Eastern Cape but that he was
10 not being given the transfer that he wanted. According to the deceased, the accused handed his firearm to her and told her that the best thing was for her to kill him. The deceased informed Mhambi that she did not take the firearm; the accused then left.

15

One time the accused arrived at their house Mhambi was there. He was still dressed in police uniform. The accused had something in his hand like a file.

20 He wanted to speak to the deceased. He walked past and went to the bedroom. At this stage Mhambi and the children were watching TV whilst the deceased was busy cooking. The deceased did not follow the accused immediately. The accused stood at the door of this bedroom and told the
25 deceased "I wanted to speak to you".

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The deceased then went to the bedroom, Mhambi heard the noise as if someone was calling her. She dropped the volume of the TV and listened but could not hear anything. She heard
5 something like a commotion as if people were fighting. She peeped through the bedroom door because it was not closed. She found the deceased lying on her back and the accused on top of her, holding her. The deceased asked Mhambi not to come in because the accused was trying to commit suicide and
10 that Mhambi should go and call members of the public. The deceased told Mhambi that she had shoved the accused's firearm under the bed and she could feel that he was going to overpower her.

15 As Mhambi was about to go and call for help a young man approached and she asked him to come and assist. The deceased followed her to a neighbour's house. At the neighbour's house they closed themselves in the bedroom and called the police. They only went out of that house after they
20 heard that the police van had arrived. The police wanted to know what was going on and they explained to them that the accused wanted to commit suicide. They then wanted to know where he was and Mhambi told them that he was still inside the house. The police called the accused and he came out.
25 This incident happened in 2013. After that incident the
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accused went home to the Eastern Cape. The next morning Mhambi and the deceased went to the accused's workplace in Bellville to speak to a person by the name Butsi or Butho because the deceased wanted advice on what she could do
5 because she did not want to open a case against the accused. They did not find the person that they were looking for.

In 2014 the deceased called her and informed her that she had locked herself inside her bedroom and the accused was there.
10 She asked Mhambi to call the police. Mhambi called the police and they went to the deceased's house. According to the deceased after the police had arrived at the house the accused left. At some stage in 2014 she received a phone message from the accused informing her that her friend was filthy in that
15 she infected him with AIDS. She did not answer him back; she only showed the message to the deceased's sister. She knew that the friend the accused was referring to was the deceased because the friend he would talk about when he spoke to her was the deceased.

20

Mhambi went to stay with the deceased at the deceased's house in March 2014. They stayed there together and the deceased informed her that she was afraid of the accused and had taken the decision to obtain a protection order against
25 him. In June she and the deceased went on leave at the same

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time. When they returned from leave the deceased had to go to court for the protection order, if her memory served her well that should have been on 3 July 2014. The deceased had a temporary protection order at the time or an interim protection order and the deceased informed her that she had to go to court again. She came to know that the protection order was against the accused. The day before she had to go to court the deceased told her that she just had a gut feeling that the accused was going to kill her and he would kill her in court.

10 She informed the deceased that the accused will never have guts of doing that in front of the public because there would be witnesses. She then wanted to know from Mhambi what they were going to do with the children, (i.e. the deceased's two children). Mhambi told the deceased that she must make a will so that they would know what they should do with the children.

15 The deceased said no, she was not going to make a will at all, people that are left behind will see what to do with the children. On the day that the deceased had to go to court Mhambi received a call informing her that the deceased was shot. In cross-examination Mhambi testified that when she met the accused for the first time she did not know where he lived permanently. It was the deceased that told her that she lived with the accused at 10th Avenue in Kensington. The deceased had informed her that the house was hers. She had visited the

20 accused and deceased in Kensington. When she first met the

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accused he appeared to be a very supportive person towards his partner.

She made a statement to the police when they visited her at
5 the workplace. She confirmed that the signature that appeared
in the statement was hers. A police officer took a statement
from her and wanted to type it; he came back and read it to
her. The accused asked Mhambi about a scratched out section
that was contained in her police statement. She answered that
10 a typed statement contained a part that differed from what she
told the police. They scratched it out to correct it and she had
to initial that portion. Having been questioned about the
statement the witness stated that she was informed by the
deceased that the accused had gone to her house and they
15 argued but she did not inform her what the argument was
about and that the accused assaulted her. The accused put to
the witness that he was dissatisfied with the part of the
statement that was scratched out because he did not
understand why the police would type something that was
20 different to what Mhambi told them. The statement of Mhambi
was handed as exhibit "N".

Mhambi testified further that she had no knowledge of any
stage where the deceased and the accused broke their
25 relationship. She did not know what triggered the text

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message from the accused that her friend was a whore and had infected him with AIDS. She did not know the reason why the accused sent such a message. He never told her. The deceased was assaulted in 2013 and there were messages that were sent to the deceased by the accused and the deceased would inform her about those messages. When asked about what she meant by the word 'dumped' which appeared in her statement, namely, "Lindani was being dumped by Busiswa"; she responded by saying that the deceased told her that when the accused moved to the barracks he informed her that the distance would actually allow her the freedom that she needed and it would have been over between them. She never heard anything about breaking up. She did not know about any text message that the accused sent to her directly after he allegedly found out about the deceased's unfaithfulness towards him. She conceded that the deceased told her that she was not afraid of the accused. It was put to her that the reason that the deceased mentioned that she was not afraid of the accused was because the accused had not yet known the names of her boyfriends which the deceased slept with in the accused's house. Mhambi testified that she had no knowledge of what the accused knew about the deceased's conduct. When Mhambi was being driven by the accused from her workplace, the accused told her that he caught the deceased with a man "romancing", the accused told her he caught this

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young man with his head between her legs. She could not remember what her comment was when he told her about this but she initially said that she had no knowledge of that. In her police statement Mhambi mentioned that the accused's firearm
5 was taken from him due to the abuse by the accused. She elaborated on this issue by stating that the deceased told her that someone from Pretoria came and took the accused's firearm. It was put to her that that information was incorrect. The accused mentioned that his firearm was taken because he
10 submitted his sick note from the doctor that cited stress and that had nothing to do with the deceased. The accused put to Mhambi that he was confronted by the deceased regarding the issue of the tyres in 2014, Mhambi mentioned that she heard about the incident about the tyres being punctured in 2013. It
15 was also put to her by the accused that the accused told the deceased that it must have been her boyfriends that she had been sleeping with in his house that must have been fighting with her there. Mhambi testified that the deceased mentioned that it was the accused, although she did not see him
20 puncturing the tyres.

Mhambi testified further that the deceased had informed her that whilst they were living together, the accused paid the rent whilst she was buying groceries. This was apparently an
25 arrangement that the parties had agreed upon. She was

however informed by the deceased that the house that was in Delft was bought by the deceased; the deceased did not count the accused in on that. It was put to her that the accused co-owned the house with the deceased by virtue of his
5 contribution towards the renovation of the house and the household in general. Ms Mhambi responded by saying that the person who could answer as to why she saw the house as hers was the deceased.

10 She could not comment on the allegations that the deceased continued to build a house at her Eastern Cape home whilst the accused was paying the rent for them in Kensington thereby progressing her home while the accused was being used to pay the rent in Cape Town.

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She testified that the accused, having observed the mistakes that he mentioned about the deceased, he should have left her. She was informed by the deceased that at one stage, the deceased had opened a case against the accused which she
20 withdrew, if her memory served her well. That she should not be confused with the application of the protection order. She was challenged about what she meant in her written statement when she said that the deceased later told her that she was afraid of the accused as the abuse was escalating, she stated
25 that the abuse she was referring to was the assaults by the

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accused. She confirmed that she received a message from the accused that her friend had infected him with AIDS. She could not recall a message from the accused stating that she thought that the accused would not find out about the deceased's
5 unfaithfulness. The accused found it strange that Mhambi could not remember this message. When asked about why the deceased wanted the accused to be disarmed she stated that it was because the deceased was afraid because she did not know what the accused would do with the firearm. She only
10 heard about the HIV issue from the accused. She showed the deceased the message that came from the accused about her HIV status but the deceased did not comment. If the deceased knew that she was HIV positive maybe she did not want her to know about her status as she did not mention anything about
15 it.

The deceased told her that the accused at one point went to her house. When she did not open the door he went to knock at the window. When she did not open he broke the window.
20 She had no knowledge about the accused's suspicions that there was a high possibility that the deceased was with one of her boyfriends that she used to sleep with in the house and hence she did not open. She mentioned that the person who would be able to answer that was the deceased.

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She also could not answer on the allegation that the deceased never loved the accused but was using him. She once again stated that the only person who could give that answer was the deceased. She repeated by stating that the deceased never
5 mentioned the word 'dumped' to her but said that maybe now that the accused had gone to live at the barracks he was going to leave her alone.

When asked to clarify what she meant about what she was
10 referring to in her statement when she said the accused became jealous of the deceased, she mentioned that it was at the stage when the deceased informed her that the accused was asking her why she came home late and how long it took from work in Maitland to Kensington. She never heard of the
15 accused lying in hospital because of the abuse that he allegedly received from the deceased. She confirmed that she only knew the relationship between the accused and the deceased from the deceased's point of view and she only knew what she was told. The deceased mentioned to her that she
20 had made an application for an order against the accused but she did not tell her what was stipulated in that order or what the conditions of the order were. Mhambi confirmed that she did mention in her written statement that:

25 "..."when the abuse was continuing, even after she was

dumping him she decided to apply for an interim against him. On the day she passed away, she was at court following the interdict process."

5 She testified that the abuse she was referring to was the assault which she conceded took place in 2013. She was unable to confirm whether there were any other assaults closer to the time or leading to the deceased applying for an interdict against the accused. She did not remember the deceased
10 mentioning to her in 2014 that she was assaulted. The continuation of the abuse that she mentioned in her written statement related to the 2013 assault. She conceded that the reason for the deceased applying for the interim protection order was not for the continuing abuse as she mentioned in her
15 written statement. She however maintained that she did not know the reason why the deceased had applied for the interdict.

She conceded that when the deceased lay in hospital the
20 accused was the person who called everyone pertaining to the deceased's situation. The accused put to her that as a friend of the deceased, Mhambi should have spoken to her friend and advised her about things that she was doing wrong and that could have avoided the situation that the accused finds himself
25 in. Mhambi testified that she did not understand why the

accused was blaming her. Furthermore the deceased had not relayed things to her in the manner the accused was putting to her in court.

5 The next witness of the State was Nomvuyo Centane ('Centane'). The State advised the Court that this witness would also lead hearsay evidence in the same manner as the previous witness Mhambi. The Court ruled that her evidence will be dealt with in the same manner as Mhambi's evidence.

10 Centane testified that she was employed by the Department of Home Affairs. The deceased was her younger sister who came right behind her. She knew the accused in this matter because he was her younger sister's partner. Their relationship started in 2010. Her sister, the deceased, was married and had

15 problems in her marriage. Her husband would assault her and come home late. She was informed by the deceased that whilst the deceased was still in her marriage she and the accused would call each other. The deceased told her that she and her husband stayed in separate bedrooms. She

20 informed her that the accused advised her to get out of the marriage because she would be in danger. The deceased then left this marriage. She went to stay with the accused at a flat in Kensington. Whilst they were staying at the flat in Kensington they had their own personal arguments. When they

25 had these arguments the accused would leave and go to the

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nearest police station. She was not present when these arguments were taking place in Kensington but her sister would tell her about what had happened. Whilst they were having arguments they would quarrel, raise their voices and
5 mostly it was about the motor vehicle that belonged to the deceased. The deceased would argue that the accused could not just take the vehicle without her permission. She however could not remember each and every argument that they had. When the relationship started it started well. It was on and off.
10 They stayed together at Kensington and from there they moved to Delft to rent. And that was in 2011. Whilst they were renting at their house in Delft they also had arguments. There was a stage when the deceased informed her that the accused had to go to a funeral of his relative in the Eastern Cape. He
15 then borrowed her motor vehicle and money. According to the deceased she refused to give him money informing him that she had no money. He then asked her how she could say that she did not have money when he had been paying rent for the flat. He said that he knew that the deceased had money in the
20 bank. The deceased informed her that she informed the accused that the vehicle that she had given him was enough. After their trip to the Eastern Cape the deceased and the accused continued staying together.

25 In January 2011 the deceased fell ill and was admitted at the

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Melomed Hospital in Bellville. Whilst the deceased was in hospital, the accused was very supportive. The deceased was in a coma for about two weeks. One would have thought that the accused was working at the hospital because he would just
5 report for duty at his work and go straight to hospital. Her family would hear everything about the deceased's condition from the accused. The accused made his own investigations and wanted to find out from the doctor what was wrong with the deceased. The doctor informed him that he drew blood
10 from the deceased and found that she was HIV positive. After the deceased was discharged from hospital the accused inquired from her why she did not inform him about this. According to the deceased she informed him that she was not yet ready to tell him or talk about it.

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The deceased told her that she informed the accused to use a condom and he refused. The deceased further informed her that the accused went to test himself and found out that he was negative. According to the deceased the accused
20 informed her that he will never sleep with a person whom he loves using a condom. According to the deceased she and the accused stayed together and never used a condom.

In the middle of 2012 the accused and the deceased had
25 arguments because the accused suspected that the deceased

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had affairs. He did not want any friends close to her. The accused would tell her that she valued friends more than him. He would also say she would go to Mzoli's Place and leave him behind at the house. The accused left and went to stay at the police barracks. The deceased said she was quite happy about him moving out as she thought the relationship would work well if they no longer stayed together. She did not know what circumstances led to the accused moving out of their common place. The deceased told her that maybe the arguments would cease to exist if the accused was no longer there. The accused continued to stay in Pinelands but according to the deceased he would go to her at night. According to the deceased he wanted to find out whether there was no man around at her place. Towards the end of 2012 the deceased told her that she was separating from the accused because she had had enough of him. She had had enough of the way that he was treating her. The deceased also wanted a transfer, even if it was at the same level, because she wanted to get away from him. She tried applying in Durban but she was not successful and in the Eastern Cape as well but she just wanted something that would move her out of Cape Town. When asked whether by separation she meant termination of the relationship or just taking a break from the relationship. Centane testified that towards the end of 2012 the deceased had told her that it was over between her and the accused, she

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had had enough. She does not know what happened but in 2013 the accused and the deceased were together again for a while. She thinks it was for about a month or less. At that time the deceased informed her that she had forgiven the accused.

5 The deceased and the accused separated again and they never went back together. She was told by her sister, the deceased, that there was no peace in their relationship because most of the time they were arguing. The deceased informed her that the accused would call her a whore and that
10 they would not just separate because he came to Cape Town because of her. He also would inform her that she had AIDS and that she had infected him. According to the deceased he also informed her that if she was not in the relationship with him then no other person would get her. Although they were
15 separated in 2013, the accused did not stop insulting her; he would send her messages, some of which the accused would send to Centane. She could not remember the content of all those messages but they were along the lines that the deceased was a whore and that she had infected the accused
20 with AIDS and that she had used him. The accused sent these messages to her.

Still in 2013 the accused assaulted the deceased in front of the children. He trampled on her leg with boots and it turned
25 green to black. He did that on her face as well, close to her

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eyes, which had a blackish mark. The deceased called her and informed her that she was assaulted by the accused. At the same moment the accused called her and informed her that he was on his way to her and that the deceased was on her way to open a case against him. The accused came to fetch her with his own vehicle and she went with him to Delft. When she got to Delft she could see her sister's leg was swollen and black and she could hardly walk. She wanted to know from the deceased what happened because she wanted to hear her side of the story. The deceased informed her that as usual the accused came there and insulted her and she did not keep quiet, she responded back, insulting him as well. He then assaulted her.

15 The deceased further informed her that she was going to withdraw the case against the accused - apparently she had laid a charge against him. Centane then left Delft. Her sister informed her approximately the next day or two that after the incident she had withdrawn the case. The deceased informed her that the accused's relatives had gone to her from Langa. They apologised and begged her to withdraw the case because the accused was a breadwinner. The deceased said it was not her intentions to let the accused lose his job because she was also aware that the accused was a breadwinner.

