

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED:

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DATE

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SIGNATURE

Case no: SS274/2004

13/9/2018

In the matter between:

SEBASTIAN JOLIE DLADLA

Accused

And

THE STATE

JUDGMENT

MSIMEKI J:

INTRODUCTION

- [1] This judgement has been necessitated by the application which the accused made in the Supreme Court of Appeal seeking leave to appeal and permission to lead further evidence. This, because the accused's application for leave to appeal had been dismissed by the Court. The Supreme Court of Appeal, on 17 March 2015, granted the following order:

“1. Application for condonation is granted.

2. Special leave to appeal is granted to the full Court of the High Court Gauteng Local Division, Johannesburg.”

BRIEF SUMMARY OF WHAT HAPPENED WHEN THE APPEAL WAS HEARD

- [2] On 3 March 2017, the appeal was heard by the Full Court of this Division as directed by the Supreme Court of Appeal.
- [3] The appeal turned on the affidavits which the accused (then applicant) used in the Supreme Court of Appeal when he sought leave to appeal and permission to lead further evidence. These are the affidavits of-
1. Tshepo sipho Mokwana;
 2. Sipiwe Mzolo;
 3. Sibonginkosi Moyo; and
 4. Risimati Thomas Hlungwane.
- [4] It is noteworthy that the record of the accused's first trial (as this is his second trial) had to be reconstructed. The record could not be traced and the appeal formed

part of the so-called “delayed appeals” project, where the records could not be traced or had to be reconstructed or where the appeal was brought a long-time after the conviction and sentence of an appellant.

[5] The appellant and the respondent were, respectively, represented by Adv JT Bauer (Mr Bauer) and Adv L Mashiane (Mr Mashiane). Adv Thompson, in the first trial, represented the accused while Mr Mashiane represented the State.

[6] The Full Court, on hearing the appeal, found that:
“The evidence brought forward by the affidavits of witness Mokwana boils down to a complete recantation of his evidence in the trial” and that “it accords with his version advanced in his guilty plea.” The trial, the Full Court referred to herein, is the first trial of the accused. The guilty plea relates to the trial of Mokwana that served before my sister Satchwell J. The affidavits, as the Full Court further found, had been brought to the Supreme Court of Appeal only in 2015 which was years after the conviction and sentencing of the accused in his first trial.

[7] It is noteworthy that Mr Mashiane, during the bail application which the accused brought after the Full Court set aside his conviction and sentence, submitted that the State (respondent in the application) only became aware of the accused’s application in the Supreme Court when they received the Order of the Supreme Court of Appeal. It was Mr Mashiane’s further submission that the State, as a result, could not deal with the matter at that level. This could not be gainsaid.

[8] Mr Bauer and Mr Mashiane argued their matter in the Full Court which, after the arguments and submissions, made the following order:

“1. The conviction and sentence of the Appellant are set aside;

2. The matter is remitted to the trial court on the following basis:

(i) The affidavit of the appellant together with the affidavits and the supporting documents accompanying it is (sic) admitted into evidence

(ii) The State's case is re-opened for hearing of further evidence;

(iii) The defence is permitted to re-open its case should it so decide

(iv) Should the need arise to call other witnesses in relation to any relevant issues the trial court is not precluded from allowing and hearing such evidence." (**My emphasis**)

[9] The Full Court, after realising the errors in its judgement handed down on 20 March 2017, corrected the said errors as follows:

1. Paragraph [3] is to be deleted and replaced with the following: Special leave to appeal was granted by the Supreme Court of Appeal to the Full Court of the High Court, Gauteng Local Division, Johannesburg on 17 March 2015.

2. The first sentence in paragraph [11] is to be deleted and replaced with the following: The evidence brought forward by the affidavits of witness Mokwana boils down to a complete recantation of his evidence in the trial. It accords with his version advanced in his guilty plea.

