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

CASE NO: CC60/21

In the matter between

THE STATE

V

BABSY NTAMEHLO

JUDGMENT delivered 26 October 2022

THULARE J

[1] The accused was indicted on a charge of murder read with sections 1 and 256 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA) read with sections 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997) (the Minimum Sentences Act). The State alleged that the accused planned and killed the deceased, N[....] T[....] (N[....] or the deceased) on 6 September 2020. The accused pleaded not guilty to the charge.

[2] The issue is who killed N[....], partially burnt her body and buried her in a shallow grave on the banks of the Mosselbank river, Fisante Kraal, in Durbanville, a walking distance from her home.

[3] The accused and N[....] were customarily married in 2008 and lived together in the squatter camp in Fisante Kraal, Durbanville. They lived with their son, L[....]1. The accused had been abusive to N[....] and in 2016, N[....]'s family decided that as part of mitigating the abuse, N[....]'s younger brother, L[....]2 T[....] (L[....]2), was to come and live together with her to help protect her against the accused. L[....]2 moved from the Eastern Cape to come and live with N[....] since 2016.

[4] The relationship between the accused and N[....] was characterized by arguments, threats and sometimes even physical attacks. N[....] often shared these arguments, threats and physical attacks not only with L[....]2, but also with Zandile Maseti (Zandile), Nyameko Sixhozi (Nyameko) and Section Ntamehlo (Section). Section was the accused's biological brother and Zandile's husband. Section and Zandile were customarily married. Nyameko and both Babsy and Section shared a clan name, Tshawe. They referred to each other by their clan name and generally called each other Mtshawe. Following the amaXhosa tradition, Nyameko, Babsy and Section were brothers. Again following amaXhosa tradition, N[....] and Zandile were sister-wives, being married to blood brothers. In 2018, the accused was allocated an RDP house situated at [...] Olea Street, Fisante Kraal, Durbanville. His wife and child, together with L[....]2, moved in with him from the squatter camp to the RDP house.

[5] The relationship between the accused and N[....] had been a difficult one, but they had managed to continue to live together, and together build another house for themselves in the Eastern Cape, on a plot issued to them in the accused's rural village. N[....] was allocated an RDP house before the accused's house was issued. The house was in Atlantis, outside Cape Town. N[....] and the accused had agreed not to move to Atlantis but to remain in the squatter camp in Fisante Kraal, as Atlantis was far from the accused's place of employment, and the accused had registered for an RDP house in Fisante Kraal. N[....] was self-employed and sold food at a stall. According to L[....]2, Nyameko, Zandile and the accused himself, the relationship between the accused and N[....] strained further soon after the family moved to the RDP house.

[6] The reason for the increased tension was that the accused sought to chase N[....] away from the RDP house issued in his name which was now their common home. N[....] resisted these attempts. N[....] had complained to the three witnesses that she and the accused had agreed that she would sell her RDP house in Atlantis and that the RDP house allocated to the accused would be their common house. They had agreed that the proceeds from the house in Atlantis would be used to fund the building of their other common home in the Eastern Cape. She had sold the Atlantis RDP house and the proceeds from the sale were used to build the common home in the Eastern Cape and also to contribute to the common household in the RDP house allocated to the accused. These were the reasons that she resisted walking away with nothing, leaving the accused with two properties which were their joint estate, for which she had sacrificed so much.

[7] Nyameko testified that he knew the couple since 2010 and had a good relationship with both. He learnt about the couple's dispute around the occupation of the RDP house from the accused in 2018. N[....] told him that the accused wanted her to leave the RDP house, but she wanted them to fix their marital problems. L[....]1 also told him about the accused assaulting his mother. He saw how this adversely affected the child. He spoke to the accused about the challenges in the accused's marriage. The accused told him that he (the accused) no longer wanted N[....] as his wife.

[8] In 2020 the accused left the RDP house and went and stayed with another woman in the squatter camp not far from where Nyameko stayed. The accused told him about this move. N[....] also reported to him that the accused left the common home and L[....]1 told him and also complained about the accused continuing to assault N[....]. In one instance, the accused had sent him a voice note where the accused reported that he had kicked N[....], because N[....] was taking the accused for granted. The accused sent him a whatsapp message written in IsiXhosa which read:

“Mtshawe lekaka ndirhalela uykhama ndiybulale nobakupha ekuzenikusa ndogqiba ndiyoyitshisela kulomlambo ulaphezantsikwethu mntakwethu ndonele.”