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Still in 2013 the accused called the deceased into the bedroom. The deceased's younger daughter was very close to the accused. When the deceased was called into the bedroom by the accused this younger daughter followed. According to
5 the deceased whilst in the bedroom the accused told her to kill him and he showed her the firearm; the deceased refused. After that the accused informed the deceased that he was going to commit suicide and he was going to do that in front of her. He said people and relatives would want to know what
10 happened and this would remain with the deceased for the rest of her life and she would never forget about it. The deceased informed her that the accused took the firearm and placed it in his mouth. The deceased then struggled with him because she wanted to remove the firearm from him. At the end she was
15 able to remove it from him. The firearm fell onto one side and the deceased was able to run away with Mhambi, who was also present. Mhambi and the deceased ran and locked themselves in the neighbour's bedroom. She did not know who had called the police between the two of them but the police were called
20 and they came. She did not know what the police did but the accused left. The younger child was present when this happened. The child mentioned to her teacher at crèche that her father had a firearm which he placed in his mouth. The deceased informed her of what the teacher said. The teacher
25 then informed the deceased that this was domestic violence

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and that she could not leave things to happen like that. All this information she heard from the deceased.

In 2014 the accused would call the deceased but she would
5 refuse to answer his calls. If she did not answer his calls he would send her rude messages and that was a continuing thing.

Another incident took place in 2013 when the accused and the
10 deceased were living together for a short period. According to the deceased the accused slept over at the house and requested the deceased to accompany him, but she refused. The accused left and then came back. On his return the door was open and he came in. At that time she was seated in the
15 company of another young man and they were sitting on the couch. The accused also informed Centane about the young man that he had found at the house. According to the accused the young man had an affair with the deceased and the deceased informed her that it was not the case, the young
20 man was just a man that she knew. The accused told her that the young man was about to lick the deceased because his tongue was out and the deceased had opened her thighs. The deceased denied that. The accused said this was the deceased's boyfriend. He insulted her saying that she was a
25 whore.

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Still in 2013, at some stage the accused called his neighbour and opened the drawer showing him pills whilst insulting the deceased saying that she had AIDS, that she was sick and was
5 hiding her ailment. At that stage there was no relationship at all between him and the deceased. He continued insulting her stating that he had come to Cape Town because of her and she had infected him with AIDS and he rented the flat with her whilst he was paying less money than her.

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In 2013 the accused sent Centane messages that he was sending to the deceased. He would insult her and at times he would call Centane until his airtime was finished. During those calls he would complain to her about the deceased. This issue
15 (the sending of the messages) happened in 2013.

Messages that were sent by the accused in 2014 were even more or less the same as in 2013 where he would insult the deceased accusing her of infecting him with AIDS and that she
20 was a whore and that she had used him and that he regretted meeting her because if he did not meet her he would have finished building the house at his homestead.

In 2014 the accused stopped reporting to her as he did in
25 2013. She then told the deceased:

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“There is something that he wants to do, this person might kill her.”

5 At some stage in 2013 the accused had been knocking on the window and the deceased did not open. He knocked at the window until it broke and that was the bedroom window where the deceased normally slept. The deceased woke up with the broken window and suspected that it was broken by the
10 accused.

In 2014, it could have been towards the end of May or the beginning of June, she visited the deceased. The accused came in without knocking. He came in and started shouting like
15 he would normally do. He said he wanted his money and that she had used him. The deceased told him that he was making a noise. She went into the bedroom whilst he was shouting. The deceased went to the bedroom and locked herself in. The accused did not sit down but stood there shouting. Centane
20 asked the accused what he actually wanted from a person who was a whore. She told the accused that there were so many girls out there and if she was in the accused's shoes she would have left the deceased. The accused did not answer her, he just continued saying that the deceased used him. He
25 spoke about his money and that he came to Cape Town
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because of her. She asked these questions to the accused because her sister had locked herself up in the bedroom. She and the accused were at the front room of the house. While she was sitting there at the house she saw police coming in.

5 When the police came the deceased came out of the bedroom. When the accused wanted to speak to the police, the police told him that he was not the complainant. The accused then went into the toilet but as he was about to get into the toilet the police pulled him. The police wanted to know what he
10 came there to do. The accused said it was his house. The police instructed him to leave. The police informed the deceased to have her doors locked at all times.

During the June holidays in 2014, the deceased left for the
15 Eastern Cape and left the children with Centane. The deceased had a feeling that she could not trust this person because he could also kill the children. Although she worked together with the deceased they did not see each other all the time. The deceased came to her on a particular day and told
20 her that:

“...this man was going to kill her. And he was going to kill her by using a firearm.”

25 She knew about the protection order that was obtained by the
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deceased against the accused for domestic violence. The deceased told her around April or May that she had taken a decision to take out an interdict against the accused. She was told by the deceased that the house the deceased was staying
5 at was bought by the deceased.

In cross-examination she testified that the accused was jealous of his girlfriend and he did not trust himself. Centane was confronted with the police statement that she made. The
10 copy that the accused had did not contain a signature. She confirmed that she had signed the statement immediately after the typed version was given to her. She could not answer how it came about that the accused had received a copy of the statement that did not contain a signature of the deponent.
15 She confirmed that the accused was very generous to the deceased but could not answer the question that was posed to her of why then would the deceased have the nerve to sleep with boyfriends in the accused's house. According to her that was for the deceased to answer, because Centane did not live
20 in Delft.

She was asked whether an abusive man would leave a woman in a house and go and sleep in garages or other places because of being insulted by her, as was mentioned by
25 Centane in her police statement. Centane responded by
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saying that she would not be able to answer that as she never caught the deceased sleeping with a boyfriend in the accused's house.

5 Centane disputed that the house the deceased lived in belonged to the accused. It was put to her that the accused lay in hospital in 2010 due to severe depression resulting from the abuse from the deceased. She answered that she could not remember that and was hearing it for the first time that the
10 accused was being abused. She confirmed that she was told by the deceased that she insulted and swore back at the accused because he swore at her. She could not answer about financial commitment issues between the deceased and the accused as that was an issue between the two people.

15

She did not know when the accused met the deceased. She confirmed that the accused came to complain to her about the deceased a number of times. She could not remember the accused telling her about the deceased being secretive after
20 the accused had told her about his results (that he was HIV negative). The deceased consented when he said that he would not use a condom with a person that he loved. She confirmed having said to the accused how could the deceased trust what the accused had told her as she was also given and
25 shown the same paper by Zukisa (her ex-husband) who

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allegedly infected her with AIDS.

Centane testified further that the deceased had told her that the accused came to Cape Town of his own free will and voluntarily. She confirmed that she knew that the deceased was HIV positive before the accused came to Cape Town. Upon being asked whether she asked the deceased whether she had told the accused about her status, she responded by saying that she did not say anything because it had nothing to do with her and that the deceased was not a minor, she was an adult and it was not her place to tell her what to do. She testified that as an adult when one meets someone and they do not know where that person had been, one would use a condom to protect themselves. She did not know what the accused's status was when the accused met the deceased because she is not a doctor. She was challenged about mentioning in her statement that the accused kicked the door open when she was at the deceased's house. She testified that it was a typing error. She had written her statement and it came back typed. She was challenged that in her evidence in chief she had mentioned that the accused came in. She did not mention the kicking of the door. She denied that she ever said that the accused was obsessed with the deceased and was hearing it for the first time. The deceased went to lock herself up in the bedroom because she did not want to listen to the

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accused. She was told by the accused that he found the deceased wearing a nightie with another man. The deceased told her in the presence of the accused that the accused called a neighbour by the name of Request showing him ARV pills
5 from the drawer and the accused did not deny that. When it was put to her that the deceased insulted the accused's entire family saying that some members of the family were running mad, Centane stated that the deceased had no right to insult the accused's family nor did the accused have a right to insult
10 her about her HIV status. The accused told her that he caught the deceased with another man sitting on the couch about to lick her. She did not know about the alleged unfaithfulness of the deceased as she did not stay with her nor was she told by the deceased that she was unfaithful to the accused. The
15 deceased was scared of the accused because he was dangerous and she was trying to move away from him and even tried to apply for a transfer to the Eastern Cape which was unsuccessful. She conceded that when the accused mentioned to her that the deceased was abusive towards him,
20 she said that the deceased had never healed from the previous abusive relationship and when she looked at the accused she saw her ex-husband, Zukisa, who so much abused her. She further testified that she even mentioned that if it were her, she would not have moved into another relationship as quickly
25 as the deceased did. When asked about why she would then

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say the accused was a dangerous person, she responded by saying that the accused assaulted the deceased in front of the children and even threatened to kill himself. According to her, the accused could have gone elsewhere where he could be treated better and should have left the deceased. She had no knowledge of any meeting where the deceased's family sat down and discussed that the firearm of the accused had to be taken away from him. She denied that she strategized with the deceased in order for her to go and apply for an interdict against the accused. Even if that were the case, which she denied, it did not give the accused the right to do what he did to the deceased. In fact the deceased never wanted to go and apply for an interdict as she said that it would not assist because if the accused wanted to kill her he would kill her. She also said she would not have security people walking around with her so that she could be protected and that even if she obtained the interdict the accused would kill her as he had said he was going to kill her. The accused denied having said this to the deceased. The deceased told her that the accused threatened her on various occasions that he was going to kill to her. She phoned the deceased at one point and told her that the accused was quiet and must be thinking something. The accused complained to her about the deceased not wanting to be sexually involved with him. She replied by saying that there was nothing that she could do as she could

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not interfere with bedroom issues. There was a day that the deceased ran away and went to sleep at Centane's flat saying that she was tired of the accused's threats. At that time the deceased and accused had already broken up and the accused
5 was not living there. The accused always threatened the deceased and always went to her at the house at any time and knocked. The accused enquired as to why the deceased would not apply for the protection order at that stage, if such things happened.

10

The deceased told her that the accused said if he did not have her no-one would. The assaults and the attempts to commit suicide happened at the stage when they were separated and the accused did not want to accept that. She conceded that
15 the deceased was a person who insulted others. She heard from the deceased that she had broken up with the accused.

She conceded further that the accused was very supportive when the deceased was lying in hospital. The accused
20 informed her that he could not continue building a house at his homestead because of the rent that he was paying and he was in financial constraint because of the deceased. The deceased disputed that and told the accused that he could still do what he did whilst he was in Colesberg. She had no
25 knowledge of *lobola* negotiations. She was not informed by

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the deceased neither was she informed by the accused about that. The accused did inform her that he wanted to get married to the deceased. The deceased also informed her about that. That was in 2010 when they were still living in
5 Kensington. According to her, it was also the accused's responsibility to make sure that he was not infected with AIDS by using protection. The deceased informed her that she told the accused to use a condom. She would not dispute that the deceased insulted the accused. The deceased told her that
10 she insulted the accused in response to the insults that she received from him. She was told by the deceased that the accused's firearm was taken from him at some stage. She however did not see the firearm being taken from the accused. She did not know why the firearm was taken but it was not
15 taken because of what the accused was doing to the deceased. It was taken for work related reasons. She heard again that the firearm was returned to the accused. When it was put to her that in her statement to the police she did not mention the things that she stated were told to her by the deceased, she
20 gave a statement as if she directly witnessed or had personal knowledge of what she was talking about. To this she answered that at the time she was not 100% well.

The next witness was Sithembele Gumede ('Gumede').
25 Gumede testified that he is a member of the SAPS and he has
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been for five years. He is stationed at the Bellville LCRC where he processes crime scenes by taking videos, photographs, collecting, packaging and dispersion of forensic material for examination and by taking photos of wounds of the
5 deceased at the mortuary. On 7 July 2014 at 09:11 in the morning, he took photos of the deceased with WC 14/1552/2014 at Tygerberg Mortuary Parow.

The next was Dr Estevao Bernardo Afonso ('Dr Afonso'). Dr
10 Afonso testified that he is stationed at the Faculty of Sciences at the University of Stellenbosch where he is employed as a consultant specialist forensic pathologist. He is affiliated with the Forensic Pathology Services of the Western Cape where he conducts his duties at the Tygerberg Mortuary. He has
15 done in excess of 2 000 post mortems. On 7 July 2014 at 08:00 a.m., he examined a body of a female which was pointed out to him by forensic pathology officer, W Claassen, who identified the body as WC 14/1552/2014, whose age was reported to be 37. The individual had been declared dead on 3
20 July 2014 at 11:18. There were 42 gunshots on the body, including entrance and exit wounds. The wound tracts travelled from the right to the left. Seven projectiles were recovered, three from the clothing and four from the body. Internal injuries included bowel perforation, laceration of the
25 kidney and fracture of the forearm, pelvis and the tenth rib
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were noted. The colour of the internal organs, which were pale, was consistent with blood loss. He concluded that the cause of death was multiple gunshot wounds. Three loose lying bullets were recovered from the clothing and they were retained as evidence. Fourteen wounds were present on the right forearm which represented seven perforating gunshots to the limb. This means the weapon was fired seven times, so seven bullets entered the arm and exited. The wounds were measured at 6 and 7 millimetres. Two wounds were observed in the right lateral abdominal wall approximately in the posterior axillary line. Another wound in the right lateral abdominal wall in the axillary line. Five wounds in the right lateral aspect of the pelvis. Six wounds in the right anterior abdominal wall, wounds on the chest abdominal wall, right lower back and three exit wounds on the left hip. Six exit wounds on the left buttock. Two gunshot wounds that went through the tenth rib laterally and fractured - or broke - the tenth rib. The force of the gunshot injured the right lung causing the bruise on the lung and resulting in a little bit of blood within the space around the lung. There was approximately 100 millimetres of blood in the abdomen as a result of injuries. There were twenty three injuries in the small bowel, seven within the firm tissue and two on the ascending part of the colon, two in the rectum. Pelvic walls were fractured. One gunshot injured the uterus.

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The wounds in the abdomen and pelvis with the round shape he interpreted as being from direct shots. The ones that looked irregular and larger in size he interpreted as being re-
5 entrance wounds. Some of the seven wounds that entered and exited through the arm re-entered the body through the pelvis and the abdomen. Given the extensive nature of the wounds, even if the deceased received immediate surgical treatment, Dr Afonso doubted that the surgery would have had a positive
10 outcome.

The last witness was Bongani Mxoli ('Mxoli'), who worked for the Independent Police Investigative Directorate ('IPID'). The accused's case was allocated to him as an investigating officer
15 in February 2015 because the previous investigator, Mr Tyhalisisu was off sick. Mr Tyhalisisu passed on early in 2015. He collected the post mortem, the chain statements and took statements from the sister of the deceased, two colleagues of the deceased and other contents of the docket.
20 The sister of the deceased, Centane, gave him handwritten notes she said were from the accused. He subpoenaed the witnesses but could not get hold of two witnesses, Arthur Khanyile and Jeremy Claassen, who no longer worked at the Tygerberg Hospital Mortuary. He served the accused with
25 further particulars of the docket. He did not go through the

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contents and so did not know how one of the copies of the statements received by the accused was unsigned. All of his were signed. He gave the accused time to go through the docket and the accused said he was satisfied.

5

In cross-examination he testified there was no error in the statement taken from Centane. Centane made the statement to him as if it was her direct version and not from someone else. He investigated this case only, and not any other cases
10 against the accused.

Before the close of its case the State brought two applications to get the hearsay evidence, as well as the utterances by Fredericks which I have already referred to, admitted as
15 evidence. Fredericks was recalled at the conclusion of the State's case as already indicated. I return to the issue of the admission of hearsay evidence later in the judgment. That concludes the summary of the State's case.

20

The accused informed the Court that he elected to testify and to also call witnesses after the Court explained his rights, including his right to remain silent.

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DEFENCE CASE:

The accused commenced his evidence by reading a document titled '*Love Life*' or '*Life of Love*'. He was not sure what prompted him to write this document. The document details
5 his relationship with the deceased. I do not intend to go into the detail of what is contained therein as all of it is on record and largely accords with the rest of the accused's testimony. I may to the extent necessary refer to certain aspects of the document during the course of my judgment.