3. Prayer 2 of the order is to be replaced with the following:

2. The matter is remitted to the trial court on the following basis:

(i) Tshepo Sipho Mokwana is to be recalled as a witness and the defence is permitted to cross-examine him on the further affidavits:

(a) dated 11 September 2013 (G1)

(b) dated 4 September 2013 (G2)

(c) dated 2012 (G3)

(ii) the State's case is re-opened for hearing of further evidence;

(iii) the defence is permitted to re-open its case, should it so decide, and

to lead the evidence of:

(a) Siphiwe Mzolo (F)

(b) The investigating officer Lietenant Hlungwani (G)

(c) Sibonginkosi Moyo (H)

(iv) should the need arise to call other witnesses in relation to any relevant issues, the trial court is not precluded from calling and hearing such evidence.

[10] I need to mention that the Court, on 25 May 2017, dismissed the application for bail which the applicant had brought.

[11] It is important to mention that the accused, in this Division, stood trial facing the following charges:

1. Count 1: Robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1997 (the "CPA"), read with section 51 of Act 105 of 1997
2. Count 2: Murder read with Section 51 of Act 105 of 1977;
3. Count 3: Murder, read with Section 51 of Act 105 of 1997.

4. Count 4: Contravention of Section 2 of Act 75 of 1969- Unlawful possession of a firearm;
5. Count 5: Contravention of Section 36 read with Section 1 and 39 of Act 75 of Act 75 of 1969- Unlawful possession of ammunition.

[12] The accused, on 24 November 2004, was convicted as charged and sentenced on 1 December 2004 as follows:

1. Count 1: 15 years imprisonment;
2. Count 2: Life imprisonment;
3. Count 3 Life imprisonment;
4. Count 4: 3 years imprisonment;
5. Count 5: 3 years imprisonment.

The sentence in counts 1,4 and 5 run concurrently with the sentences in count 2 and 3.

[13] The accused, initially, was indicted together with Tshepo Sipho Mokwana (Mokwana) who pleaded guilty to the charges. Their trials were separated. Mokwana's trial served before Satchwell J while that of the accused served before me. Mokwana turned State witness in the trial of the accused.

[14] The Full Court, on the basis of the fresh evidence, set aside the accused's conviction and sentence and referred the matter back to this Court as alluded to above.

[15] On 26 June 2017, Mr Guarneri replaced Mr Bauer and took over the defence of the accused. Mr Mashiane proceeded and represented the State.

[16] The State and the defence reopened their cases. The accused's first trial was presided over by the Court which sat with an assessor who is now unavailable. Mr Mashiane, in terms of Section 147(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) applied that the trial proceed before me alone as that would be in the interests of justice. The defence had no difficulty with the application which I granted.

[17] At the very outset, I must point out that what revived the matter is the application which the accused brought in the Supreme Court of Appeal.

[18] Evidence was presented to the Supreme Court of Appeal by way of affidavits. Based on the affidavits which became evidence, the Supreme Court of Appeal was persuaded to refer the matter to the Full Court of this Division for its consideration.

[19] The Full Court, too, having considered the evidence which was placed before the Supreme Court of Appeal together with Counsel's arguments, referred the matter back to the trial court with specific directions referred to in paragraph 8 above.

[20] The accused's case is that he should not be convicted if regard is had to the affidavits of:

1. Tshepo Sipho Mokwana
2. Sipiwe Mzolo;
3. Sibonginkosi Moyo; and
4. Risimati Thomas Hlungwani.

These affidavits, according to him, confirm his version that he is innocent and that the version is reasonably possibly true. This simply means that he is entitled to a verdict of not guilty in respect of all the charges.

[21] The State, on the other hand, argued that even after the Court considered the affidavits referred to in paragraph 20 above, the accused remained guilty. The

State contended that the affidavits were an invention of the accused and that they were devoid of the truth.

[22] The duty of this Court was to hear new and further evidence and thereafter to decide whether or not the original verdict in the first trial should stand.

[23] Section 316 of the Criminal Procedure Act 51 of 1977 (“the CPA”) governs the hearing of new and further evidence. In subsection 5(a) the section provides that:

“5(a) An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.