The message was interpreted as:

“Mtshawe this shit I wish to strangle to death even around the early hours of the morning and conclude by burning it at the river down from us my brother I had enough.” This message sounded to him like the accused wanted to kill N[....] and bury her.

[9] His reply to the message read:

“Ndiyakuva yihlo kodwa ke mTshawe ngase kum ungayenzi lonto ngoba izobambezema ubomi bakho ichaphazele uL[....]1 for the rest of his life engenalo uxolo nawe mntakwethu nyamezela kiki naye wenzela lonto Ngavumi yihlo plz sowunyamezele ncekelela”

The reply was interpreted as:

“I hear you father but Mtshawe according to me you should not do that because it will hold back your life and disturb L[....]1 for the rest of his life as he will have not forgive you or have peace with you my brother just persevere maybe she does it for that. Do not allow it please persevere and hold on.”

This reply was intended to persuade the accused not to kill his wife, as it would be L[....]1, their child, who would suffer. He did not discuss the whatsapp message any further with the accused, and did not tell anyone about it until he learned about the death and discovery of the body of N[....]. How N[....]'s death and discovery was narrated and happened reminded him about the whatsapp message from the accused about three weeks before. He disclosed the message to the police.

[10] L[....]2's testimony was that since he moved in with his sister, he did not have a good relationship with the accused. On one occasion the accused went so far as to ask him when was he leaving their home. It was clear to him that the accused did not approve of him living with them. The poor relationship between him and the accused was because the accused abused his sister verbally and emotionally. He however had good relations with the other relatives of the accused. He received whatsapp messages and voice notes that the deceased sent to him, where she would have recorded the accused's abuse. He never saw the accused abuse N[....] physically. However, he received reports of such from N[....], when she reported about what would have happened whilst he and L[....]1 were not home.

[11] N[....] always reported her comings and goings to L[....]1, Zandile and himself. N[....] would never leave without informing any or all of them as to where she was going. It was because of this usage that it was strange that none of the three was aware of her whereabouts from the evening of Sunday 6 September 2020. This raised concern and alarm for them. That evening, between 20H30 and 21H30, he left the house. When he left, it was only the accused and N[....] in the house. N[....] was alive when he left her in the house to go and visit his friends. He came back later than evening and when he arrived, between 22H30 and 23H00, only L[....]1 and the accused were in the house. N[....] was not in the house. He asked L[....]1 and the accused if any of them knew where N[....] was and both said they did not know where she was.

[12] In the early hours of Monday 7 September 2020 he heard the sound of a wheelie bin being pulled. He heard the sound of the burglar gate and the door of their house opening and being closed. He could hear that someone had entered the house and the person went to the bathroom. He heard the sound of water running from the shower inside their house. He then heard as if someone was doing laundry in the house. That person came to their room and it was the accused that appeared at the door of their room. The light in their bedroom was switched on. The accused entered the bedroom where he and L[....]1 were sleeping. Around that period, the deceased had moved from the main bedroom that she shared with the accused, and used to sleep with him and L[....]1 in that separate room. The accused asked them if N[....] was not back yet, and he told the accused that they did not know where she was. The accused left the room, and he fell asleep.

[13] When he woke up at around 08H00 N[....] and the accused were not in the house. His attempts to call N[....] took him to voicemail on her cellphone number. He went to Zandile and Section's house to ask them if they had any information about the whereabouts of N[....]. The two did not know where N[....] was. He knew that N[....] was scared of the accused. She had expressed to him the belief that the accused would kill her. He had heard the message on her phone, before that day, which N[....] had

recorded and had allowed him to listen to, wherein the accused had told her that most people go missing and do not get buried by their relatives. Against this background, the three were motivated to immediately report N[....] as a missing person to the police. He went with Zandile and Section to the police station. He, Zandile and Section spent the day trying to check with everyone and everywhere where N[....] could be, but there were no leads of where she might have gone.

[14] On Tuesday the 8th September 2020 he went back home to fetch a picture of N[....] to take to the police station. He found the accused at home. He told the accused that he had reported N[....] as a missing person. The accused was angry at him to learn that he had reported the deceased as a missing person to the police. The accused decided to also go to the police station.

[15] Upon L[....]2's return from the police station to the house, N[....]'s relatives and members of the community started arriving and assisted in the search for N[....]. When the accused arrived at home, from the reports that they got, the relatives started questioning the accused about the whereabouts of N[....], whilst the community followed up on the reports and the tracks of the wheelie bin. The reports from which the family and the community worked, included that from him, L[....]1 and Zandile. The police arrived whilst the family and community members were questioning the accused inside the house. Yosana, one of the police who attended to the house, took the accused into the main bedroom.