10

The accused testified that he met the deceased sometime in August 2006 in Philippi. He had just progressed from the Police College. He remembers the date because he was about to go to the station he was allocated to in Namaqualand. He
15 approached the deceased like a gentleman and showed interest in her. He asked for her telephone numbers which she gave. He started calling her that same evening and gave her his telephone numbers. They could not meet again as he had to report to work in Namaqualand. He went to Namaqualand
20 and they continued calling each other. She also seemed to show interest in him. They became distant lovers as she was working in Cape Town. They met once at his brother's place in 2006 in Cape Town. In or about August/September 2006, the deceased called to tell him that she was getting married. He
25 was shocked because he already loved her from their

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telephone conversations, although they were not physically engaged. Their communication ended. In 2008, he got a transfer to be closer to home in Kuyasa Police Station in Colesberg. At the time he was busy building his home in the Eastern Cape. Sometime in April 2009 he went home to monitor progress of the building. He received a Please Call Me text message from the deceased's number. The deceased was no longer on his contact list but when he looked at the number, it looked familiar. When he called the number he recognised her voice. She told him that she was coming from hospital after giving birth to her daughter Aqhama, with her then husband. She told him that she and her husband were not in good terms and her relationship with her husband was over. She told him further that she had met with the elders of the family but they could not come to a real solution. She told him that she was considering divorce and he supported the idea as things she said about her relationship with her husband were intolerable. On that day it was not very clear if they were becoming lovers again but she kept texting him asking how he was. They would send each other love messages and evidently became lovers again. By this time she told him that she was sleeping in a room separate from her husband. He was also having problems with his child's mother. His relationship with the deceased developed to the point that he introduced her to his family. They also started

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engaging intimately initially using protection. He went on to do an HIV test which came back negative and showed the results to her. He then told her that he did not like using a condom with a person he loved and planned to have a strong and
5 lasting relationship with her. He assumed that as a person that just gave birth, her HIV status was negative.

Sometime in 2010, the deceased asked him to relocate to Cape Town as she could not live without him. He told her that
10 Cape Town was expensive and he had a lot of responsibilities to take care of. He asked her if they could both request transfers to the Eastern Cape. The deceased did not think it would be easy for her to get a transfer as she was in a managerial position at her workplace. At the time she worked
15 for the Department of Home Affairs. The deceased told him:

“I do not see how you won’t be able to do what you are doing at your home while in Colesberg when you are in Cape Town for rather because we are both working and
20 we are going to assist each other.”

The accused then stated that he did not think it was going to be easy but asked her to give him a chance to finish their five-bedroom house he had already started to build. The deceased
25 insisted that they would be able to assist each other

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financially. He then agreed to consider the transfer based on the commitments made by the deceased. He told his brother, Vuyani Memani, about the deceased's requests and commitments but his brother discouraged him from relocating to Cape Town because of a lady. He was reluctant but the deceased insisted. The relationship between her and her husband had deteriorated to the point that she had instructed lawyers to file for divorce. The deceased's husband found out about the affair she was having with the accused and obtained information about the accused, i.e. where he worked and lived, his identity number *etc*, which the deceased shared with the accused. She reported that her husband was abusive towards her. The accused advised the deceased to move out of her home where she lived with her husband as the situation there was dangerous. She was initially reluctant but after having considered his advice she got a place in Kensington and that was in April/May 2010. The accused committed to her that when she moved to Kensington he would assist her and indeed he did so. She spoke about a deposit of R8 000 that needed to be paid for the Kensington flat and financial problems she had, such as transport for children, money to pay for instalments of her vehicle, Toyota Yaris and asked for his assistance. He assisted her by depositing R1 500,00 a month in her account to pay rent for the flat which was R3 000,00 at the time.

The deceased then insisted that the accused visit Cape Town during his rest days instead of his home. That continued until he got a transfer to Cape Town. The transfer came about upon
5 him noticing online that a Constable Afrika from the Bellville Railway Police Station wanted a transfer to Colesberg. A cross transfer between him and Constable Afrika was approved. According to the accused's recollection, his report at Bellville Station in Cape Town was on 20 June 2010.

10

Whilst he was still visiting Cape Town they would have problems. The deceased would always attribute those to the abuse she experienced in her previous relationship. He would tolerate her because the deceased was very good in
15 convincing people. Due to problems and arguments they had, he would experience constant and severe headaches and was seen by a doctor, Dr Rawood. He complained to Dr Rawood that the pills he prescribed did not help. Dr Rawood then suggested that he be referred to a psychiatrist as he might be
20 stressed. He was referred to the Gatesville Melomed Hospital and all that was before he moved to Cape Town. He was then admitted to this hospital for a week under the specialist psychiatrist Dr Khalid Dhansay. From there he was under Dr Dhansay's supervision and undergoing sessions with him. The
25 accused then felt that he did not want to be dependent on pills

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and stopped the treatment and the sessions. At some point he had a squabble with the deceased about a conversation he had with his child's mother regarding an alleged affair with a colleague from Namaqualand. The deceased insisted on
5 calling his child's mother to tell her the truth. They would fight about little things with the deceased. The deceased would shout at him in front of the children. He would tell the deceased that he was not used to that kind of treatment and she would apologise sincerely stating that she would not do
10 what she did in future. Unfortunately, she continued.

According to the accused, it was just in her blood that she would always shout at him. Unfortunately, the transfer processing was at an advanced stage so it was difficult to
15 withdraw it. The deceased would justify the fights by saying that maybe it is because they are not used to each other and that is why they fight and perhaps things would change when they live together. One day when he was left with the children, Aqhama and Lilitha, Lilitha asked the accused why her mother
20 was always 'jumpy' or 'grumpy' with him and that if she was a grown-up, she would not allow her to do that. Being surprised to hear a child talking like that, he explained to the child that when she becomes an adult she would come across such situations. He was so hurt that even the child noticed this kind
25 of behaviour from her mother. He told the deceased and she

apologised sincerely and said it would never happen again as she usually did but she continued treating him in that manner in front of the children.

5 The accused reported for duty in Cape Town in June 2010 as already stated. The treatment immediately changed, the deceased was somebody he never knew. Even the respect she would show by apologising to him got lost. She would say anything and would be too proud to apologise and humble
10 herself that she did wrong. That hurt the accused so much.

During the first month after he arrived, i.e. June 2010, and at the end of that month, whilst he had gone to pay his accounts and deposit the money for the family for the building of the
15 house the deceased told him not to forget to pay the rent. He paid the full R3 000 and he did not have the nerve to ask her to give him back the R1 500 when he went back home. It became normal for her to call him and ask him not to forget to pay the rent. There were no negotiations.

20

Problems then cropped up as he was now struggling to send money home and that affected the progress of the building of his house. According to the accused, he made a mistake by mentioning to the deceased when they first met in December
25 2009 that by June 2010, his house would be complete and by

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October or December he would be getting married regardless of whom he got married to. That would have happened if he did not get a transfer to Cape Town as he was now at an extreme disadvantage. He complained to her that she did not
5 live up to her commitment and he was now getting into deep debts as he had to complete his house at home so he could not be mocked. He borrowed money from the banks to complete the house but he did not know where he would get the money to furnish the house. He again spoke to his
10 brother, Memani, about this. Memani stated that women are sometimes very careful about money and conservative, he must risk and pay *lobola* and see if her behaviour towards him financially would not change. He was reluctant to do this, but his brother insisted. He then spoke to another “homeboy”, Mr
15 Buti to get his opinion on the matter. Mr Buti also said the same thing.

In the month of September, he was going to be paid a bonus, he then approached the deceased and asked her if he could
20 send elders from his clan, in October or November, to the Dlamini’s to negotiate the *lobola*. The deceased told him that the divorce with her estranged husband was not yet final. She asked him to wait for that process to be finalised before he sent his family to hers for negotiations. That is the reason
25 why he never paid *lobola* in 2010 nor any other time.

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He then waited but another problem cropped up. The deceased told him that she was building a house at her home in the Eastern Cape. He confronted her about this as to how she
5 could do that when his house was on hold because of the rent he was paying. She then suggested that they should look for a place in the townships in places like Khayelitsha or Delft. He was hesitant about this suggestion as Cape Town was notorious for police killings. He was afraid but had no choice
10 as he wanted some financial reprieve.

In October/November 2010, the deceased's divorce from her estranged husband was finalised. The accused and the deceased were by then already experiencing a lot of problems.
15 At some stage she refused him intimacy when he approached her. She pushed him away and at one point told him she is not a sex slave. He was still attached to her in his heart but was questioning whether it would be a good decision to continue committing to a person who had shown these characteristics in
20 their relationship. He spoke to his brother about this. His brother suggested that they get an independent person to discuss the situation. It sounded like the matter was resolved. She said it would not happen again but it unfortunately continued.

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One morning in 2011, he sent a SMS to her stating that he had arrived safe at work as the two of them normally did. The deceased did not respond. This was strange to him. He started calling and she did not pick up the phone. He got
5 worried. Time went by and he asked for some hours off from Warrant Office Boshoff to check what was happening at home. He could not be released due to shortage of members. Warrant Officer Boshoff said he would release him at 4pm. He patiently waited until 4pm. He left for home and found the
10 deceased still in her pyjamas very weak and sick. He took her to Gatesville Melomed Hospital. Her situation deteriorated when she got there. He showed a lot of care for her and even asked her to be taken to the Intensive Care Unit ('ICU') when he found her lying on a bed with her condition being very
15 critical. He cleaned her when she involuntarily relieved herself. He even called her family to tell them about the condition, frequently visiting at the hospital. The doctor informed him about the deceased's CD4 count that was very low and that she may not survive. He was shocked. The doctor asked if he
20 was the husband or the father of the child to which he said no. He told the doctor who he was and how he landed in Cape Town. The doctor asked if he was told the deceased had HIV and AIDS. The deceased knew that when she was pregnant with Aqhama. The doctor thought the accused was the father
25 of the child and that is why he informed the accused. The

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accused was shocked and did not know what to do. The doctor asked if he wanted to be tested so he could find out what his status was. He told the doctor that he was not ready. He went to Parow to pay the deceased's lawyer who was busy with the divorce. He went to the doctor's surgery to do an HIV test. The doctor asked why he had come and he told her that he only found out that day that his fiancé had AIDS. The doctor asked if she could counsel him and he turned her down. She asked if the results turned out positive would he still be with her and he said 'yes'. The doctor asked if he was a Christian and there was no justification for the deceased not to have told her partner about her status. The following day the doctor told him that the results were negative. He asked himself questions of how the deceased could do that to him when he had not yet even gotten married whilst she was already divorcing. It was his prayer that she would be well and his prayers were answered. The deceased recovered and was able to speak. He could not control his happiness and phoned her sister, Nomvuyo. Nomvuyo is referred as Centane for the purposes of the judgment. The deceased fully recovered. On the day she was discharged the accused went to pick her up. Whilst giving her her prescription, the doctor mentioned three words to the deceased, honesty, transparency and openness. The doctor told the deceased:

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“This young man loves you so much, Colesberg is not nearby, it takes a man to relocate for a woman. You need to be open, transparent, and honest to each other.”

5 The deceased did not know at that stage that he knew about her status. They went to the vehicle and as he put the ignition on she asked him to switch it off. He told her that he was all hers and that he would support her, she should not worry he was going to die where she died. The deceased started telling
10 him that she was HIV positive and she had AIDS, that she had been infected by her husband Zukisa. She told the accused that when she told her husband about her HIV status when she was pregnant with Aqhama he was not shocked. She asked the accused if that was the end of their relationship and he
15 said no everything was fine. She further stated that she was afraid of telling him because he was going to leave her. According to the accused, if she had told him whilst he was still in Colesberg he would have indeed left her as he would not have been prepared to get married to a person who was
20 HIV positive especially after all the deceased had ‘left him’ for another man. However, in that present moment, in the vehicle, he forgot about everything and focused on comforting and supporting her. This was still in 2010 when they lived in Kensington.

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Also in 2010 towards the end of the year the situation became very dire and the deceased became somebody very strange, somebody he did not know and not the person he met in 2006. She was emotionally abusive to the accused. She became
5 somebody who was very disrespectful and did not apologise for the words that she would speak to him. He would sometimes go to the garages or railway stations to sleep there. He would stay the whole night and in the morning when the deceased was about to go to work, would go back home. He
10 would phone his brother, Memani, concerning what was happening. They had lots of quarrels. She did not care about him because he was already in Cape Town and she was building a house, he still wanted a lot of things at his home and she did not keep to the commitment she made before he
15 came to Cape Town. He was suffering financially and was paying rent which in 2011 went up to R3 300,00. The accused went to live with his brother in Kuyasa, Khayelitsha. The deceased would phone and apologise. He would forgive her and return home. She would drive to his brother's place to
20 fetch him to go back to Kensington. Since then he told himself that he will just tolerate what was happening. He could not go back to his brother's house because his brother could not understand why he would just forgive the deceased.

25 The deceased started telling him that she did not leave a child

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and she would not leave her friends for the accused. They would quarrel over such things without any resolution. The accused reported these things Centane. Centane would understand but the only person who seemed not to understand
5 these quarrels was her elder sister, Sister Nomboniso. That is how difficult his life was with the deceased but he tolerated it. He does not know why he tolerated the situation and still asks himself that question today. He surmises that maybe it was because they were living together and did not have a place of
10 his own. He reckons that he could have moved out of the house that they bought together in Delft. The accused went on to say:

“I mean right from the time we were still living in
15 Kensington when I count these incidents which took place and then I don’t really know what kept me to tolerate this kind of situation but it happened that I did tolerate it up to this very unfortunate situation I am faced with today.”

20

Now in 2011 towards the end of the year they moved out of Kensington and went to live at the N2 Gateway in Delft. Whilst they were living in Delft there were three bereavements in his family. When his cousin brother passed away he did not get
25 the support he needed from the deceased and the deceased

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apologised. Again, he had an incident of a person that he regarded as a mother passing away in 2012. At the time, he was in deep debt. He did not have money to contribute to the funeral. He approached the deceased and asked her to lend
5 him money and was going to reimburse her during his bonus month. Without any explanation, the deceased told him that she did not have the money. He was unhappy about this but he accepted it and decided that he would find other ways to get the money. Then he asked her if they could use her
10 vehicle to travel to the funeral. She said it was not a problem and told him that he should make means to ensure that the vehicle is serviced before they left. He then went to the bank and asked them to increase his overdraft facility. He is not sure whether he got the money from the overdraft or the credit
15 card. He deposited some of the money to his home to help with the funeral arrangements. The deceased said there was no need to take the vehicle for service as they could do that on their return from the Eastern Cape. He was unhappy about the deceased not assisting him financially. He gave her R2 000
20 for the service of the vehicle. The deceased wanted to return it but he declined. They travelled together to the Eastern Cape to go to the funeral. When they returned back to Delft something happened which triggered a quarrel and which reminded him of the deceased's failure to assist him when he
25 needed money for bereavement at his home. The deceased
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told him that the use of her vehicle was sufficient and that the accused was unappreciative. She called him a gold digger, digging from women. They had an argument over this issue and he immediately suffered a terrible tension headache. At
5 the time he was crying and phoned his family members and Centane. The situation resulted in a terrible experience of mental, emotional and psychological suffering because he could not understand how she could speak such words to him as she knew how he landed in Cape Town and that he did not
10 want to come to Cape Town in the first place.

They had a fight over her cell phone as she refused to give him the pin number. One time she went to a party. He had suspicions that she was cheating on him but he was not sure.
15 This is because there were a lot of strange things happening in their relationship. She took the children and left him in bed. That very night the accused's colleagues from Mount Frere in the Eastern Cape called him. This colleague told him that the deceased was at a party and that the accused should attend
20 those gatherings and that is all he said. Since that party the accused was very unhappy. He did not speak much to the deceased except in relation to things that needed to be done at the house. He approached her as his girlfriend and she said: "what are you doing? I do not know what you are doing."
25 He was very hurt. He took the car keys and went to look for a
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place at the barracks. He got a place late at night after having struggled to get help. The deceased kept phoning the entire day but he ignored her calls. When he eventually phoned her back she apologised and promised that what happened earlier will never happen again. He told her that he had already signed a contract to stay at the barracks. Despite the fact that he had signed a contract that had conditions he agreed to go back to home to Delft. Unfortunately, the deceased became very abusive. He lived between the home in Delft and the police barracks spending the days he was working at the barracks as it was closer to the train that he used to commute to work. He later bought a vehicle.