Subsection (5)(b) provides that:

“(b) An application for further evidence must be supported by an affidavit stating that-

- (i) Further evidence which would presumably be accepted as true, is available;*
- (ii) If accepted the evidence could reasonably lead to a different verdict or sentence.*

Subsection 6 provides:

(6) Any evidence received under subsection (5) shall for the purpose of an appeal be deemed to be evidence taken or admitted at the trial in question. (My emphasis)

[24] It is noteworthy that-

1. The Supreme Court of Appeal granted the accused special leave to appeal to the Full Court of the High Court Gauteng Local Division, Johannesburg

2. The Full Court heard the appeal, set aside the conviction and sentence and referred the matter to this Court to hear new and further evidence.
3. This Court, simply, had to hear the evidence and then decide whether the accused was still guilty or deserved to be acquitted.

[25] This court, in arriving at its decision, had regard to the provisions of section 316 of the CPA. The Court had to determine if-

1. There was truth in the new evidence , and
2. Whether or not the evidence led to a different verdict.

[26] Du Toit, De Jager, Paizes and Skeen, in their work: Commentary on the Criminal Procedure Act at 31-21 state that:

“The reopening of a case for the purpose of a retrial was not the scenario contemplated by the Legislature with the introduction of Section 316(5), but a special procedure to reach a fair decision in special circumstances.”

[27] Of significance is the fact that the accused placed a lot of reliance on the affidavits of Tshepo Sipho Mokwana. The State was very sceptical about the emergence of these affidavits. It referred to them as “an invention of evidence by the accused.”

[28] To prove that Mokwana had nothing to do with the affidavits which were allegedly said to be his, the State called six (6) witnesses.

[29] The defence, to prove that the affidavits were made by Sipho Mokwana, called four (4) witnesses.

[30] **MDUDUZI MANDLOPA**

He was the witness that the State called first. He repeated his evidence that he gave in the accused’s first trial. He specifically testified that Ekha Moyo was shot by the accused he referred to as “the gentleman in the accused’s box, light in complexion.” His further testimony was that the accused drove the Toyota Camry

motor vehicle which, according to him, was never shot at. He testified that the accused and his friend were the ones that had fired shots at Ekha Moyo and not vice versa. The name of Tshepo Mkwana being mentioned, he testified that accused's friend he was referring to was indeed, Tshepo Mkwana who is dark in complexion. Ekha Moyo, according to him, had no firearm when he was shot. He accompanied Innocent Mbatha to where Ekha Moyo, who was in their company, was shot and injured. Ekha Moyo later died in hospital. Mbatha was looking for his missing combi and driver, Lunga Zungu. Mandlopa and Ekha Moyo walked into the basement of King Ramson Building. They used a Toyota Corolla when they went to the building. Mandlopa worked with Mbatha in the taxi industry for a long time. He helped Mbatha who had various businesses. Mbatha had shops, taxis and a funeral parlour. Mandlopa specifically denied that he had been paid some money by Percy Mashiane in order to implicate the accused in this case. He testified that he did not even know Percy Mashiane. He started knowing Tshepo Mkwana on the day that Ekha Moyo was shot. He and Ekha found the accused and Tshepo in the basement.

[31] Mr Guarneri informed the Court that he was going to cross-examine the witness while avoiding repeating what was said in the accused's first trial. This, because he understood what was to be done as directed by the Full court. Mr Mashiane informed the court that he had, to a large extent, concentrated on the new evidence.

[32] **CROSS-EXAMINATION BY MR GUARNERI**

He testified that Ekha Moyo had informed them that he was there when Mbatha's combi was robbed. He testified that two people shot at Ekha in the second basement. He ran away following the Toyota Camry that the accused was driving when he chased the deceased Ekha Moyo. Mandlopa testified that the accused fired about four shots at Ekha while Mkwana fired about three shots. The accused, according to him, fired further shots at Ekha at the time he was fleeing.

Mandhlopa testified that the second basement was well lit and that he was never fired at. This, in my view, showed honesty on his part. It was, according to him, highly likely that Ekha was already wounded when he ran out of the second basement. Dealing with the number of shots that were fired and who shot first between the accused and Mokwana, the witness testified that the incident had taken place many years ago and that he would easily forget some of the things. Reminded that he in the first trial had testified that Mokwana was the first to shoot he repeated that he was testifying about an incident that had taken place about ten years before the second trial and that, with time, he would forget some of the things. This, indeed, is understandable.