[16] L[....]2 was part of the community members who followed up on the tracks of the wheelie bin from the accused home. The tracks were followed into their street, turning right into the street, out of the house. Their street, to the right ends at a T-junction at the last houses. The other side of the T-junction is an open field. The tracks went into the open field and were followed through the open field to the banks of the Mosselbay River which was not far from the houses. The field and the banks had overgrown grass, which made it possible to follow the tracks as the grass bent leaving a spoor which reflected

the trail of the wheelie bin. The searching team came across sand, in that overgrown grass at the river bank, and it looked like the place had been recently dug.

[17] That place stood out from the rest which was green with grass. Lutho saw a lighter next to the sand, which he recognized as that of N[....]. He also saw a fresh can of a Score soft drink also close to the sand. This struck him as the previous evening, he had returned from playing a soccer match, had consumed the Score drink from its branded can on his way home and had dropped the can into the wheelie bin which was inside the yard where it was kept, just before going into the house. There was an area close to the sand which indicated that the surrounding was burned. It was clear that there had been some fire. L[....]2 reported his thoughts to the team, to wit, that the sandy area was a shallow grave in which the accused buried N[....]. This is the message which the search team took to the family, police and community back at the house.

[18] It is this report that caused a mini-riot. At the time that the search team came back and reported, Yosana was still in the bedroom with the accused. The family and the community were baying for the accused blood, after receiving the report. Yosana had to call for manpower, and he also had to shoot into the air, to get the community members to back off in order to secure the accused and take him to the police vehicle so that he can be safely to the police station. After the accused was put into the van in order to be taken to the police station for his safety. L[....]2 took Yosana to where it was believed was the grave of N[....]. After Yosana saw the place, the police took charge of the area, secured it and later other units of the police arrived. A body was found which he identified as that of N[....]. On 28 May 2022 the family decided to go and clean the house. L[....]2 was cleaning the area between the beam and the roof of the house. He was trying to hold onto the beam for balance when he felt something like a phone. He discovered the phone which he identified as that of N[....]. It was clearly hidden there. He notified the investigating officer.

[19] L[....]1 T[....] is the biological child of the accused and N[....]. He was 16 years old at the time that he testified and was in grade 9. He had a good relationship with both his

parents. He also had a good relationship with his two paternal uncles, Nyameko and Section, and also with his maternal uncle L[....]2. He was aware of the marital problems between his parents. The accused moved out of their home and moved to a girlfriend in a squatter camp in the same area. He went to the girlfriend to see the accused when he needed to be assisted with money.

[20] He saw the accused assault his mother. One of those incidents happened in the bathroom. He saw the accused strangling N[....] and smacking her with his open hands. He tried to get in between them and the accused pushed him so hard that he fell. He stood up and went in between them again, and it was only then that the accused stopped hitting N[....], although the accused continued swearing at her. N[....] was crying as this was happening. It was this incident that caused him to approach Nyameko, to ask Nyameko to intervene. He requested Nyameko to ask the accused to stop what he was doing. He was aware that Nyameko spoke to his father, but his father did not stop to beat up his mother. L[....]2 and the accused were not on good terms, because it was L[....]2 who restrained the accused when he assaulted his mother.

[21] On Sunday 6 September 2020 he left home at around 17H00 to visit a friend in the area. He went past the braai stands where N[....] was doing business, selling food, and saw her there. This was the last time that he saw his mother alive. He came back home at around 21H00. He had a packet of chips which he just finished eating and went around the house where the wheelie bin is kept in order to throw the empty packet into the bin. The bin was kept in the passage at the back next to his bedroom window. He saw that the bin was not there. He entered the house and there was nobody home. He went out onto the street and could not see anybody of his family. He went up to the Somalian shop and did not find anybody.

[22] He went home and L[....]2 arrived later. The accused and N[....] were still not home. The accused arrived some time thereafter. He asked the accused about the whereabouts of N[....]. The accused said that he did not know her whereabouts, that when she left, she had said to the accused that she will be back. He asked the accused

about the wheelie bin, and the accused said to him he should not worry about the bin. He went to bed. Later that night he heard the sound of a bin. He also heard what L[....]2 described after the sound of the bin, including the discussion between the accused and L[....]2 in their bedroom. The following morning he saw the bin where it was kept at the back. He saw the accused leave for work. Later that afternoon, when he asked the accused if he had anything from or about N[....], the accused told him that N[....] called, and told the accused to ask both L[....]2 and him to give the accused money.