On one occasion he confided in a colleague, Mr Maqolo, about the deceased refusing to have intercourse with him. Mr Maqolo retorted that it was unusual and that the deceased must be up to something, she must be having a person she is involved with. He did not believe Mr Maqolo. He discovered very, very late that the deceased was unfaithful.

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On 31 October 2012, the deceased was on stress leave. The accused slept at home in Delft. He woke up in the morning to fetch something he had forgotten at the barracks. He showered at the barracks and went to do a few errands at transit offices, then he went back home in Delft. He parked in

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front of the house and found the door slightly open. He pushed the door and entered. The door opens towards the lounge. He entered the room and saw a man on his knees getting out of and between the deceased's thighs. The
5 deceased took a deep sigh and immediately the man went to sit on the couch. The accused was very shocked and could not believe what he was seeing. This man wore a tight t-shirt. The accused had his firearm on which was visible as he placed it on his left hand side inside the holster. He stood there
10 stunned, shocked and hurt. This gentleman at some stage said: "*Sorry Bhuti, I'd like to explain.*" The man said nothing and the accused ordered him to get out of the house. He then cried vigorously rolling himself on the floor of the bedroom. Then he said to her: "Now I know why you have been behaving
15 like this". And she was apologising saying: "I am not in love with this guy, I am sorry I am not in love with this guy, I am very sorry I did not mean to hurt you."

He told her that she needed to look for her own medical aid as
20 he could not pay medical aid for another man's woman and he was not thinking straight. She tried to hold him and he pushed her away. He went to his vehicle, drove away and phoned one of her friends, Mhambi. He told Centane who was also of the view that the deceased was in love with the gentleman he
25 caught her with. At a later stage they met at his house and

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spoke about what happened. The deceased denied any relationship with the gentleman he caught her with and Centane called him obsessed and he was very hurt by that. That clearly indicated to him that it was not the first time that

5 the deceased had a man in their house. It was possible that when he was at work and sleeping at the barracks that she had the opportunity to sleep with her boyfriends in their house. At some point, the deceased told him that the gentleman he caught her with was begging her and he was a law

10 enforcement officer whose name she did not mention. One morning he noticed numerous missed calls on her cell phone. He wanted to see those missed calls but she refused to open the phone which was password protected and became very abusive towards him. He told Sister Nomboniso about these

15 incidents. The deceased once told him that her friends and family members will not listen to him but would only listen to her. He was very shocked about that. He reckoned that the treatment that he was getting from the deceased was indicative of the fact that she found happiness elsewhere and ensured

20 that when she was at home there were problems so that the accused would not sleep at home but at the barracks. Whenever they had problems he would suffer from a severe headache and would go to the barracks. He wondered as to why she was doing this. At some stage he told himself that he

25 would rarely visit his house assuming that only being at his

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house contributed to the problems he had. He took a week and returned again a week later because he would miss the deceased's younger daughter, Aqhama. He took the deceased's children as his own and would enjoy more time
5 with them than his own biological children often taking them to places like the beach. He did not share a biological child with the deceased. It was so painful for him to be faced with a situation like this today.

10 He contributed towards the tiling, plastering and painting of their house and did not know that he was doing it for the deceased and her boyfriends. The house was his as well and not just the deceased's as stated by Centane. Their problems went on. They fought without any solution but he persevered
15 and fought through the difficulty. He was now determined to work next to his home in the Eastern Cape. He made efforts towards attaining this goal. Provincially those were not successful. He escalated them to the national office citing the problems that he had with the deceased and a report from his
20 psychiatrist. His efforts failed on a number of occasions, necessitating him to write to the Minister of Police for his intervention. The response he received from the Minister of Police was that this matter was remitted back to the national office of the police (i.e. the police headquarters) and they
25 would communicate with him in that regard. Had his employer
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considered the psychiatrist's report, he could have been transferred to the Eastern Cape and that could have prevented the situation he is faced with today. The National Commissioner of Police, Ms Ria Phiyega, told the panel within
5 the Department of Police that the psychiatrist's report was not comprehensive. Members of the panel were free to call his psychiatrist if they had any queries or required clarity on anything but they did not do that. The matter got delayed. He took his complaints further to the office of the Public Protector.
10 Whilst that was in process with his lawyers, the incident which is the subject of this case, occurred.

One day, in 2012, when he was reporting for his duties, as he was about to enter the police station he experienced loss of
15 sight. Immediately he became weak and then he had to bend down on the ground. He then closed his eyes and regained the sight. He could feel right from there a terrible headache and something hitting him sharply right above his eyes, like a sharp pain. He immediately felt a stiff neck but regained his
20 sight. He went to the police station and reported the matter to his commander. He was recorded as unfit for further duties. He then drove back to the Pinelands barracks where he lived during his work days. He took off his uniform, put his civilian clothes on and drove himself to Gatesville Melomed Hospital to
25 Dr Dhansay. Unfortunately the doctor was ill on that day. The

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accused was booked in and sent to Kennilworth Psychiatric Clinic. He was examined at the clinic and was informed that his pulse was beating abnormally low. He was shocked and the nurse examining him calmed him down. The following
5 morning he lost some sight whilst attempting to shower and fell. He spent about a week there, then Dr Dhansay arrived. He told Dr Dhansay about his situation with the deceased and that he could not handle the matter in which he caught her with another man. The doctor asked if he could call and speak to
10 her and he said he had no problem. The doctor indeed called and met with her. He was not told what they spoke about. He accompanied the deceased to her vehicle thereafter. After a week he was discharged from the psychiatric clinic. He went back to his house in Delft, then the problems started again
15 after he asked her about why she was treating him in the manner she did. He left for the barracks and did not sleep at his house. He informed Sister Nomboniso about this and she was shocked. This was all towards the end of 2012.

20 In 2013 at times he slept at their house but did not have meaningful communication with the deceased. The situation became permanent and the only people he spoke with when at home were the deceased's children, particularly the younger child. The quarrels continued. The accused told the deceased
25 that she was evil, having caused him so much hurt after all the

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sacrifices he had made for her. She started insulting him with his mother calling his mother a witch. He would tell her not to insult his family, cry and go to the barracks. The deceased had no regard for his feelings and to the deceased he was just a non-living object. This was a daily problem. It was difficult for him and the transfer difficulties also added to the stress he had. It took him long to get better and the best thing was to get out of the Western Cape away from the deceased. He could not endure the fact that he caught the deceased with her boyfriend in the house where they (the accused and the deceased) slept together. He could not handle his situation and often booked off sick and was suffering from a lot of headaches. He got to be in denial and was under an extreme depressive situation but was not attending his psychiatric sessions as he ought to have done.

At one stage at his house, sometime in June or July 2013, he experienced a severe tension headache and loss of sight and phoned his work for an entry to be made in the occurrence book. He could not recall if he went to the doctor but he went to work a few days later. When he arrived at work he was informed by either Sergeant Mbana or Constable Mahlahla that they were sent to visit him at the barracks but he was not found at his place. A disciplinary case was opened against him but later withdrawn. He did not have a good relationship

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with this commander due to the transfer issues. He would meet with the deceased from time to time during his disciplinary hearing as she worked in the same building where the hearing was held and they would talk about Aqhama. He would eventually go home. His body and 'system' accepted his situation but the feeling that the deceased was his girlfriend of fiancé waned. The deceased had harmed him spiritually, emotionally, psychologically and made him lose interest in her. The deceased had been refusing him intimacy. They were informed at some point that the barracks would be converted into offices. That was when he was pushing for his transfer to be accelerated so as to avoid going to live at his house permanently again. The barracks was the place he could go to when he was insulted by the deceased at their home. On 13 September 2013, he asked Captain Ntshingila to assist him with a phone call to the head office to find out about his application for a transfer. The person he spoke to at the head office informed him that his transfer was finalised and he lost all hope, because this meant he had to return to his house if he happened to move out of the barracks. He immediately felt a terrible headache and asked to be booked off from further duties, which was granted. He went straight to the barracks and when he arrived there he took his bag which had his transfer documents and correspondence in it and drove to his house. On his arrival he found the deceased with ladies he did

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not know and with Mhambi, whom he knew. The children were also there. He asked to speak to the deceased in the bedroom. He showed her the documents and correspondence and told her about the call he had made earlier that morning
5 wherein he was informed that the transfer was declined. He informed her that he had done everything possible to try and be rescued from the situation. He told her that the police lie to the media when there are incidences of suicide. She must give the documents to the media so that the police could be
10 exposed, that they do not assist their members. He then drew his pistol. He did not know what went wrong with him. He fell on the floor, his fingers got stiff. The deceased in the meantime grabbed the pistol from him as he was placing it in his mouth. His aim was to squeeze the pistol and let it finish
15 with him. The deceased asked him not to do that. She managed to get the pistol from the accused as he was grabbing the trigger. It did not fire. It fell under the bed. He had a sling on that prevented her from running away with the firearm. The deceased was screaming. She called for Mhambi
20 and asked her to call people. At the time the firearm was on the bed and he was weak. He took his phone and phoned his sister and told her of what he has been going through and that he could no longer attend to his family responsibilities. He told her that they should forgive him and look after he children
25 as he was better dead. His sister told him to rather resign and

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go back home and that they did not need his money but needed him, his soul. His brother also called him and asked him not to commit suicide and asked him to leave his house and go to the barracks. He decided to go to his brother's place but as he was about to do so the police arrived. He told them about the trauma he had suffered because of the deceased. The police asked him to go to the police station. He did not see a reason why he should go to the police station as what he had attempted to do did not materialise.

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At one point he knocked at the door of their house in the evening and the deceased did not open. He went to knock at the bedroom window but the deceased still did not respond. He got injured in the process as the window cracked. He was convinced that there was someone inside (i.e. a man), as he had never knocked for such a long time without the deceased opening the door. He went back the following day and asked the deceased why the door was not opened and she said she was avoiding an argument as she was going to work the following day. He was not satisfied with that answer and told her that there was something that she was busy with when he was knocking, implying that she was with a man at the time. The deceased kept on denying that she was cheating.

25 One day he slept over at their house, the deceased insulted

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him. He could not hold his tears, he rolled himself crying and this was noticed by the deceased's younger daughter. The child asked what was wrong and her mother told her that her father was sick. The very same day, the deceased told him
5 that she was asked by the teachers what happened to the child's father as he was crying. Apparently the child told the teacher that the accused was sick. He was alarmed at the deceased taking this as a joke. This situation affected him a lot. The child also saw him putting a firearm in his mouth on
10 the occasion he did and the child spoke about that at school too.

On 13 September 2013 after the suicide attempt, he went to his brother's place. The following day, 14 September 2013, he
15 made arrangements to go home to the Eastern Cape. He went to the doctor who gave him pills and prepared a sick note for him as he was not feeling well. He took the sick note to his workplace. He was booked off for a week and thereafter he was due to go on annual leave. He then went to the Eastern
20 Cape and stayed there for the whole of October 2013. On 3 November 2013, he came back to Cape Town and prepared to resume work on 7 November 2013. As he was busy with his duties, his commander told him that they had been instructed that the accused be posted 'inside' and for him to hand in his
25 service pistol. He was told by Captain Whitely that in terms of
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the police procedures once a person had anxiety, stress or something like that, they are obliged to take his firearm. He informed the captain that because he was being disarmed, he would lose out on overtime pay. That brought differences
5 between him and the captain. He was unfortunately compelled to hand in his firearm. He asked what he needed to get his firearm back and was advised to see a psychologist or a psychiatrist who may recommend that he gets his firearm back. He went to his specialist psychiatrist Dr Dhansay. The
10 accused handed in a letter from Dr Dhansay as part of his evidence, dated 18 December 2013, which read:

“This letter is provided at the request of the above and with his signed consent. It serves to confirm that I
15 reviewed the above on 20 and 28 November 2013. Based on those two assessments I feel that Mr Nakani is fully fit to resume all duties at work including the use of his firearm. If there are any queries or concerns in this regard please do not hesitate to contact me at any stage.
20 Yours sincerely
Dr K Dhansay”

He lost out on some overtime money as a result of being disarmed and was greatly disadvantaged. Fortunately, when
25 he got his firearm back at a later stage he was able to work for
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more money.

During that time, he went to the deceased and told her about the difficulties he was having at work and socially at home and
5 had it not been because of her he would not have been in that situation. He informed her that his firearm was taken and this was very exciting to her. She would insult him saying that he is a man who was scared of approaching women, he was a gold digger and that from his father's side of the family they
10 were mad people whilst his mother's side practiced witchcraft and that is why he was the way he was. This hurt him so much. He was disturbed by these utterances spiritually, emotionally and psychologically. These were sent particularly as WhatsApp messages. He asked her what she wanted him to
15 do as there were a lot of men out there. These things worked on him because he would not be able to sleep. He was told that the deceased was cheating on him and was once seen with a certain gentleman at Century City. She denied that. He believed that she could not be that disrespectful towards him if
20 she was not up to something.

One morning he reported for duty and had a conversation with Constable Gxagxisa about his situation and told him he would like to be reported unfit for duty and proceed to his house.
25 Constable Gxagxisa advised him that this person was going to

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hurt him and he would end up doing something he never thought he would do. He told Constable Gxagxisa that he trusted himself and 'such a thing won't happen'. He went home and found the deceased with the children. He asked her
5 why she called him a gold digger and had she forgotten that he came to Cape Town because of her. They argued and Lilitha, the older daughter left and came back with Request, a neighbour. He explained to Request that he wanted Request to be present so that he could be called as a witness. They
10 quarrelled in front of Request. She pushed him with the door as he was leaving. At which point he lost control of himself and beat her. Immediately after that he drove away and informed her sister, Centane, of what had happened. Centane shouted at him asking why they always fought in front of the children.
15 He asked Centane to go to the deceased on his behalf and ask for forgiveness for what happened that day. His brother also phoned to tell him that the deceased called him to tell him about what happened and that she was going to lay a charge against him. The deceased laid a charge of assault against
20 him. That was in November 2013. Memani, his brother, and his uncle went to the deceased to ask her not to press the charges against the accused. The deceased told them that he pointed a firearm at her which was not true. She told them about the incident when he knocked the window until it was
25 broken. She denied that she was cheating and agreed not to

proceed with the case against him. According to the accused, the matter was resolved. The deceased withdrew the case of assault against him. After the matter was resolved and the deceased had indicated that she was swollen, he did his best
5 to get ointments to assist her and went to see how she was doing at their house. Things looked like they were getting better again. He was still staying in both places, their house and at the barracks.

10 He mentioned a number of incidents to Centane involving the fact that the deceased did not disclose her HIV status to him and she was the one that asked him to come to Cape Town. Centane told him he was negligent, he could not just stand by looking at the person and assume that she was 100% healthy.
15 After their discussion Centane understood and condemned the deceased's behaviour although she was saying the deceased denied cheating on him. He phoned Sister Nomboniso who said she was going to talk to the deceased.

20 Beginning of 2014 he told the deceased about the rumours that their police unit was to be converted to a Rapid Rail Response Unit and that the Pinelands barracks were to be converted to offices. The deceased told him that he left their home on his own accord, no one chased him and he could come back. He
25 informed her that that would be the last resort. One day around

February/March 2014 a certain lady residing at the barracks told him about an affair that the deceased had but refused to divulge the name of the person that the deceased allegedly had a relationship with, accusing him of not satisfying the deceased in bed, saying that he had a small penis. He was embarrassed by this. The lady seeing that the accused was taking the matter seriously changed and said she was joking. He knew that she was not joking. He asked the deceased about this allegation but she denied it. He went with two fellow police officers from Delft Police Station to the deceased at their house to ask the deceased to stop referring to him as a boyfriend. The deceased would not give him a chance to talk, shouting. He confronted her about the allegations. She shouted and insulted him and he could not speak any further. He just went into his vehicle and drove away. At some point the lady from the barracks gave him the name of the gentleman who had an affair with the deceased. It became clear to him that the deceased was busy with a number of men. He sent the deceased a text message about the affair and she denied that she was cheating. The deceased did not show any remorse, provocatively saying that the two of them were united by her. When he initially found out about the name of the person the deceased had a relationship with he asked her to move out of their house and go live with her boyfriends. He gave the keys of the house to the deceased and told her that

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he was no longer interested in that house.