[33] They travelled from Soweto to the building after Ekha had informed them that Lunga was in the basement. Advised by Ekha, they left their motor vehicle at a distance of approximately 150 to 200 Metres from the building. Ekha suggested that Mbatha remain in their motor vehicle. Mbatha's combi was found in the basement. Tshepo told them that the driver of the combi had been killed. Indeed, he was found dead. Ekha was unarmed. He testified that he was aware that Tshepo, accused and Ekha had hijacked the Combi. He was not concerned about the criminals in the basement as he was looking for Lunga who was like a son to him. He was unaware that there was a plan in place that the accused be killed. It was to him news that Percy Mashiane had given instructions that accused be killed. He did not know that. He had no knowledge that Ekha had telephoned the accused and asked him to come to the basement.

[34] The witness did not know that the accused's combi had been stolen and that Ekha had telephoned the accused telling him that he had wanted to apologise to him for stealing the combi. He denied that Ekha wanted the accused to drop the charges against him. He also had no knowledge that Percy Mashiane would pay the accused's killers who would be Mokwana, Ekha and Makhosini Nkosi. He did not know that the accused had to be killed because he had refused to make Percy Mashiane a partner in his business named SJ Security. He denied that Ekha fired

shots at the accused. He denied what **Exhibit G1**, which is said to be Mokwana's affidavit, says regarding a telephone call which he (Mokwana) received from Percy Mashiane who had wanted to know if accused had been killed. He had nothing to do with Percy Mashiane.

- [35] He knew nothing about Nkosi and Paul driving in a stolen Peugeot motor vehicle. He maintained that he had gone to the basement with Ekha. He confirmed that Ekha fell down at the entrance where the police found him.. He agreed that accused came out of the basement driving his Camry Motor vehicle. He was adamant that the accused had shot Ekha. He agreed that Mbatha was not in the basement but he denied that Percy had paid him, Mbatha and Mokwana to implicate the accused in the murder of Ekha. He also denied that he and Mbatha visited Mokwana in prison to update him about what was happening in court.
- [36] Asked about his firearm he testified that it used a magazine. He, without hesitation, told the Court that the accused shot Ekha in the basement. He again shot at Ekha who, at the time, was fleeing.
- [37] Siphiwe Mzolo's version of the incident of the 24 December 2002 was put to the witness. The witness disagreed therewith stating that he had gone there with Ekha and that he had not signed Mzolo's register. According to him there was no security officer when they went in. He testified that they found the accused in the basement when he went there with Ekha Moyo. He did not know Mokwana, Paul and Makhosini Nkosi. The witness seemed surprised by Mzolo's version and testified that maybe Mzolo was testifying about an incident which might have taken place before he and Ekha arrived. He stuck to his version of what transpired on 24 December 2002. He specifically denied that Ekha apologised to the accused while he was on his knees next to the entrance. He denied that Ekha was asked if accused had shot him. He testified that he could not remember everything as the incident had taken place in 2002 which was a long time ago.

INNOCENT MBANTANA MBATHA

[38] He was the next witness called by the State. He confirmed his testimony that he gave in 2003/2004 and stood by it. Informed that there was evidence which said that he, Mandlhopa and Mokwana had been paid to falsely testify against the accused, he testified that that was not true and that he did not even know Mashiane. No one paid him to implicate the accused, he said. He was a business man in 2002-2004 owning taxis, shops, petrol station, garage, panel beating shop as well as a mortuary. He also owned a soccer club called Zola Juventus. He testified that he, Ekha and Mandlhopa came to town in a Toyota Corolla.