[23] Thanduxolo Vayisi (Vayisi) testified that he knew both the accused and N[....]. He and the accused attended the same church and lived in the same township, whilst at one stage before, he worked at the same place with N[....]. On the evening of 6 September 2020 at about 20H30 he was seated inside a car which was parked three houses away from the accused's home. He had accompanied his friend who went to drop something for a girlfriend and child. The friend had gone inside the house to deliver, whilst he waited in the car, which had tinted windows. Next to the accused's home was one of the streetlights that provided the light in the street. The houses are very close to each other.

[24] He heard the sound of a door and saw the accused close the door. He knew that the accused lived in that house where the accused came out of. He saw this as he looked, from the front passenger seat of the sedan, through its rear window. He saw and recognized the accused, who left the door and came to stand in front of the yard on the street, looking around. He did not pay much attention as to what the accused did further and sat in the car, busy on his phone. His attention was thereafter drawn by the sound of the wheelie bin. It was around 21H00. He looked again and saw the accused pushing the wheelie bin towards the direction of the car.

[25] The car in which he was, was between the accused's home and an open field. The open field led to a river bank. The accused went passed the car in which he was seated, pushing a wheelie bin towards the open field. The accused passed next to him whilst he was in the car. It was not unusual for a person to be pushing a wheelie bin in the street

in their area. People in the area used the wheelie bin to go and dump refuse in that field at night. Some used the wheelie bin as some form of transport to deliver bulk liquor, also at night. In the accused family he knew all of them. L[....]2 was a soccer player, as he was, and they met at the soccer fields. He also knew L[....]1, the son of that family.

[26] Zukile Ndleko (Ndleko) testified that he resided at [...] Olea street, Fisantekraal. He was a neighbor to the accused and had lived there for five years. Their homes are one structure, divided by a wall. Their bedrooms are separated by a wall that separates the two houses. He had never had problems with the accused or N[....]. He often heard the loud screaming and arguments from his neighbours but he never interfered. On the evening of 6 September 2022 he heard the arguments from his neighbours at around 21H00. He then heard a loud cry and thereafter it went quiet. He went to sleep. At around 03H00 he heard the sound of an opening or closing gate, and heard the sound of a wheelie bin being pulled or pushed. He did not get out to look what was happening. After the arguments and screaming, he would not ask the accused or N[....] anything about it. Even after hearing the loud scream on the 6th, before it went quiet, he did not enquire with them about it. He was of the view that altercations and peace in the same breath were normal for a couple.

[27] Zandile's testimony revealed that she and N[....] shared their life experiences and challenges. She was aware of the accused's abuse of N[....]. N[....] sent her recordings of the threats that the accused made. In one of the recordings which N[....] made during her altercations with the accused, the accused told N[....] that people like N[....] got killed and their bodies were never buried by their loved ones. N[....] had informed her about the house in Atlantis. N[....] had told her about the agreement between N[....] and the accused to sell the Atlantis RDP and build their house in the Eastern Cape. The accused and N[....], after the sale of the Atlantis RDP house, indeed built a house for themselves, not far from her own together with her husband Section, in the Eastern Cape. N[....] had told her that the accused wanted her (N[....]) to leave their RDP house and this was the main cause of their tension and fights.

[28] She confirmed L[....]2's testimony about what happened Monday the 7th and Tuesday the 8th, following the Sunday on which N[....] disappeared from home. Her testimony is further that on Monday she sent a message to the accused, including informing him that they were going to the police station to report N[....] as missing. The accused did not respond to that whatsapp message. The Tuesday morning she went to the accused's home. She searched the house for any leads. She knew N[....] so well that she knew what N[....] would take with her and never left without. The personal items that she knew N[....] would not leave without if he she left on her own, were in the house. After the accused was arrested, as she continued with checking on N[....]'s personal things, underneath the bed, she found the maroon handbag, which the accused had described as the handbag which N[....] took and left with, when according to the accused, she left him in the house the Sunday late afternoon on 6 September 2020.

[29] Yosana was the first investigating officer assigned to the case after L[....]2 reported N[....] missing. He was a sergeant in the SAPS with 12 years experience. When reading the docket on the Tuesday morning, 8 September 2020, he noted that Nocipho was reported missing by L[....]2 on the 7th and by the accused only reported on the 8th. L[....]2 mentioned in the statement that the relationship between the accused and N[....] was not good, and the accused did not mention this. Furthermore L[....]2 had said that N[....] did not leave the house without reporting. Yosana went to the house for further investigation. He found the community members, N[....]'s family and the accused.