After he came to know the name of the person the deceased had an affair with he wanted to know when the whole thing started. He phoned Memani and Buthi. Buthi picked up that he was not well and asked him to go back to the doctor. He told Buthi not this time around, if he must die he would rather die. He told Centane about the affair and about the deceased wanting to infect the world with HIV and AIDS. Centane shocked him stating that the accused came with HIV and AIDS from Colesberg. He was shocked by that and that made him experience a terrible mental suffering. He decided to stop talking to Centane about his situation with the deceased as he did before.

15

After he found the name of the man who was having an affair with the deceased he investigated his number and phoned him. He confirmed that he knew the deceased and that the deceased was his ex-girlfriend and they met in 2012 and that is when the accused moved to the barracks. The man confirmed that he met the deceased at Samora Machel. This man confirmed that he slept more than twice or thrice at the deceased's house with the deceased and had sexual intercourse with the deceased. This gentleman also told him that the deceased told him about the things that the accused

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went through and he felt embarrassed. Police came to his house at some point and asked for his firearm having been called by the deceased. He was grabbed violently by the police and told to leave. He told himself he will never set his
5 foot at their house.

The deceased accused him of bursting her vehicle tyres. He told her she must go look for people who did that to her, her boyfriends, and leave him alone. During that period, i.e. after
10 the accused was chased out of the house, he sent text messages or WhatsApp messages. The deceased knew that the accused was a worshipper of God, a God-fearing man and she pretended to be one when she was not. The accused did not speak to the deceased for a while and decided to focus on
15 his responsibilities at his Eastern Cape home. He told his sister that he would take leave and go home to the Eastern Cape in October, the month after his September bonus month.

On 25 June 2014, he was on leave and received a call from the
20 police, a Warrant Officer from the Bellville Police Station, Voortrekker Road, stating that he had a document to serve to him and asked him to make a turn there. The accused went there. On his arrival he was shown an interdict. When he saw it he started crying. He saw that the interdict was applied for
25 in April 2014 and he was told to appear in court on 3 July

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2014. He took leave again until the evening of the day he was going to appear in court just to deal with his situation.

On 3 July 2014 he woke up from the barracks and went to the
5 Bellville Court as instructed. On arrival in court the deceased was present. The magistrate asked if they were continuing with 'this', (the interdict), the deceased said 'yes'. He told the magistrate that he was opposing the interdict. He told the magistrate that he was asking for his firearm to be excluded
10 from the provisions of the interdict for it had nothing to do with it. He handed the letter from Dr Dhansay as an exhibit. The magistrate, having looked at it said the application (of the deceased) was more recent than the letter. The magistrate said:

15

"I am not going to attend (sic) this, I am going to look into it on the 30th or 31st July."

Then the matter was postponed to the 30th July 2014. The
20 accused told the Court:

"I am working with this firearm and now I will have a problem if this happens that I am being disarmed."

25 The magistrate told him that he had to rearrange his duties

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with his commander. The Court turned to the deceased and asked: *“how do you feel, lady”*, the deceased said: *“to be honest, Your Worship I am not feeling safe at all.”* As the Court gave the ruling, he fell down on his face on the podium
5 that was in front of him and he was crying. The matter was postponed without considering his requests.

He immediately suffered from a terrible tension headache. He became very weak, he struggled to reach his vehicle in the
10 yard. All his joints were just weak. It was very cold that day. It was like he was seeing some bubbles like one would experience when it is sunny. He lost his sight a little bit. He felt like his head was stuck. He was wondering even today how he got to the barracks. He was fortunate to be still alive.
15 From the court in Bellville, he went to his vehicle. He sat a bit in his vehicle. He closed his eyes trying to regain his sight. As he was driving, he thought of going straight to the doctor and to get himself in hospital. There, he could get something that could make him sleep for two to three days. He wanted to
20 forget about what happened in Court. He drove to the barracks. He cannot say how he got to the barracks in the condition that he was in. On his arrival at the barracks, he took his pyjamas, slippers and service pistol with both magazines. The provincial instruction of the police was that
25 when one was going to be admitted in hospital for a long time
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the service pistol had to be handed in. He took his clothes and his pistol with the purpose of going to Gatesville Melomed Hospital. He drove out of the barracks. He could not remember which route he took, that he happened to have
5 landed at his house in Delft. He was just lucky that he did not get involved in an accident on that specific day.

He could not know how, what he could slightly remember on arrival at his house was that he parked his vehicle opposite
10 the front door of his house. He got out of the vehicle. As he could slightly remember, he parked his vehicle parallel to the deceased's vehicle. They met at the time and he thought she was getting something out of the vehicle. They met in front of the accused's vehicle, which was opposite the door of the
15 house. The accused then went on to state:

*"It is like I said, what more do you want from me. And it is like she insulted me. M'Lady as indicated already before this Court of Law, my condition at the time, it was
20 in a very bad situation that I can't remember everything that took place on the specific day. So what happened, and I can slightly remember, was she insulted me. Then I can't recall how I drew my pistol and how everything took place. I can't recall how I landed in the Police
25 Station, which route I used. That is how I perished. It is*

what I can state before this Court of Law that happened on that day. Looking onto the evidence before the Court of Law a lot of things are astonishing, having astonished me, in that I am asking myself a lot of questions. How I
5 *hadn't been involved in an accident or something because I have seen Captain (indistinct) statement, my commander that I phoned him on that day which I can't remember. M'Lady on a speaking (sic) ..." – meant to be (honestly speaking): "... this is regrettable,*
10 *remorseful and I've got no words to actually or precisely state, how regrettable, or rather remorseful the condition, I am faced with, is. It is hard that it happened."*

The accused went on to state that on the following day, i.e. 4
15 July 2014, his brother visited him at the police cells in Bellville Police Station. He asked his brother what happened and where was his vehicle. His brother was shocked to hear him asking those questions as he told him that he phoned him. His brother asked him what he was going to do with the slippers
20 and the plastic bag he was given by the police at Delft. Then he told his brother that he was leaving from the barracks, and was actually heading to Gatesville Melomed Hospital. How he landed in this place and how '*this happened*' he could not recall, it was hard but his brother was also trying to comfort
25 him about '*this thing*'. He asked his brother whether they had

met the deceased's family. His brother said they were afraid because the accused was still inside and therefore maybe if he were to get bail they could go and meet with the deceased's family. Unfortunately he never got bail and his family never
5 went to see the deceased's family. The accused went on to state the following:

*"M'Lady, this is very, once again and again, unfortunate, regrettable situation that existed in my life, that
10 somebody's life got lost out of my hands. I have become severely depressed. The results of the position I found myself in, and my emotional state, was deteriorating. Yes, it is very regrettable situation, I am faced with. The passing of Busiswa out of my hands, I don't know how to
15 describe it. It is such a very unfortunate situation that I can't explain how it really happened. I don't know what happened onto me. I acted out of insanity, I acted out of myself. When I look at the surrounding things that took place on that specific day, I was not myself. I can't
20 believe myself today, that truly, I am the one (indistinct) and the charge against me, and unfortunately somebody passed on, out of my hands. It is such a regrettable, I don't know what to say, situation that I am faced with. This is very hard. It has been such a long time, a lot of
25 things, which happened, and I didn't think M'Lady, that at*

that stage, things would go as far as to somebody's life lost out of my hands. I don't know. I should think, if such a provocation that after so much that has happened which Busiswa did, cheated on me, and sleeping with her boyfriend's in my house, and she provoked me further, with the interim protection had triggered my unfortunate depression and anxiety to the point that I could no longer be in a capacity to be able to be acting like any other reasonable, and normal person, in the manner that everything took place. It is such a regrettable situation, M'Lady, once again, that I was distressed and I think the reality that I accepted that Busiswa did all these things, made me to experience severe depression and deep-seated emotional distress. And I think unfortunately, if these things hadn't existed, I couldn't be faced with this unfortunate situation. It is hard that I am faced with this very difficult situation. I don't know before this Court of Law what to say. I so wish that they couldn't have ever been anything that had, after so much terrible experiences of my relationship which was fraud (sic) [meant to be fraught] with difficulties with Busiswa, wouldn't have had anything that triggered the situation once again. This is, the unfortunate situation that I'm faced with, and this is how I can say this took place. I can't recall everything that took place on that specific

day. I don't know what happened. I shouldn't be alive. And I don't know it is hardly M'Lady, to understand some of the things, how they were done. If one is looking onto, inasmuch as I can't talk about that, the 7th April, the 25th June 2014, nothing happened. The 25th, when I found out about this thing to the 3rd July 2014, nothing happened. How, which people were looking onto things, (indistinct), this kind of unfortunate situation that triggered all which happened, and which resulted to me being in a situation where I could no longer reason, where I could because of the situation that I experienced, had my ability or power, to control my emotions as that of a normal person. How I wish that it didn't happen. It is unfortunate, and regrettable and a regrettable situation that I'm faced with and honestly it happened, unfortunately out of being intended." (sic)

[I think it is a mistake, it is supposed to be unintended].

"M'Lady... it happened unfortunately without being intended. It was not intended to have happened, M'Lady. It was a very unfortunate situation that happened. Unfortunately it was not intended. It happened out of the fact that at the time, I was not myself. I was not in my normal blameworthy state of mind. And the evidence as having been produced before this court of law also shows that the situation was not normal at all. It is such a

regrettable and unfortunate situation M'Lady, that I am seeing myself, in this position. It is unfortunate but not abilities that I can make things get back to where they were. If it was possible, I will make things to be as they were. It is hard. And it is very, very regrettable."

The reason I have quoted this verbatim shall become clear later. Much of the accused's evidence that followed was the same. The accused kept repeating what is quoted above in different ways and adding that he was not in his normal state of mind, acting reasonably, distinguishing between right and wrong. He was also shocked when he was told by his brother what had happened. He did not know what happened to him on that day. He asked for forgiveness from the deceased's family and his family for the tragic incident and for the passing of the deceased out of his hands. This is something that he never thought would happen one day. He wished that their parents were in court to hear what he had to say. It was unfortunate that the person whom he loved at the end of the day passed on out of his own hands.

The accused was cross-examined extensively. His cross-examination went on for a couple of days. When pressed about whether the treatment by the deceased annoyed him, he maintained that it stressed him. He was asked about why he

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did not leave her, he stated that he loved her a lot. When he left and she asked for forgiveness he would return home because he loved her a lot.

5 I do not intend to repeat the evidence that he gave in cross-examination as it is all on record. The accused repeated much of his evidence in chief in cross-examination. I would however highlight other important aspects that arose during his cross-examination to the extent necessary, in my analyses of the
10 evidence.

The next witness for the accused was Masithande Booï ('Booi') who testified that the accused was his nephew, born in the same village as he. The accused had asked him to go and
15 apologise as an elderly person in a quarrel involving him and the deceased. The deceased accepted the apology and he could not remember which year that was. In cross-examination, he could not say exactly what the quarrel was about, save to say that the deceased and the accused had a
20 misunderstanding between each other as lovers.

Vuyani Memani ('Memani') was also called by the accused as a witness. The accused applied for admission of hearsay evidence to be led by this witness on the same basis as the
25 State. The State had no objection. Memani testified that he is
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the accused's brother. He knew about the relationship between the accused and the deceased since they started dating, if he was not mistaken in 2006. They broke up in 2007 because the deceased was going to get married. The accused
5 got a transfer to work in Colesberg between 2008 and 2009. The accused told him that the deceased called to say that she wanted the accused by her side because she was divorcing her husband. The deceased said they will assist each other. In 2009 or 2010, the accused came from Colesberg and shared a
10 flat with the deceased in Kensington. The accused complained that the deceased did not stick to the agreement and he was paying rent for the flat alone which was in the region of R3 000. The deceased was also busy building a house at her parental home. Because of the quarrels in the relationship
15 between the accused and the deceased, he advised the accused to marry her as they might be able to pull everything together. The accused told him he was waiting for the deceased's divorce to be finalised. The accused and the deceased carried on staying together. The accused informed
20 him about their quarrel that involved the deceased refusing to have sexual relations with him. He and a person by the name of Nonyosi visited the deceased in the accused's home to try and resolve the issue. The deceased told them that she was not a sex slave. They came to an understanding after those
25 discussions. A few days later the accused complained again

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that the deceased was coming home late. When confronted about friends she said she would not leave her friends. A few months later and at midnight the accused informed him that he and the deceased had a fight and the accused went to sleep at the garage near the house. They would have fights on different occasions and the accused even slept at the police station. It was now clear to him that the accused was not happy in the relationship anymore. This resulted in the accused seeking a transfer to the Eastern Cape. The accused and the deceased eventually left to live in Delft. Fights between the accused and the deceased involved sex, money and friends, these fights did not stop. The accused went to live at the barracks. The accused and the deceased would visit each other. In 2013, the accused mentioned that the deceased was seeing someone else. He caught her with another man in the house. She was seated on the chair wearing something short with this man's head between her upper legs. He was surprised to hear this. The accused called him and another person by the name of Buthi to try and negotiate the issue. Then there was another discussion involving a case of assault that the deceased had opened against the accused. The deceased refused to drop the charges. The case was eventually withdrawn. After that the deceased reported to him that the accused broke the window at their home. He asked his brother why he did such a thing,

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to which he responded that the deceased did not want to open for him. The issue of the broken window was resolved. The couple forgave each other. As time went by, and in 2014, the accused told him that the deceased was applying for an
5 interdict against him. The accused was hospitalised twice at hospital in Wynberg. His brain was not functioning properly, that is not to say he was insane. Every time the accused and the deceased had fights the accused would be hospitalised. The first time was at Gatesville and he was there for two
10 weeks.

The accused was not happy with the interim court order against him by the deceased. The accused told him that he was not happy because the deceased did not want him to go to
15 the house or talk to her friends and his pistol was going to be taken from him. The accused once asked for the deceased's financial assistance for a funeral back home and she called him a gold digger. The accused was once removed by the police from his house with the deceased. The deceased was
20 admitted at the Bellville Melomed several times. She was very sick and could not do anything for herself. The accused took care of the deceased. The accused told him about an affair the deceased had with a gentleman from the Flying Squad. This gentleman told him he was not the only one sleeping with
25 the deceased. The accused complained about expenses he
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went through because of the deceased. At one point, whilst the accused was living in Kensington together with the deceased, the accused arrived at his residence with his bags saying that he had an altercation with the deceased and
5 wanted to live with him for a while. He agreed that the accused could stay with him until he had a plan. The very same night, the accused was called by the deceased, pleading with him to go back home so they could talk. They had an argument, the deceased persuaded him until he gave in. The
10 deceased came to fetch him.

The accused told him he would appear in court on 3 July 2014. He told the accused he would go to court to support him even if he worked the nightshift. On the morning of 3 July he
15 overslept and woke up past nine. He thought he should go to court. Whilst he was on his way there and still in the area of Khayelitsha, the accused phoned and told him that he killed the deceased. The accused then said they must meet at the police station in Delft. He phoned again immediately and said
20 he must not go to the police station but to his house. He went to the house and it was cordoned off. The deceased's vehicle was parked in front of their house and her body was a little bit further from the vehicle. The accused had not arrived. The accused arrived later with the police van. He went to the
25 accused at the police van and asked him "*why did he do this,*

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was there no other way to do things". He did not respond and both of them cried.

People were called, such as the grandmother of the kids that stayed in Langa, but he did not see them arriving. Later the investigating officer phoned him and said he must go and fetch the accused's belongings. He was given a plastic bag and the vehicle. The vehicle contained pyjamas and slippers. He took them as well as the vehicle. The following day he went to see the accused at the Bellville Police Station. The accused asked him what happened and he also posed the same question to the accused. It came out that the accused was not fine, he was still in shock. He was crying as Memani was talking to him. The accused did not even realise that he saw him at the crime scene the day before. He told the accused that, he, that is the accused, was the one who phoned him and also phoned them back at home (in the Eastern Cape) but he looked like he did not know that. He would visit the accused frequently. After a few days he asked the accused whereto he was taking the plastic that was found in the vehicle. The accused informed him that when he left the court he was not right at all. He had a headache, he was giving a thought to being admitted to hospital. He saw that the accused was starting to remember what really happened. He asked the accused to tell him what really happened. The accused told him that he remembered

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going to court. In court, they had a session and the last thing he remembered was that he had a headache and dizziness. He went home to go and fetch some things because he thought he was going to be admitted in hospital. It looked like the court ordered that the firearm be taken away from him. He did not succeed in his arguments regarding the firearm. Even when the accused was in Goodwood Prison, he would visit him but it was difficult for him to get what really happened from the accused. The accused could only remember the headache and when he left court. How it came about for him to arrive at home, he did not know. When he asked the accused about the shooting part the accused would cry. He decided to stop asking him about the incident until he got to a point where he remembered.