[39] He, in the main, confirmed Mandlhopa's evidence. He testified that Mandlhopa and Ekha walked into the basement and that Ekha never entered the basement driving a Peugeot motor vehicle. He proceeded to where Ekha Moyo had fallen down after the shooting. Here, according to him, was where the accused was arrested. He did not know the accused who was in the back of the Metro Police motor vehicle. He asked the accused why he had shot the young man, referring to Ekha. The accused answered that he had shot Ekha because he (Ekha) had stolen his car and not that he had defended himself when Ekha Moyo and others shot at him. He heard that Ekha Moyo died in hospital. He saw the accused's motor vehicle which had no bullet holes on the left side of the window and door. That was the Camry that the accused was driving. He had his Parabellum pistol but never shot at the accused. Madlhopa merely informed him that the young man had been shot.

[40] Mbatha remained in his motor vehicle. He and Mandlhopa had gone to town to look for Lunga Zungu, his taxi, driver who had been hijacked with his taxi before Ekha was shot. Ekha came to his panel beating shop and informed him that his motor vehicle had been hijacked the previous day in Florida. His manager confirmed that the motor vehicle and the driver had not returned. He arranged to go to where Ekha said the motor vehicle was in the basement of one of the

buildings in town. They found the motor vehicle which he identified as his. Mandlhopa drove the motor vehicle home. Lunga Zungu was not found.

[41] He gave Ekha money to use to get Lunga for him. He got information that Lunga was with the accused and the other people. He, Mandlhopa and Vilakazi rushed to where it was said Lunga was in the basement. Ekha said Mbatha should not accompany him and Mandlopa to the basement. Mandlhopa and Ekha entered the basement where Ekha was shot. They ultimately found the body of Lunga at Florida Mortuary.

[42] He arrested Tshepo who knew him well as a result of information that he had received. Tshepo told him that the accused, himself and Ekha Moyo had shot Lunga in the bush in Florida. Mbatha reported the missing of his motor vehicle and Lunga, his driver, at Naledi Police Station. The police arrived and Tshepo confessed to them. Tshepo's information helped them find Lunga at the mortuary. He testified that Tshepo would be lying if he said Mbatha, Mandlhopa and himself fabricated lies to implicate the accused.

[43] **Cross examined**, he testified that he had his firearm concealed on the day of the incident. He confirmed Mandlhopa's evidence that he did not go to the basement but remained in the motor vehicle. It appeared Mbatha too no longer recalled everything when he testified. This included whether he had his licensed firearm when Mandlhopa and Ekha went to the basement.

[44] Ekha told him that Lunga was in the basement. He agreed that Tshepo had told them that Ekha had been involved in the robbery of Mbatha's motor vehicle. Ekha confirmed this saying he had been with them. He agreed that Ekha possibly lied to him when he said that Lunga was in the basement. Ekha advised him not to get to the basement. He testified that not much was said about Vilakazi because they did not want to involve him as he also did not go to the basement. Mandlhopa was brought up by him and he also imparted business skills to him. Ekha did not want

the people in the basement to recognise Mbatha as there could be problems. Ekha said the people could do Mandlhopa no harm and it happened like that as he was not shot at. Ekha told him that Lunga worked together with the robbers. He agreed that Lunga then betrayed him as his employer. He agreed that Ekha had been dishonest to him about the presence of Lunga in the basement. However, there was truth regarding the other things.

[45] The witness contradicted himself when he said that he only had given Ekha Moyo R1500.00 for going to look for Lunga. This, because he, in the first trial, had said that he had given Ekha R100.00 to enable Lunga to contact them. This, in my view, is not that material. He testified that the matter was very old and that he could not recall everything. He again agreed that Ekha knew that Lunga was not in the basement. He testified that Ekha, accused and Tshepo did not tell him directly that Lunga was dead. It, however, later emerged that Ekha Moyo, accused and Tshepo were together when Lunga was killed. He agreed he was not there but testified that Tshepo disclosed the truth to them and even helped them find Lunga's body.

[46] Informed that the day Ekha was shot Mokwana, Ekha and Paul had planned to kill the accused, he answered that this was news to him as Tshepo had never said this to him or Court. Told that Percy Mashiane gave instructions that accused be killed he said he could not agree as he did not even know Percy Mashiane.