[30] He took the accused into the main bedroom room for an interview. The accused was the owner of the house, the husband of N[....] and the last person who was with the deceased when she was alive. The accused told him that N[....] left the house on Sunday 6 September and did not return. The accused also told him that on Monday the 7th N[....] called the accused and asked the accused to deposit money for her at a shop and that she dropped the call before the accused could make any enquiries about her whereabouts. On the other hand L[....]2 had reported that he could not get to the deceased on her cellphone as it went on voicemail. Yosana went through the accused's

call log. He found other calls made before and after the alleged period but he could not find the call made by the deceased to the accused on the accused's cellular phone. He confiscated the accused's cellphone.

[31] He asked the accused about the blood stains on the couches as well as on the bathroom handle. The accused said it was from chicken livers he cooked the Monday. The forensic unit took these blood samples for further investigation. L[....]2 and other community members had gone on a search and came back to report that they may have found the grave. The community members wanted to attack the accused and for the accused's safety Yosana had to fire some shots into the air to disperse the crowd and gain a safety passage of the accused to the police van. In that episode, the accused was slightly assaulted by the community who managed to get to him before the police took him away.

[32] Yosana followed L[....]2 and the other community members as they followed the trail of the wheelie bin, visible by its tracks through the bent grass and visible spoor on sand patches. The place was about 700 metres from the accused's home on the banks of the Mosselbank river. There was a clearly freshly dug and closed loose sand patch and next to it was a burnt patch. There was a yellow lighter and two Score soft drink cans. L[....]1 had told Yosana about the missing wheelie bin on the Sunday and the response of the accused to L[....]1's enquiry about the bin. L[....]2 had also reported to Yosana about the sound of the wheelie bin the Sunday night and the entry of the accused that night into the house and into their room after that sound. L[....]2 had told Yosana about the Score drink cans on the scene and the yellow lighter.

[33] Yosana had noted, whilst still at the house and investigating the scene, that the wheelie bin now at home was cleaned. This was strange because it was not the time that the municipality had done refuse collection, which is the time when ordinarily bins were cleaned. The bin contained nothing on Tuesday the 8th. There was a handful of refuse inside the bin on the Wednesday when the photographer came to take photos. The cumulative effect of the observations he had made at the house, the reports from

L[....]2, L[....]1 and Zandile as well as the observations at the river bank caused him to call the Local Criminal Record Centre and other applicable units of the SAPS to come and dig the place and investigate whether it may be a grave. The loose sandy patch was dug up. It was in a water logged area and the police had to dig and remove the water before digging further. The sand was loose. About 30 centimetres into the ground they could identify the body. It was a shallow grave. The body was partly burnt. L[....]2 identified the body as that of N[....]. Yosana could not find the cellphone of the deceased. After the discovery of the body and its identification by L[....]2, he went to the police station and arrested the accused and charged him for the murder of N[....].

[34] Jaars was the new investigating officer who took over when the matter was already trial ready. On 28 May 2022 the cellphone of the deceased was recovered. He received it from L[....]2. He applied for the section 205 subpoena and obtained the cellphone records of the accused and the deceased, which were entered into the record as exhibits. Upon his examination he found that there was never a call from the phone of the deceased to the phone of the accused on Monday 7 September 2022.

[35] The accused admitted that the deceased was last seen at their home on Sunday 6 September 2020 and that she went missing from about 20H30. On Tuesday 8 September 2020 N[....] was found buried at the banks of the Mosselbank river. The cause of N[....]'s death was asphyxia as a result of the application of force to the neck (unnatural), simply put, by strangulation. The accused made formal admissions which to avoid prolixity, will not be repeated in totality. These included the post mortem results and the photographs depicting their house and the scene where N[....]'s body was discovered and recovered. The relationship with the deceased was not good. This was because the deceased had extra-marital affairs.