15

In cross-examination, he confirmed that the majority of his evidence was based on what was reported to him by the accused and the deceased. At the accused's arrival in Cape Town everything was fine, but things started to take another turn three months after his arrival. He told the accused that instead of evicting the deceased out of the house, he could rather sell his vehicle and go and live at an informal settlement. The accused told him that he wanted to go home and be away from the deceased. He sought a transfer to the Eastern Cape because of the challenges in the relationship.

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When the accused told him about his unhappiness about the interdict, he told the accused to argue his case in court. He confirmed that he had a conversation with the accused at the crime scene.

5

REFERRAL OF THE ACCUSED FOR PSYCHIATRIC
OBSERVATION

At the end of the defence case, when both parties had closed their cases, the Court was of the view that the defence raised
10 by the accused appeared to be that of non-pathological criminal incapacity. To that end, in view of the fact that the accused was unrepresented and the fact that no expert evidence was led in regard to his mental state, the Court thought it important to obtain expert evidence so that an
15 assessment could be carried out on the question of criminal capacity, by the Court having regard to all the evidence before it. The Court requested the parties to address it on whether the accused should be referred for mental observation in terms of section 78(2) of the Criminal Procedure Act 51 of 1977 ('the
20 Criminal Procedure Act'). Section 78(2) states that:

*"If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence
25 charged, or if it appears to the court at criminal*

proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter
5 *enquired into and be reported on in accordance with the provisions of s79.”*

The Court advised the accused of the provisions of section 77(1)(A) which gave it a discretion to order legal
10 representation for the accused if it is of the opinion that substantial injustice may be caused. After some discussion on this point, the accused asked the Court to assist him in obtaining legal representation for purposes of assisting him to make representations to the Court regarding the issue of
15 possible transfer for psychiatric evaluation raised by the Court. A legal representative, Mr Theunissen, was appointed by the Legal Aid on behalf of the accused. The matter was postponed to afford Mr Theunissen an opportunity to prepare argument on behalf of the accused. Having listened to argument by both
20 parties the Court ordered that the accused be committed to Valkenberg Hospital for an enquiry in terms of section 78(2) read with section 79 of the Criminal Procedure Act. Subsequent to the referral, the Court received a psychiatric report on observation case from Valkenberg Hospital authored
25 by Professor S Kaliski, a forensic psychiatrist and Dr N /NY

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Dyakalashe, a specialist psychiatrist. The accused challenged the report in terms of section 78(4) of the Criminal Procedure Act. Professor Kaliski was called to testify. He stated his qualifications and experience including the fact that he is currently the Head of the Clinical Unit of the Forensic Mental Health Service and an associate professor in the Department of Psychiatry at the University of Cape Town. He read the report into the record. The report essentially found under the heading '*Mental State*', that no symptoms of mental illness were evident. In the ward, his behaviour, that is the accused, and functioning, was normal. He impressed as being of average intelligence. The assessment was that no psychiatric cause could be determined for the amnesia. His poor recall of some details was probably due to his intense emotional state. His actions at the time were purposeful and goal directed and therefore not due to automatism. The report further stated that the accused was not mentally ill and was not certifiable in terms of the Mental Healthcare Act 17 of 2002, that he was fit to stand trial and was able to appreciate the wrongfulness of the alleged offence, and act accordingly and that the disposition fairest to the defendant would be for the Court to continue with its findings.

In cross-examination by the State Professor Kaliski testified that in the last 26 years he has compiled about 3 000 reports

and the manner in which the report was compiled was standard.

When asked by the defence to define non-pathological
5 incapacity, he testified that it is a term created by the courts, it
is not a medical term. According to him, non-pathological
incapacity was not an on-going condition but a temporary state
that occurs during the commission of the alleged offences
defined by the courts. It implies that a person is not mentally
10 ill and does not have a problem with his or her brain *per se*.
The psychiatric term is automatism. Automatism is the *sine*
qua non of the defence of non-pathological criminal incapacity.
In order to succeed with the defence of non-pathological
criminal incapacity there must be evidence of automatism
15 during the alleged offence. Automatism is a psychiatric term
derived from epilepsy and there are certain kinds of epilepsy.
There is epilepsy called complex partial seizures when during
the seizures the person may carry out what looks like
purposeful actions but they are not. They carry out aimless
20 actions and the reason is because their higher cognitive
functions are not working. So automatism really means a
person carries out apparently purposeful or purposeless
actions which are not under direct control of the cognitive
functioning which is one's ability to plan, to be aware of what
25 is going on around him or her, an appreciation of what he or
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she is doing. A person who has automatism has no appreciation of what they are doing at all. Virtually every time a person has a seizure they have automatism. The accused was checked whether he suffered from epilepsy on 7
5 September 2016 through an EEG test. He was found to be normal. 90% of automatisms are caused by epilepsy but there are other causes such as presence of a head injury, low blood sugar due to, for instance, taking too much insulin. It is very rare for a person with emotional stress to display automatism
10 especially if there is some sort of planning beforehand. The depressive episodes have no relationship to epilepsy. The psychiatrists used deductive reasoning to come to the conclusion that a person did not behave in a state of automatism. Professor Kaliski was challenged a great deal by
15 Mr Theunissen on this aspect who stated that to be Court's function. I return to this issue later.

He further testified, that is Professor Kaliski, that the findings were based on information given by the accused in the
20 interviews conducted by him, Dr Dyakalashe and a social worker. The accused was also observed by nursing staff. A panel was held where the accused was represented and various people asked him questions. Professor Kaliski also received court transcripts. He compiled the report from all that
25 information. The accused's counsel requested the information

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used to compile the report which was provided, although it was said to be unusual. Professor Kaliski testified that automatism can be excluded in this case because in automatism one produces behaviour or actions which they had rehearsed many, 5 many times before - the accused's actions at the time of the offence were no such actions. Everything he did he had to be thinking purposefully and planning what he was doing.

They also do blood tests to exclude syphilis and HIV as those 10 may affect how the person thinks. The big disorder they are worried about is epilepsy. HIV can cause subcortical dementia, which is a form of dementia, which can manifest in uncontrolled inappropriate behaviour as well as cognitive impairment. The tests showed that the accused did not have 15 HIV. In this case because of the history of the headaches they thought they would exclude it. The accused came with medication prescribed and they noted that. The psychologists form part of the panel and they would give their input. The psychiatric report and the file from Valkenberg were marked as 20 exhibit "W" and "X" respectively.

Although Mr Theunissen indicated that the accused would be calling any witnesses on this aspect of referral, the accused was ambivalent on this issue as he kept referring to a report 25 by Dr Dhansay that he would have liked to be taken into

account as part of the enquiry during his referral. I adjourned the court proceedings several times to allow Mr Theunissen to arrange for the calling of Dr Dhansay as a witness. After a number of postponements, Mr Theunissen indicated that the
5 accused did not wish to call Dr Dhansay. It was placed on record that Dr Dhansay wrote a report in support of the accused's application for transfer, that the accused suffered from severe depression, for which he was treated between 2010 and 2012 and that he was hospitalised in both instances.
10 It was also confirmed by Mr Moeketsi that the State did not dispute that Dr Dhansay had compiled a report with those contents.

Having considered the psychiatric report from Valkenberg and
15 the evidence of Professor Kaliski and having listened to the submissions by both the State and the defence on the referral of the accused and in the absence of evidence rebutting the evidence of Professor Kaliski and the psychiatric report, the Court accepted the findings by Professor Kaliski and Dr
20 Dyakalashe and adopted it as its findings and ordered the trial to proceed. Both parties were given an opportunity to re-open their cases in view of the fact that the referral of the accused for psychiatric evaluation was done at the instance of the Court after the close of their cases and Professor Kaliski gave
25 evidence thereto. Both parties indicated that they will not

reopen their cases.

Mr Theunissen indicated that he will continue to represent the
accused for the rest of the trial and that was confirmed by the
5 accused.

Each party was given an opportunity to address the Court in
argument.

10 HEARSAY EVIDENCE

Hearsay evidence was led by Mhambi and Centane for the
State. As already indicated, although the accused had
indicated that he would not object to hearsay evidence being
adduced concerning utterances alleged to have been made by
15 the deceased to the witnesses, I was still of the view that,
because the accused was not legally represented, the State
still needed to satisfy the Court that it was in the interest of
justice that the evidence be admitted in terms of s3(1)(c) of
the Law of Evidence Amendment Act. The State applied for
20 that evidence to be admitted and I allowed it.

In S v Ndhlovu and Others 2002(2) SACR 325 (SCA), Cameron
JA stated that at 337D that:

25 “...a trial court, in applying the hearsay provisions of the

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1988 Act, must be scrupulous to ensure respect for the accused's fundamental rights to a fair trial."

I am of the view that the fair trial rights of the accused against
5 whom the State sought to have evidence admitted were
observed in this present matter. The accused was informed by
the Court of the relevant provisions of section 3(1) of the Law
of Evidence Amendment Act and they were explained to him in
great detail. The case in Hewan v Kourie N.O. and Another
10 1993(3) SA 233 (T) at 239B-G dealt with the manner in which
the Court should deal with the provisions of Section 3(1)(c).

In a criminal case when considering all the factors set out in
section 3(1)(c) the Court in determining whether it would be in
15 the interests of justice to admit hearsay evidence, the
overriding factor in assessing each of the factors listed therein
would be whether it would impact on an accused's right to a
fair trial in terms of s35(3) of the Constitution 1996. See S v
Molimi *supra* at paras 36 and 42. I will now deal with the
20 factors set out in section 3(1)(c).

As regards the nature of the proceedings, this being a criminal
trial, it is apparent that some of the hearsay evidence led by
Mhambi and Centane is of an incriminating nature and may be,
25 if sufficient weight is attached to it, considered as evidence

which may, viewed with other evidence, lead to the conviction of the accused. This Court is well aware of that fact and the general reluctance a court should have in admitting such evidence as cautioned in S v Ramavhale 1996(1) SACR 639
5 (A).

In regard to the nature of the evidence, the manner in which the evidence led by Mhambi and Centane came to the fore, was as a result of the relationship they had with the deceased
10 and the accused. Mhambi was a very close friend of the deceased. She was the person to whom the deceased confided about her relationship with the accused. They worked together in the same workplace and often spent time together talking about the relationship of the deceased and the
15 accused. Mhambi had at some point stayed at the deceased's house in Delft. Centane on the other hand was a sister of the deceased to whom both the deceased and the accused reported their problems in the relationship. The two witnesses also witnessed some of the incidents as illustrated in their
20 evidence and were also sent text messages by both the deceased and the accused. I cannot detail all of their evidence again, as the bulk of it had to do with what they were told by the deceased regarding the nature of the relationship with the accused, that appears in the summary of their
25 evidence.

As to the purpose for which the evidence was tendered, the obvious purpose was to show the tumultuous or troubled relationship between the accused and the deceased and utterances made by the deceased to them up until her death. It served to corroborate the case of the State as to what the circumstances were, leading to the killing of the deceased and to suggest that the deceased had made statements to them such as that the deceased told them that if he could not have her no one will.

In assessing the probative value of statements, the reliability and completeness of the manner in which the State witnesses had relayed the words of the deceased is important. The reliability and completeness of whatever it was the deceased said to them is also important. The bulk of the utterances alleged to have been made by the deceased were confirmed by the version that the accused put to the witnesses. He however disputed some of the utterances including the context in which those were made. Without getting into the details or mentioning all of them, I will mention those he disputed that I thought were crucial to the assessment. Those are, firstly, the statement that was made by Mhambi that the deceased told her that the accused said to the deceased if he could not have her no one will as I have already indicated. Secondly, the

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statement that the deceased had a gut feeling that the accused was going to kill her, shortly before she was due to appear in court for the hearing of the interim protection order and that the accused would kill her in court. Centane also mentioned a
5 statement by the deceased that the accused said he would kill her. The accused also disputed that he was abusive to the deceased and in fact averred that it was the deceased that abused him emotionally, psychologically and socially. He also disputed that he was dangerous and that he assaulted the
10 deceased. According to him, the assault was once and that matter was resolved. He also disputed that “he was dumped by the deceased” as alleged by Mhambi in the statement to the police and that they were no longer in a relationship. There are other disputed facts which can be found in the record.

15

The accused also pointed to discrepancies between the statements made to the police and the testimony of the witnesses, and the fact that Centane, in her police statement, did not state that the content of the statement or some of it
20 were statements told to her by the deceased. To this end, the accused argued that the evidence of these witnesses was not credible and should be disregarded by the Court.

The Court is mindful of the close relationship that the
25 deceased had with these witnesses, and therefore caution

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should be applied in assessing the evidence that is potentially incriminating to the accused, especially regarding the statements made about the deceased telling the witnesses that the accused was going to kill her or that she had a feeling that
5 he was going to kill her.

The State argued that the statements made by the witnesses largely accorded with the content of the application for the interim protection order made by the deceased, which the
10 accused introduced to the Court for purposes of cross-examining the State witnesses. I will not focus too much on the content of the application for the protection order itself. I am alive to the fact that it was introduced by the accused with the view to using parts of it to contradict the testimonies of
15 Mhambi and Centane. It should be remembered that the accused was not legally represented, therefore the content of the application, whilst it is before the Court, should also be treated with caution.

20 The probative value in my view of the evidence of Mhambi and Centane did not only depend on the quality of the evidence, but also on the totality of the evidence that was presented. This would include the evidence of the other State witnesses, especially where the evidence was closely related to that
25 which the hearsay statements referred to. The State submitted

that the evidence of the said witnesses on the whole went to show that the deceased, as a result of the problems that characterised her relationship with the accused, went to the extent of informing other people and even applying for an
5 interdict. Therefore, before the alleged offence was committed there were problems which led to the committal of the offence. The accused's own version put to the witnesses confirmed some of their evidence. I have already alluded to the fact that some of the context and statements were disputed by the
10 accused during the versions that he put to the witnesses. There was other evidence by the State witnesses which could not have been fabricated which may serve to strengthen the probative value of the evidence of Mhambi and Centane. The reason why the maker of the statements did not give
15 evidence is obvious, the deceased passed away.

As to the aspect of prejudice, some of the evidence is prejudicial to the accused as would be in any incriminating evidence. On the other hand, as the accused stated the
20 evidence of these witnesses serve to bring light to the nature of the relationship with the deceased. The evidence was fully canvassed in court, witnesses were challenged in cross-examination and argument was held on whether on the grounds set out in section 3(1)(c) of the Law of Evidence Amendment
25 Act it should be admitted. Given these safeguards, the

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interests of justice justified the admission of this evidence.

In my view, even though some of the evidence may be prejudicial to the accused, there is no risk that his fair trial
5 rights would be infringed if the Court in the interests of justice admitted this evidence. It is under this overall protection that any prejudicial evidence is admitted during a criminal trial, obviously with the added caution, that such evidence is hearsay and that the Court should be vigilant in admitting it
10 without good and compelling reasons. It would have been illogical or not sensible in my view for the Court to disregard that evidence.

The accused also applied for the admission of hearsay
15 evidence to be led by his witness, Memani regarding the nature of his relationship with the deceased as well as the utterances by the deceased and the accused to this witness. The State did not object to the admission of the evidence of this witness and no further enquiry was required, as section
20 3(1)(a) was fulfilled by virtue of that agreement. In any event the interests of justice would have similarly called for this witness' evidence to be admitted.