[47] The contents of Mokwana's affidavit were put to the witness and he denied them adding that that appeared new to him. As the version of Mokwana's evidence was put to him he kept on saying that that was definitely something new to him. He did not know that. The witness specifically testified that accused had never told him that he shot Ekha in self-defence but, instead, said he had shot Ekha because Ekha had stolen his motor vehicle. Indeed, the evidence had not even been placed before the Court. He denied the version that Percy phoned Mokwana wanting to know if accused had been killed and that Mokwana told Percy that Ekha had failed to kill the accused who then had to be killed by Mokwana. He testified that the

further version had been unknown to him. The witness agreed that Ekha was chased by the accused who was driving his Camry; that Ekha was already lying down when he approached them at the entrance and that the accused was arrested by the Metro Police. He denied that he was part of the scheme to frame accused as the killer. He called it a lie that he and Mandlhopa visited Mkwana in prison to update him on the evidence in court. He agreed that he was not in the basement when Ekha was shot. Told that Mkwana said that Mandlopa was not in the basement he answered that Mkwana was forgetful. It was, according to him, not true that he and Mandlhopa had been paid R20 000.00 each.

- [48] Mzolo's version was put to the witness and he emphatically told the Court that he knew nothing about the version. He told the Court that he never saw bullet holes on the left door and window of the Camry. He testified that he remained in the motor vehicle when Mandlhopa and Ekha went into the basement. Mandlhopa came to him and reported to him that Ekha had been shot. He and Mandlhopa only signed the register when they went to fetch the combi and not when they left.

SIFISO NDLOVU

- [49] He was the next witness that the State called. He was a constable in the South African Police Services based at Mondeor police station. He was shown **Exhibit "G2"** on page 125 of the court record. The document is an affidavit of Tshepo Sipho Mkwana which is dated 4 September 2013. The witness briefly testified that he assisted the Sipho Mkwana but did not know him. Sipho just walked into the charge office with no one guarding him. He was not cuffed and his legs were not chained. Mkwana asked the witness to write the affidavit in English for him. His name and Johannesburg Medium B prison were already written. The contents of the affidavit came from Mkwana. The witness and Mkwana signed the affidavit. The document was stamped and given to Mkwana as it was his. I need to mention that the document which was still blank had been given to Mkwana by the witness.

- [50] The witness did not know the accused. He was surprised to learn that Mokwana had been in custody since January 2003 to June 2017 when the witness testified. This, because the one who walked into the charge office had been a free man. He wondered if the one who walked into the charge office did not share the same names with the one who was in custody. He testified that the one who walked into the charge office or client service centre could not have been the one who was in custody. Tshepo Sipho Mokwana was brought into Court and shown to the witness who immediately said that that was not the Mokwana that he had helped on 4 September 2013. I need to mention that this Tshepo Sipho Mokwana was in leg chains and accompanied by a prison official called Khampepe Lekhotla from Johannesburg Prison which is commonly known as Sun City.
- [51] Mr Guarneri cross-examined the witness who testified confirming his evidence in chief, namely that the man he helped had been a free man when he came to the Mondeor Police Station. He was honest to tell the Court that due to the lapse of time he would not be able to recognise the man but all he was sure of was that the man was not chained and cuffed. He saw the person for the first and last time on 4 September 2013.
- [52] Mr Guarneri asked the witness to describe the man that he had helped and he told the Court that the man was dark and short although he did not mention it in his statement which became **Exhibit "SN"** which stands for Sifiso Ndlovu. He recalled that he helped the man because he basically wrote the statement for the man while others wrote their own statements themselves. He testified that because of this case a standing order came into being that people who come to make statements be properly identified. He testified that he asked the man about the address which was Johannesburg Medium B and the man informed him that he was recently released from prison. However, he did not regard the issue of the address as serious and it did not even cross his mind to pursue the issue.