[36] N[....] applied for two protection orders against him. The one was on 3 September 2019 and the other was on 21 August 2020. He was not happy that N[....] refused to leave the house, even when according to him he had obtained an order in his favour for her eviction. He sought not only the assistance of the courts, but also that of Legal Aid

South Africa to have her evicted from his home. He read the protection order issued in 2020 and saw that the deceased should sleep in the separate bedroom and that the deceased did not have to account to him. This made things worse at home. He sought the intervention of his brothers to persuade his wife for reconciliation. He did not sent the whatsapp message to Nyameko in anger, but to source his advice as he was stressed. He admitted telling the deceased about people being killed and buried without their loved ones but that he was referring to a program that they had watched on television. He denied ever assaulting her and did not know why she applied for a protection order against him.

[37] He disputed that there was an agreement for the sale of the house in Atlantis between him and the deceased. He heard from her relative that the deceased was selling that house. He had advised the deceased to rent out the house to supplement her income to boost the children's schooling. He sent Nyameko the whatsapp message at the time that things were not good between him and the deceased. It was because of the deceased's extra-marital affairs. When he had left home to stay with another woman, he had returned to find the door locks changed. He admitted to him wrestling with the deceased in L[....]1's presence and that L[....]1 intervened. He only saw the following day that the deceased had a blue eye and his finger possibly went into her eye during that interaction.

[38] He disputed that he did not respond to Zandile's whatsapp when she spoke about N[....] missing on Monday the 7th. He called her that Monday and asked her whether she had seen the deceased. He disputed that he told Zandile that he told her that the deceased left with the maroon handbag. He admitted having said that to Yosana and the family and admitted that Zandile was present. He admitted being asked by L[....]1 about the bin. According to him, in response, they even went to open the window of L[....]1's room to look through and they saw the bin where it was kept.

[39] He denied that there was a scream from his house on Sunday the 6th. He disputed that he pushed a bin that evening. He left the house at about 21H00 and walked to the

Somalian shop in the area. On Tuesday he had moved the bin from the back to the front as it was the day that the municipality would collect refuse. The deceased, when calling him on Monday the 7th of September, used an unknown number, when requesting her to deposit money. He did not tell Yosana or his lawyers that the call was from an unknown number. He testified about his shock whilst in his bedroom with Yosana, before L[....]² and the search team arrived, when Yosana asked him: “Why did you kill your wife”.

[40] In *R v Blom* 1939 AD 188 at page 202 to 203 it was said:

“There were two cardinal rules of logic which could not be ignored when it came to reasoning by inference: (1) The inference sought to be drawn must be consistent with all the proven facts. If it is not, then the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

[41] In *Mahlalela v S* (396/16) [2016] ZASCA 181 (28 November 2016) at para 15 and 16 it was said:

“[15] The difficulty is that proved facts envisaged in *Blom* are facts proved beyond reasonable doubt. Intermediate inferences, too, must be based on proved facts. Inferences may not be drawn from other inferences. See the article by Nicholas AJA in (E Khan (ed) *Fiat Iustitia essays in memory of Olive Deneys OD Schreiner* (1983) at 312 (1983) 312).

[16] Simply put, circumstantial evidence provides a basis from which the fact in dispute can be inferred. The salient question to be answered is whether the appellant was guilty of the crimes committed beyond reasonable doubt. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence.”

[42] The accused and N[....] were married and had one child L[....]¹ and lived together at the house where N[....] was last seen alive and left with the accused. The accused was abusive to N[....], which included emotional, psychological and physical abuse. He

insulted her, accused her of infidelity, threatened her and often assaulted her even in the presence of their only son. The abuse was such that her family, including some in his family like the accused own brother, Section and his wife Zandile as well as his brother by tradition, Nyameko, were aware. Although spoken to by his own relatives, including Nyameko, it did not deter the accused. Two protection orders issued against him in her favour did not help. It needs to be said that the system experienced by those who need protection most, which appears to not be in accordance with the law, contributed to the failure to protect N[....].

[43] Where there was an existing protection order in her favour, and she approached the Bellville Magistrates Courts again to complain against the abuse, the answer was not the simple issue of another protection order. The true and appropriate answer was to hold the accused to account for the breach of the terms of the existing protection order. The law did not envisage the issue of a multiplicity of protection orders to a victim, but the issue of a protection order, and if breached, accountability and consequences. I do not understand the law to provide for judicial officers to contribute to a handbag, a drawer or kist full protection orders. It seems to me that the failure of the legal system contributed, through failure to adequately provide equal benefit of and protection by the law to N[....], to provide a fertile environment for her abuse which graduated to her killing.