This witness was also intergral in the relationship between the
25 deceased and the accused. He also received telephone calls,

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complaints, messages from the deceased and the accused and was involved in meetings trying to resolve problems between the accused and the deceased.

5 ASSESSMENT OF EVIDENCE

The summary of the evidence of Mhambi, Centane, the accused and Memani paints a picture of a very troubled and tumultuous relationship between the accused and the deceased. I do not wish to repeat the evidence, as what I have outlined in respect of each of these witnesses sufficiently reveals the turbulent nature of this relationship. It was an unhappy relationship from the outset, filled with emotional stress and turmoil. It appears that even before the accused moved to Cape Town, when visiting the deceased on his off days in 2010, the couple had fights and arguments and he was not happy with the manner in which the deceased treated him in front of the children. He lay in hospital for two weeks due to depression, during that period, but yet he moved to Cape Town and the two lived together. There was always hope that things would get better. He made a number of discoveries in Cape Town including that the deceased was not prepared to keep to her promise that she would assist him financially when he moved to Cape Town, whilst expecting him to pay the full rent and still build his house in the Eastern Cape. She was on the other hand building a house at her own homestead. He

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was also dismayed to discover that the deceased had contracted HIV but had failed to disclose that to him. He nonetheless stayed in the relationship and endured the treatment he felt he was being subjected to. He further caught
5 the deceased with another man in a sexually compromising state. This and other reports from colleagues about the deceased's unfaithfulness strongly devastated him and caused severe emotional stress. This indeed was a bitter relationship, filled with hardships, regrets, doubts and suspicions as
10 depicted by the evidence by both sides. From the evidence of the accused it is clear that this manifestly affected him in many ways, he was hurt, disappointed, humiliated, he felt betrayed and he was deeply scarred. As he puts it, he was affected emotionally, psychologically and socially and felt like
15 he was treated like a non-object. The deceased too seemed to be unhappy, Mhambi and Centane who told her side of the story gave accounts of messages and conversations they had with the deceased which showed her misery. She applied for an interdict against the accused. It is so that the accused
20 intended to oppose it and refuted the allegations made by the deceased against him as he did not know what its purpose was. He further disagreed with the version of the State witnesses relating to his alleged treatment of the deceased. In cross-examination, he testified that he and the deceased were
25 no longer together and he made a decision to no longer set
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foot at his house. He therefore did not see the purpose of the
interdict. He concluded that there was a conspiracy to
dispossess him of his working tool by the deceased and her
family which indeed caused him a lot of stress as he put it, it
5 reminded him of all the things that had happened in the
relationship in the past and triggered a depressive emotional
situation that he had never experienced before. Whatever the
purpose of the interdict was, it extremely devastated the
accused. Perhaps it is appropriate to state what the contents
10 of the interim court order were, at this point, as they were
canvassed during cross-examination. In terms of the order the
accused was ordered inter alia:

1. Not to assault or threaten to assault the complainant, i.e.
the deceased/children.
- 15 2. Not to enter the complainant's, i.e. the deceased's,
residence/premises at 24995 Muhavura Street, N2
Gateway Leiden Delft.

There was also an additional order that the firearm of the
20 accused be seized by a member of the SAPS at Pinelands
which was key to the triggering of the severe stress. The
return court day was 3 July 2014. I am mindful of the fact that
the accused refuted the allegations made against him by the
deceased and felt that she had no right to keep him away from
25 their house and was unhappy about his firearm being taken

away from him. Whatever the issues around the interdict were, the point is it existed and as the accused put it in his evidence it worsened his already dilapidated emotional state and triggered “the whole thing”.

5

That forms the background of the issue to be determined by the Court. The issue before the Court lies on whether the elements of the crime the accused is charged with were proved.

10

ISSUES TO BE DETERMINED

Murder is defined as an unlawful and intentional killing of another person. The elements are therefore:

1. Unlawful;
- 15 2. Killing;
3. Of a person and;
4. Intention.

See Jonathan Burchells’ Principles of Criminal Law Fourth Edition at page 563.

20

It is common cause in this case that the deceased was shot and killed with a pistol belonging to the accused. It is also common cause that she died from multiple gunshot wounds resulting from the shooting.

25

It seems to be accepted by the accused that the deceased was shot and killed by him. This is apparent from the version he put to the State witnesses that the deceased died at his hands and from his own evidence that he caused the death of the
5 deceased.

Therefore, from the evidence, the accused does not dispute that he shot and killed the deceased on the day in question, nor that his action caused her death. What is placed in issue
10 is the question of his criminal capacity at the time of the incident. In a nutshell, the version of the accused is that he cannot recall what took place during the incident.

15 LEGAL POSITION

Burchell correctly observes at 247 that:

*“[p]ersons are responsible for their criminal conduct only if the prosecution proves, beyond reasonable doubt, that at the time
20 the conduct was perpetrated they possessed criminal capacity or, in other words the psychological capacities for insight and for self-control.”* The State must prove beyond reasonable doubt that, at the time of the fatal attack, the accused had the necessary capacity.

25

According to *Burchell* the test is whether an accused had criminal capacity to appreciate the wrongfulness of his or her conduct and the capacity to act in accordance with this appreciation (at 247). He advocates that criminal capacity is examined in the context of cognitive faculties (i.e. the individual's capacity to think, perceive and reason, the capacity by which humans learn, solve problems and make plans) and the connective faculties which is the capacity for self-control and the ability to exercise free-will.

10

Our courts have over the years analysed the meaning of these concepts culminating in the judgment of S v Eadie 2002(1) SACR 663 (SCA) that crystallised what criminal capacity and in particular non-pathological incapacity is and how courts should apply the principles arising therefrom. Navsa JA in Eadie *supra* went through a history of cases that dealt with this topic and carefully analysed findings of various courts and in particular the approach that had been followed in previous judgments of the SCA and by academic writers.

20

For purposes of this case, the starting point is to understand what criminal incapacity is. Navsa JA points out at para 26 of Eadie that: "*In our law, criminal incapacity due to mental illness is classified as pathological incapacity. Where it is due to factors such as intoxication, provocation and emotional*

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stress it is termed non-pathological incapacity. The term non-pathological incapacity was coined for the first time by Joubert JA in S v Laubscher 1988(1) SA 163 (A) at 167D-I.”

5 Apparently by coining this term Joubert JA wanted to differentiate this defence from that of mental illness created by section 78 of the Criminal Procedure Act. The application of this term as well as the law developed with a number of decisions that applied it. Incidentally a number of decisions
10 that Navsa JA looked at in Eadie involved the killing of a person by someone that he or she had a love or close relationship with, at some point or the other, which is similar to the facts in the present matter. The distinction in those cases might lie on the nature of the defences raised and other
15 nuances on the facts applicable in those other cases. For instance, in the case of S v Francis 1999(1) SACR 650 (SCA) the accused had a relationship with the deceased. He was strongly attached to her and was jealous of the attention that she gave to other men. On the day of the offences, the
20 accused in that case had been drinking heavily. In the evening, he went to the deceased's home where he found the deceased's father. An altercation ensued between the two men. The accused just fired a shot at the deceased's father's head which passed close to his ear. The accused then started
25 kicking down the deceased's bedroom door and entered the

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room. He held the deceased hostage. Various people and the police attempted to talk to him. To cut it short, he shot and killed the deceased. The accused contended that he acted in a state of non-pathological criminal incapacity with the result that either he was unable to distinguish right from wrong or if he could he was unable to control his actions. The Court agreed with the evidence of the psychiatrist called by the State that there was a series of deliberate actions by the accused before, during and after the acts in question and he was able to distinguish between his victims. In that case it was also found that he lacked credibility. In S v Kok 2001(2) SACR 106 (SCA) the accused was a superintendent in the SAPS. It appears that a dispute arose between the accused's wife and a colleague. After work one afternoon the accused was called by his wife telling him that the sheriff had come to attach the property. He went home and found his wife and child in a distressed mood and proceeded to the colleague's home with his pistol. The accused shot at both his colleague and her husband and they were killed. He contended that he lacked criminal capacity denying that he acted consciously and voluntarily or was capable of forming an intention to kill. His evidence was supported by a psychiatrist who said that he was suffering from major depression and a condition known as post-traumatic stress disorder. It appeared that the accused was subjected to stress, particularly in relation to his duties as

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a policeman. In that case the Court held at 115 I – 116 B:

5 *“Loss of temper, that is to say failure to control one’s emotional reactions, is not to be confused with loss of cognitive control (see S v Henry 1999(1) SACR 13 (SCA) at 20d-f). The fact that he could recall these events some days later indicates that he knew what he was doing and is inconsistent with the hypothesis that he was re-enacting some memory in a dissociative state.”*

10

The Court went on to say:

15 *“It may be that the appellant whether consciously or subconsciously, subsequently repressed his memory of the events he described to Dr Dunn.”*

Navsa JA observed further in Eadie that from the decisions of the SCA it was clear that the Court approached defences of non-pathological incapacity with caution and the approach has
20 been to carefully consider the accused’s actions before, during and after the event. The Court took into account whether there was planned, goal-directed and focused behaviour. Navsa JA went on to say that the SCA has repeatedly stated that a detailed re-collection of events militates against a claim of
25 loss of control over one’s actions (at paras 43 and 44). I am

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alive to the fact that the accused in this case asserts that he could “slightly” remember the events he recounted on the day just before the incident. I return to this issue later.

5 Perhaps it is also relevant to refer to the decision of S v Arnold 1985(3) SA 256 (C) where the accused shot and killed his wife. It was contended on behalf of the accused that, at the time when the fatal shot was fired, because of emotional stress he did not have the criminal capacity and hence could
10 not be held criminally liable for the shooting. The accused said he could not remember aiming the gun and pulling the trigger. He stated that he heard the shots going off, saw his wife suddenly going down and he found himself with his arm outstretched, gun in his hand pointing towards the place where
15 the deceased had stood with his finger on the trigger. He was remorseful afterwards. Burger J found that he was indeed upset about the events prior to the incident. He further found that the State had not proved that the accused either could have appreciated the wrongfulness of the act or, if he did, that
20 he was able to act in accordance with such appreciation.

The SCA in Eadie criticised Burger J in Arnold for readily accepting the accused’s *ipse dixit* or ‘say-so’ about his state of mind because the evidence showed that his behaviour was
25 focused and goal directed before, during and after the event.

According to the SCA that was not given adequate weight by Burger J. The SCA found that the test for criminal incapacity as laid down by the decisions of that Court, which stood for decades, was J misapplied by Burger J. It further found that
5 these principles were also misapplied in other High Court decisions that Navsa JA referred to.

The SCA in Eadie *supra* went on to state at paragraph 65:

10 “To maintain the confidence of the community in our system of justice the approach of this Court, established over almost two decades and described earlier in this judgment, should be applied consistently. Courts should bear in mind that the phenomenon of sane people
15 temporarily losing cognitive control, due to a combination of emotional stress and provocation, resulting in automatic behaviour, is rare.”

It went on to say that:

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“*It is predictable that accused persons will in numbers continue to persist that their cases meet the test for non-pathological criminal incapacity. The law, if properly and consistently applied, will determine whether that claim is*
25 *justified.*”

APPLICATION OF PRINCIPLES TO THE FACTS OF THIS
CASE

Applying the facts of this case to the principles enunciated by
5 the decisions above, the accused in the present matter
testified essentially that he suffered from emotional stress or
severe depression that was caused by the deceased's actions
and behaviour throughout their relationship and such was
aggravated by the Bellville Magistrates' Court's interim
10 protection order.

The essence of the defence is that he could not recall the
actual shooting and what happened thereafter until the next
day when his brother, Memani, came to see him at the police
15 cells. It is therefore important to look at his recount of the
events of the day coupled with the actions that manifested on
the day in question.

When recounting the events of 3 July 2014, the day of the
20 incident, the accused testified that he woke up in the morning
from the barracks. He went to the Bellville Court as instructed.
He sat in front of the office which was where the matter was
going to be heard. The deceased appeared, he greeted her
and they just sat there. The registrar came out and called
25 their names. They were directed to another Court, which is the
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Family Court in Bellville.

The magistrate asked if they were continuing with this. The deceased said 'yes'. The magistrate turned to him and said he
5 must have familiarised himself with the contents of the interdict and what was his position. He told the magistrate he was opposing it. He told the magistrate that he was working at the station looking after the structure and it was important that he has a firearm. He was asking that his firearm be excluded
10 from the provisions of the interdict as it had nothing to do with it. The magistrate said to him the fact that the firearm did not form part of "this thing" did not mean it could not be taken.

He produced the report by Dr Dhansay. Having looked at the
15 letter, the magistrate said: "*This application is very recent than this letter, I'm not going to attend to this, I am going to look into it on the 30th or the 31st.*" The matter was then postponed to 30 July 2014. The magistrate had earlier asked how the deceased felt about the accused's firearm been taken,
20 she said she was not feeling safe at all. At this point, it is clear that the accused remembered in detail what was taking place in court and could appreciate his surroundings.

Moving from there, he says that he fell on his face on a pulpit
25 like structure that was in court and cried. He felt weak and
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suffered from a terrible tension headache. It was like he was seeing bubbles, same as when it is sunny. His sight was sort of lost a bit. He felt like his head was stuck. He went to his vehicle, sat there a bit. He tried to close his eyes in order to
5 regain proper sight. Suffering from all these experiences, he drove. Still, the accused could remember in detail what was happening at that point in time - even in that condition (he had never felt like that before).

10 As he was driving, he thought of going straight to the doctor to be admitted. He drove to the barracks, himself and by himself, in the condition that he was in. On his arrival at the barracks he took his pyjamas, slippers and service pistol with two magazines that must be handed in. The accused still on this
15 part could remember the details of what he was doing, from driving to the barracks, taking his clothes, pistol and two magazines. He also remembered what thoughts were going through his mind such as the fact that he wanted to get himself admitted at the hospital for a few days.

20

He states that, according to the provincial instruction, when one is to be admitted to hospital, they must hand in their firearm. What seems interesting about this comment is that the handing in of the firearm would appear to have been
25 primarily motivated by the fact that the accused was going to

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be admitted to hospital and for that reason was obliged to hand the firearm in, in terms of the provincial instructions, and not necessarily, as it appears, to comply with an interim Court order.

5

Be that as it may, returning to the recounting of events, the accused states that he does not know what happened to him after driving out of the barracks. It would appear that his condition at this point was deteriorating. He remembers driving out of the barracks and does not know how he landed at their house in Delft whilst his destination was going to the hospital. He also does not remember which route he used. He testified in cross-examination that there are a number of routes to Delft from the barracks. In fact there were three routes he could take from the barracks to the house in Delft and he had no preferred one. He could take any route. There was no straight road. He conceded that the drive from his house to the barracks was quite a distance. Although he could not give an estimation of how long it took, he testified that he would normally get to his house from the barracks within an hour.

He conceded that the three routes had robots, turns, stop streets and traffic circles. He would have had to stop at the stop signs and traffic lights and be cautious of other vehicles

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necessitating him to apply brakes, and drive the vehicle in a manner watchful of the road signs and looking out for other drivers. In fact, he testified that when he gets to Delft there are lot of stop signs and circles. He did not get involved in an
5 accident and did not know how that did not happen.

A conclusion that can be drawn from this evidence is that whilst the accused was in intense emotional state, his cognitive faculties were still functional when he was driving to
10 Delft. In other words, he could control the vehicle on the road. His vehicle was a manually operated vehicle. He therefore would need to change gears, press pedals, and brakes. He also conceded that if there was a psychological or physical impediment, he would not be able to do that and if there was
15 something disturbing his focus he would manoeuvre the vehicle appropriately.

Surely these actions are not consistent with that of a person whose cognition was disturbed during that period.

20

It can be accepted that a lot of things were going through his mind whilst he was driving because he was affected by the interdict, but that did not mean that his cognitive abilities were not functional. At that stage, he must have been aware of his
25 surroundings. He must have been aware of where he was

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going. This is more so because when he reached the house in Delft, he realised where he was and at this point he did not say “oops I am at the wrong place and I need to turn around”. Especially because he was not supposed to be there as per
5 the Court interim protection order. So at least then he seems to have been conscious of where he was, albeit ‘slightly’, as he testified. He did not act surprised when he found himself at the Delft house. It is strange that he would not remember anything on the road but gets to remember his arrival at Delft
10 and that he parked his vehicle parallel to that of the deceased at the Delft house.

Now, when he reached the house at Delft, the accused starts to remember the events vaguely. He made it a point to stress
15 to the Court that his remembrance was slight when he parked his vehicle and saw the deceased’s vehicle parked opposite the house. He parked his next to hers. They met and at the time she was taking something out of the car. He that it is like he said “*what more do you want from me*” and she insulted
20 him. In fact he could slightly remember she insulted him. He could not recall how he drew the pistol and how everything took place. In cross-examination he said the curtain just closed. He could not recall how he landed in the police station, which route he used. He was astonished when looking
25 at the evidence. He asked himself a lot of questions, how did

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he not get involved in an accident. He could not remember phoning his commander (Ntshingila) that day. He was shocked to hear from his brother about what he was told about the previous day.

5

The accused described his condition that day in a number of ways which I mentioned when I was summarising his evidence. This description seems to suggest that the accused's actions would have been triggered by a state of heightened emotional stress, caused by the deceased's behaviour over the years and provoked by an interdict and insults that the deceased hurled at him on the day of the incident after asking her what she wanted him to do, having obtained the interim order against him. In cross-examination he stated that if nobody conspired against him for his firearm to be taken away, he would not have deteriorated to the point that resulted in the existence of the situation he was faced with.

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It is interesting to note that whilst the accused states that he was intending to go to hospital and not his Delft house, the description of his condition that he mentioned and the statements he made in relation thereto do not accord with someone who happened to find himself at a place he was not intending to be. He seems to be justifying his presence at the house and actions that followed when he states for instance

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that if the deceased had not treated him the way she had and further provoked him with an interim interdict he would not have been depressed to the point of losing his normality or rationality. It seems striking that the accused who intended to go to hospital, will suddenly find himself at the Delft house immediately after the Court appearance and at the time when he was highly affected by what transpired in Court.

The defence that the accused is raising is that of amnesia. According to Du Toit *et al* Commentary on the Criminal Procedure Act at 13-21:

“For purposes of criminal responsibility, amnesia is only relevant insofar as it refers to the instance where something does not register in the mind of the accused at the time of the act because brain function is impaired at that time.”

No one else was present when the accused shot the deceased. It was only him and the deceased. In assessing criminal capacity Griesel J in S v Eadie 2001(1) SACR 172 (c) at 180g-l said:

“...the court must have regard not only to the expert medical evidence but also to all other facts of the case,

including the reliability of the accused as a witness and the nature of his proved actions throughout the relevant period. By the very nature of things, he is the only person who can give direct evidence as to his level of consciousness at the time of the commission of the offence. His ipse dixit to the effect that his act was involuntary and unconsciously committed or, as in the present case, that he had 'lost control' must therefore be weighed and considered in the light of all the circumstances and particularly against the alleged criminal conduct viewed objectively."

In this case the accused said he could not recall what happened. Professor Kaliski testified that the whole point about automatism is that there should be no antecedent event that leads to the conclusion that what the person did during automatism was a logical extension of what the person was doing before the automatism.

The accused, when he reached his home in Delft, got out of the vehicle which he had parked next to the deceased's, had a conversation with her and she then insulted him, he held a gun (which he does not recall), and fired all the shots contained in the full magazine that carried at least 15 rounds directed at the deceased. That sequence is logical.

When shooting at the deceased the accused would have had to pull the trigger a number of times in order to fire shots aimed at the deceased. One can therefore deduce that he knew what
5 he was doing, because all his actions, getting out of the vehicle (having driven to the deceased's house and parked his vehicle next to her's), talking to the deceased, and shooting, (which he cannot remember), form a logical sequence. Therefore before the shooting there was a prior rational action.

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According to Hill, the pistol that the accused was using required one to pull the trigger for each shot. The pistol that the accused used was not capable of discharging more than one shot with a single depression of the trigger. The accused
15 would have had to pull the trigger for every shot fired in order to shoot all the bullets. The accused agreed in cross-examination at the end of the day that for several shots to be fired there had to be movement of the index finger backwards and forwards. The finger was not just placed there and bullets
20 flowed automatically. It follows therefore, that for that to happen there had to be a level of consciousness.

According to Professor Kaliski automatism can be excluded in this case because in automatism one produces behaviours or
25 actions which they had rehearsed many times before and the

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accused's actions at the time of the offence were no such actions. Everything he did had to be of a person thinking purposefully and planning what he was doing. Mr Theunissen submitted that the accused as a policeman had practices
5 pulling a trigger many times. The point is that the action of pulling a trigger in this case flowed from a logical extension of events that would not have been rehearsed before, i.e. the getting out of the vehicle, talking to a person, being insulted, and pulling a trigger as many times. The circumstances would
10 have been different when practicing as a policeman. I find that the actions of the accused were goal-directed; focused before, during and after the incident. The accused was aware of his surroundings and could appreciate the consequences of his actions. His version that he could not recall what happened
15 due to heightened emotional stress at the time of the incident is rejected as not being reasonably possible.

The evidence of the three witnesses, Ntshingila, Fredericks and the accused's brother, Memani, is crucial as it relates to
20 the actions of the accused immediately after the shooting incident and of the day in question. It will be recalled that from the case law I have analysed above, the Court in testing the accused's evidence about his state of mind at the time of the incident, would, *inter alia*, look at his prior and subsequent
25 conduct or actions. After the incident, the accused drove

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himself in the vehicle to the police station to hand himself over and told Fredericks that he had killed his ex-girlfriend.

In cross-examination he testified that from his house in Delft to
5 the police station was a long way. He conceded that when
driving from the house to the police station he would encounter
circles, and some turns. He would have had to drive carefully
and safely and focus so as not to cause an accident, either to
himself or other road users such as pedestrians and drivers.
10 He agreed that if he was not focused he could cause
accidents.

In the first instance to drive a vehicle when a comprehension
of the surroundings is not there, from the house in Delft to the
15 police station, is inconsistent with a complete black-out. It
must be remembered that according to the accused the '*curtain
closed*' during the incident and he could not remember what he
did thereafter for that whole day. He woke up at the police
station the following day.

20

The accused used a phone to phone his brother and told him
that he killed the deceased. He further told him to meet him at
the police station. Immediately thereafter he called him again
to say he (his brother) must rather go to their house in Delft.
25 When his brother got there, what the accused told him on the

phone was confirmed by what he saw. The accused and the police then arrived. So, the accused would have known that he was on his way to Delft when he called his brother with the police. That is behaviour of a person who knew what had
5 happened and what he was doing. Yes, the accused was emotional and crying when Memani saw him, but a person who was not aware of his surroundings would not have been able to relate the incident and even direct his brother on the phone to where he was.

10

The accused also phoned his commander Ntshingila and told him that he killed his girlfriend. In order to phone both his brother and the commander he would have had to find their numbers from the phone. When he went to hand himself over
15 to the police, he must have driven there knowing that a wrongful act had been committed. In other words, he could distinguish right from wrong; hence he drove to the police station and asked Fredericks to arrest him.

20 None of the witnesses spoke of the accused looking like he had lost his mind and was acting strange. Even if the witnesses are not psychiatrists or psychologists, they would have at least been able to testify about the actions they observed, especially the brother of the accused. There is no
25 evidence that the witnesses were complicit regarding the

information they received from the accused. Most importantly, the State witnesses' version was corroborated by Memani. Even without Fredericks' evidence, the other two witnesses' evidence sufficiently paint a picture of a person who was
5 acting rationally.

The evidence by the deceased's neighbour, Davids, should not be forgotten. He saw a white vehicle after the incident and someone got out and felt the pulse of the woman; he (this
10 person) said she is gone and he got back into the vehicle and drove off. Although this evidence was not explored much, it is possible that the person in the white vehicle that the witness saw was the accused. I will however not give much weight to that since the witness did not testify about the identity of the
15 person in the white vehicle.

Professor Kaliski and Dr Dyakalashe acknowledged in their psychiatric report that the accused's poor recall of some detail was probably due to his tense emotional state. As the Court
20 said is S v Kok *supra*, it may be that the accused's lack of memory about the events may be because the accused consciously or unconsciously subsequently repressed such memory, which is different from amnesia that arose because of the cognitive faculties not functioning due to emotional stress
25 (at the time of the incident). Furthermore, his lack of self-

control, if any, could only serve as a defence if the accused was acting in a state of automatism. As the Court in Eadie concluded at para 70 inter alia:

5 *“...It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism. It is by its very nature a state that will be rarely encountered.”*

10 The rarity of the occurrence of this state was confirmed by Professor Kaliski. While he acknowledged that severe depression may cause automatism he stated that it was rare and it was not the case with the accused.

15 The Court accepted the evidence of Professor Kaliski. He was criticised a great deal by Mr Theunissen. While agreeing that ultimately it is the Court's function to determine the accused's criminal responsibility for his actions at the relevant time, non-pathological criminal capacity has an element of automatism.

20 In my view, whilst expert evidence is not solely determinative of the question of criminal capacity, it is valuable as part of the evidence to be looked at by the Court. The psychiatric report, as well as Professor Kaliski's evidence, was of great assistance to the Court and crucial. The assessment of the accused by the professional medical experts as well as the

evidence in Court brought valuable insights to the questions that the Court had to determine. The report, and the evidence, was clear and logical. There was no evidence to rebut it.

5 Whilst the Court accepts that the accused suffered from severe depression there was no evidence that the condition he suffered from was connected to automatism. I take note of the fact that this would have been the first time that the accused's condition would have caused him to act in the manner that he
10 did. There was no evidence that he has ever been in a state of automatism before although he has been suffering from severe depression for a long time. Be that as it may the connection between his emotional state and his loss of memory on that particular day was not shown. It must be
15 remembered that the Court does not only look at the accused's ipse dixit or say so. It looks at all the factors that I have referred to.

The Court in Eadie further impressed at para 70 that "*in future, courts must be careful to rely on sound evidence and to apply the principles set out in the decisions of this Court*".
20

I am satisfied that an intention to kill has been shown. This is shown by the brutal nature of the attack on the deceased. The
25 type of intention is clearly in the form of *dolus directus*. All

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bullets contained in the magazine were used to kill the accused. The nature of the wounds was such that there was no chance of survival. She received 42 wounds with bullets entering, exiting and re-entering her body. It appears that she
5 was killed while seated inside the vehicle.

There is no doubt that the accused was unhappy with his firearm being taken away from him. In his evidence in chief he testified that it was important for him to have his firearm and
10 that it allowed him to work outside and get overtime pay. It was important for him to get overtime pay because he had family responsibilities and he needed the money that came with overtime. Hence, when he was asked to hand in his firearm the first time around, he went to the lengths of
15 obtaining a report from Dr Dhansay stating that he was fit to use his firearm again. This shows how important having his firearm was to him. The fact that he asked the court to exclude it from the interdict shows that he did not want the firearm to be taken away from him. It was a clear trigger for his
20 subsequent actions on the day of the incident.

There is another aspect that cannot be ignored. The accused became aware of the interim interdict on 25 June 2014 whilst he was on leave. He was told that he had to hand in his
25 firearm in terms of the interim court order. He told the

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policeman that served him with the interim interdict on 25 June 2014 that his firearm was at work. He did not ensure that it was handed in. He says that he thought it was at work until he found it at his place at the barracks with his Q20 oil that he used to lubricate his hair shaving machine. He testified that he normally kept the firearm in the safe with his Q20 oil. He was going to cut his hair as he was going to resume work on the evening of 3 July 2014 and that is how he discovered that the firearm was in fact at the barracks and not at work as he thought. When he discovered that the firearm was not at work but at the barracks, he thought he would hand it in during his nightshift on that day, that is, the 3rd July 2014. He did not think the interim order would be '*upheld*'. He did not take the firearm with him to court because he thought he could hand it in later.

This evidence seems like an attempt to explain why the firearm was not returned from 25 June 2014 or at least shortly thereafter. The accused's behaviour of not ensuring that the firearm was returned forthwith leads to an inescapable conclusion that he did not want to return it. He could have gone to the police station, to ensure that it was handed in, if he thought it was there. It was not enough to say that he thought it was there in the safe when he was obliged by a court order to return it. His behaviour bordered on contempt.

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Having discovered that the firearm was not at the police station one would have expected the accused to hand it in as soon as he could or at least immediately after appearing in court, on 3 July 2014, when he saw that his request was not granted by the magistrate. He conceded that the Bellville Police Station is close to the court he appeared in, i.e. the Bellville Magistrates' Court.

Even if one accepts that he left his pistol at home on 3 July 2014, he should have then taken it to the police station in Pinelands, which is within his vicinity when he returned from court as the interim order itself said that it must be seized by a police officer in Pinelands. I understand that the accused says it would have been incorrect procedurally for him to hand it in. If that was the case, now that he had decided that he was not going to be able to work, but would get himself admitted in hospital, then he could have first taken it to the Bellville Police Station before going to hospital, or phoned his commander whilst he was still at the barracks to send someone to fetch it. He did not need to take the firearm to hospital first. In any event, he did not phone his commander when he left the barracks informing him that he was going to hospital and for him to dispatch someone to come and fetch the firearm at hospital.

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I do not accept that he was going to hand it in during his shift in the evening. He also testified that the reason for taking the firearm was to hand it in, in compliance with the provincial
5 procedure which required a firearm to be handed in if one was to lie in hospital for a long period. The reason for handing it in would have been to obey the provincial procedure and not the court order.

10 These factors lead one to the irresistible conclusion that the accused planned to go to Delft with the loaded firearm. Whether the planning took place whilst he was driving or he changed his mind about his destination along the way is another issue. In any event, even if the planning took place on
15 arrival at Delft, the point is, the accused took the firearm fully loaded, and shot at the deceased. He went there to confront her about the interdict and failed to hand in his firearm when he had an opportunity to do so, having been devastated by the prospects of losing it.

20

The accused resented the deceased for what she had done to him. This came across in his evidence. He blamed her for having caused him to act in a manner he did. He allowed the things he alleges the deceased had done to him to well up until
25 he reached a breaking point, and a heightened emotional

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state. The Court is not saying the accused was not severely affected by the situation he says he found himself in emotionally and psychologically, actions of the deceased however are no defence to the killing, unless it could be shown
5 that the accused lacked criminal capacity caused by the stress. While I do not doubt that the stress was present and played a significant role in the accused and deceased's lives, I cannot accept that it led to a lack in criminal capacity.

10 The accused may be remorseful and regretting his actions but that plays no part in the question of whether he appreciated the wrongfulness of his actions and acted in accordance with that appreciation.

15 To conclude, a lot of evidence was led in this case. Most of the evidence revolved around the troubled relationship of the accused and the deceased. The witnesses on both sides made common cause on the core issue of the turmoil in the relationship. I do not rely on the statements attributed to the
20 deceased that the accused was going to kill her. Most of my assessment was focused on the day in question and the evidence that was directly relevant to the questions of criminal capacity. There were some inconsistencies in the evidence of the State witnesses, as pointed out by the accused, that is,
25 Mhambi and Centane's evidence, and their police statements.

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When the evidence was assessed on the whole, those discrepancies did not warrant a total rejection of their evidence. In any event I was careful about the fact that the witnesses were close to the deceased and did not focus my
5 assessment on the premonitions that were alleged to have been reported to them by the deceased. The police officers that testified about the events of the day in question could have no reason to fabricate their evidence. That is in any event not placed in issue by the accused. Their evidence as to
10 the actions of the accused was supported by Memani. Memani for the accused also gave clear evidence. He did not come across as seeking to protect his brother. He was open to the Court about the phone call that the accused made to him, telling him that he had killed the deceased.

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The accused led extensive and comprehensive evidence. Whilst that was so, his version was not sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of his actions. It therefore must be rejected as not
20 being reasonably possibly true. I have already detailed reasons for this.

For those reasons, I am satisfied that having considered all the evidence before this Court, the State has been able to
25 prove beyond reasonable doubt that the accused is guilty of

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murder and it was planned.

In the result, I make the following order:

- 5 **THE ACCUSED IS FOUND GUILTY OF MURDER AS CHARGED.**

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BOQWANA, J