[44] The abuse of the accused caused the deceased to move from the main bedroom to the child's bedroom, in an attempt to seek refuge and peace. The evidence showed that this was the case as at 20 August 2020. This movement did not stop the accused to pursue her even into that bedroom. This caused the deceased, the next day, 21 August 2020, to approach the court again to seek protection. The magistrate did not consider the terms of the previous order and supplement or amend them to include a new term. In fact no reference was made to the existing order and its breach. The matter was treated as a new complaint with a new case number and new terms. The accused was ordered not to enter the applicant's bedroom. It is clearly what happened between the accused and the deceased on the 20th August, the day before the deceased went to

court and obtained a second protection order that caused the accused to write the whatsapp message to Nyameko.

[45] It is probably on that day, or at least contemporaneous with that period, that the accused told the deceased that people like her got killed and their bodies never found for their families to get to bury them. In the whatsapp message to Nyameko, the accused set out in detail what he wished to do to the deceased. The accused and the deceased had lost love, trust and respect for each other at that time. The accused wanted the deceased to leave what he saw as his exclusive property, the RDP house. According to him it was his exclusive property because it was registered in his name only and he had a title deed for it. On the other hand, the deceased saw herself as a joint owner. She was married to the accused and had contributed to their joint property. This included her share in the house that they built in the Eastern Cape as well as to the RDP house. She had sold her own RDP house in Atlantis in order to contribute to the joint estate, including the construction of the house in the Eastern Cape and to the RDP house registered in the name of the accused. She was not going to simply walk away with nothing, leaving the accused with what she had sacrificed for and invested in, whilst she had a child.

[46] L[....]1 left the house at around 17H00 and there was no one home on Sunday 6 September 2020. He last saw his mother where she was doing her trade. L[....]2 left N[....] with the accused at around 20H30. There was no indication at that stage that N[....] was going to leave the house. N[....] informed L[....]2, L[....]1 and Zandile if he were to leave, and she would also tell them of her whereabouts. This evening, she did not inform any of them that she was going anywhere. When L[....]1 arrived home at around 21H00, the deceased and the accused were not home. He wanted to use the wheelie bin and noticed that it was missing. His father came back later and he asked his father specifically about the bin and his mother. The accused denied knowledge of the whereabouts of N[....], and told L[....]1 not to worry about the wheelie bin.

[47] L[....]1, L[....]2 and Ndleko heard the sounds of the wheelie bin being pushed or pulled that night at about 03H00. They also heard the sound of the burglar gate and door open. L[....]2 and L[....]1 heard the movement of the accused into the house. They heard him use water in the bathroom, washing something. The accused came to their room and asked whether the deceased had not returned, before he went to sleep. Ndleko heard the arguments between the deceased and accused that evening after 20H30. He also heard the deceased scream and heard her last scream. It is what Ndleko heard that night, and the subsequent discovery of the body of the deceased in shallow grave, that caused him to break down whilst giving testimony, and before he left the witness stand. When asked about this, he said all he asked, was for justice for N[....]. Perhaps, with hindsight, he realized that his decision to not do anything when his neighbor abused his wife, and especially when she screamed, was not helpful. Evil thrives when good men do nothing.

[48] Vayisi knew the family very well. He knew the accused as they attended the same church and saw him a lot in the township. He had once worked with N[....] at the same place. He played soccer with L[....]2 and knew L[....]1. Almost in line with where the wall that separates Ndleko's bedroom and the accused's, on the shoulder of the road just before the tarmac, is a street light. Its light streaks directly in front of the accused property. He saw the accused come out of the house into the street to look around, and later saw the accused pushing the wheelie bin, past him where he was seated inside a car with tinted windows. The car had been stationary there from around 20H30 and the accused pushed the wheelie bin past him at around 21H00. Having regard to the degree to which Vayisi knew the accused and the opportunity he had to observe the accused, the probability of an accurate identification was substantially increased in this case [*R v Dladla* 1962 (1) SA 307 (A) at 310C-E].

[49] The next morning the accused went to work as normal and returned that afternoon. He lied to L[....]2 and L[....]1, saying that he received a call from N[....] and that N[....] told him to ask them to give him money to deposit for her. This was strange for the two as, if she needed money deposited, against the background of her relationship, it would

be strange for her to trust him over them. If she wanted money, probably, she would have phoned either of them directly and not the accused. It is a cold hearted person who would simply go to work and pretend normality, and also attempt under false pretences to benefit financially, under the circumstances.

[50] Zandile searched the house, more than once. In the first search she observed that all personal belongings of the deceased were still in the house. This included all her handbags and other necessities that the deceased would have taken with if she had left the house on her own volition. On the second search, after the arrest of the accused, she found the handbag which the accused had described as the one the deceased had left with, hidden under the bed in the main bedroom. This was the bedroom which the accused occupied and used. She had received messages from the deceased where she had recorded the accused insulting and threatening her, including where he insinuated killing her.

[51] L[....]2 and other community members followed the tracks of the wheelie bin that left accused home, which had been pushed by the accused in the early hours of Monday morning, on the Tuesday afternoon. The tracks led them to loose sand which showed that it was recently dug up, in the midst of grass on the banks of the Mosselbank river. L[....]2 identified a yellow lighter which belonged to the deceased. He also saw cans of Score soft drinks which he had consumed on Sunday evening, which he had put in their wheelie bin that Sunday. The area next to the loose dug up sand was burnt. The burnt body of his sister, N[....] was discovered in that shallow grave.

[52] I am unable to trace any iota of evidence which is consistent with the innocence of the accused. When I consider the evidence as a whole, I am unable to find any other reasonable inference from the cumulative effect of all these proved facts and circumstances. The evidence of the witnesses, considered individually and collectively, all point to the same direction, which is the establishment of the guilt of the accused beyond reasonable doubt. There is no reasonable possibility, from these proven facts,

that the accused's bare denial of his identity as the person who killed N[....], may be true.

[53] The accused decided in advance and arranged in advance on what he would do to N[....]. The deceased described the threats made to her, including providing the recordings of the accused expressing that manner. The accused told her that people like her got killed and were never buried by their families. In a whatsapp message to Nyameko, the accused himself typed, in detail, the manner in which he wishes the killing of the deceased to be executed, and the body of the deceased disposed of. The accused anticipated the event and time, and when the opportunity presented where he was left with N[....] alone, he strangled her to death as he had detailed. There was a deliberate weighing of the criminal conduct conceived over a period of at least two weeks, from 20 August 2020 to 6 September 2020 [*S v Raath* 2009 (2) SACR 46 (C) at para 16].

[54] There was no direct evidence which identified the accused as the perpetrator. From the totality of the evidence, I draw the inference that the accused strangled N[....] to death on Sunday 6 September 2020 after 20H30. The deceased screamed only once and because of the trauma was unable to scream further and died within 3-4 minutes. The accused put her lifeless body into a wheelie bin. He went outside the house on the street to check who was in the street and whether he could, without being seen dispose of the body. Vayisi was in the street inside the car with tinted windows. It was around 21H00. The car used to park unoccupied there with its owner inside one of the houses and the accused assumed that this was the case even on that day. Vayisi saw the accused pushing the wheelie bin into the field towards the banks of the Mosselbank river. In the light of the totality of the evidence and the probabilities, I am satisfied that Vayisi had adequate opportunity for observation of the accused in the street, that he knew the accused very well before that day and also where the accused resided, that he had reservations the clarity of his evidence and the confidence with which it was given was reassuring. Exercising due caution as to Vayisi's evidence, there is no reasonable possibility of mistaken identity. Moreover, he came forward spontaneously

without being prompted by any request or suggestability, and identified the accused as the person he saw pushing the wheelie bin on the night that N[....] went missing, when he heard about it [S v *Mthetwa* 1972 (3) SA 766 (AD) at 768A-769H].

[55] I find that the accused attempted to burn the body of N[....] at the river bank, as part of his disposal of her body between around 21H00 on Sunday and 3H00 on Monday the 7th. When the accused realised that he was caught up for time, he dug a grave and also because of time constraints and the risk of being seen if it became lighter, he dug only to have the body 30 cm deep in a water logged area. The manner in which he killed the deceased, and how he attempted to dispose of her body, was consistent with his message to Nyameko on 20 August 2020.

[56] Seen against the background of the totality of the evidence, the accused's explanation is not only improbable. It is beyond reasonable doubt false. There is no reasonable possibility that the accused's version may be true [S v V 2000 (1) SACR 453 (SCA) at 455 a-c]. The accused's version, to the extent that it is inconsistent with the State case, is rejected. The evidence of the State witnesses was honest and reliable. From the foregoing analysis and evaluation of the State and the accused's versions on the disputed issue of who killed N[....] [*Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA)], I find that the State proved its case beyond reasonable doubt.

[57] For these reasons I find the accused guilty of the planned murder of N[....] T[....] read with sections 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) and read with section 51 (1) of the Criminal Law Amendment Act, 1997 (Act No 105 of 1997).

DM THULARE
JUDGE OF THE HIGH COURT