- [53] He testified that he took down the statement the contents of which did not concern him and he, as a result, never brought the contents of this statement to the attention of his superior. He conceded that he went to prison to take statements as Mondeor Police Station is the nearest Police Station to Johannesburg Prison. These would, for example, be statements involving assaults that took place in prison.
- [54] The witness was asked about the **SAP13** store Stamp on **Exhibit "G2"** on page 125 of the court record and he testified that they were allowed to use the stamp. He used the stamp and realised thereafter that there were stamps he could have used. He called it a lie if accused said he (the witness) had gone to prison with a female investigator, a certain Mrs Fannie, on 4 September 2013. He emphatically denied this. He further called it a lie to say that he was in an internal security office in prison with the accused, Mrs Fannie, Mr Modise from prison, female police officer in uniform and Tshepo Sipho Mokwana. It was another lie that Tshepo Sipho Mokwana signed **Exhibit "G2"** in their presence after he took down the statement.
- [55] He denied that a copy of the statement was made for Tshepo Sipho Mokwana; that Mrs Fannie made the copies; and that the accused was given a copy. The person who walked into the client service centre, according to him, must have used the names of Tshepo Sipho Mokwana. He denied that he left with the original of **Exhibit "G2"**; shook accused's hand and said good luck to him. He called accused a good liar. He testified that he saw the accused for the first time in court. He was honest enough to tell the court that he greeted the accused in court. He denied that he had greeted accused once the court adjourned calling him by his name. He was again honest enough to say he started knowing accused's name when he came to court.
- [56] He denied that he had told the accused that he had denied taking Mokwana's statement in prison simply because he had been told to do so. These were all lies according to him. Interesting enough, Mr Guarneri said to the witness: Accused

says I should ask you, who told you to deny having taken the statement in prison? The answer was, no one, because the statement was never taken in prison, according to him. The witness was re-examined and he testified that they did not take the police stamps to prison.

RISIMATI THOMAS HLUNGHWANI

- [57] He was a Captain in the South African Police Service attached to the detectives' unit in Orlando. He joined the Police force in 1989. He agreed that he, in December 2002, investigated a case of a missing person Lancelot Zungu. The docket became a murder docket. Informed that, subsequent to the murder trial of the accused, one Siphiwe Mzolo alleged that he (the witness) had approached him as a witness in the matter, he answered that he did not know Siphiwe Mzolo. He denied visiting him. He took statements only from those he visited. He denied that Siphiwe Mzolo had informed him that he would be available if the court needed him as a witness.
- [58] He and Constable Motswalo visited Ekha Moyo in hospital on 25/26 December 2002. He heard that Ekha passed on. He did not ask Ekha as to who had shot him. He, however, heard that Ekha was shot in town. He denied that Ekha had told him that he was shot by Sipho Tshepo Mokwanna.
- [59] He agreed that he made an affidavit on 12 April 2017 which is **Annexure "GL3"**. He testified that a car hijacking CAS: *Naledi CAS 743/12/2002* and murder case Florida CAS 685/12/2002 were consolidated. The witness testified that he made several affidavits and explained how it came about. His evidence included hearsay evidence which the parties agreed could be received provisionally. He testified that a certain Mrs Mzamani introduced herself to him as the accused's attorney. He knew the accused at the time. She wanted to know who had killed Zungu and he told her that Ekha had told him that Tshepo had killed Zungu. He then made such an affidavit and gave it to her.

[60] He testified that a lady unknown to him telephoned him in 2016 asking to see him. The lady had an envelope containing typed documents which Mrs Mzamani had wanted him to sign. He was not prepared to sign the documents and he, telephonically asked Mrs Mzamane to come with the documents as she knew the procedure. Mrs Mzamane then telephoned him and brought the documents to the police station. She had two affidavits. He was only happy with the contents of one of the affidavits. The signatures on the two documents were his but the contents of the one affidavit, according to him, were not his. He refused to sign the affidavit and made an affidavit which disclosed that Tshepo had killed Zungu. She took the affidavit. He confirmed that he did not have any of the affidavits when he consulted with Mr Mashiane.

[61] Cross-examined by Mr Guarneri he denied that he had visited Mzolo. He did not go to King Ramson Building where Mzolo worked as a security guard. He denied the version of Mzolo on the basis that he had never visited Mzolo. He testified that he had only met Ekha in hospital. He was not the investigating officer and never investigated the case which involved Ekha. He admitted having interviewed many witnesses and handling many dockets but testified that he had never paid Mzolo a visit. He was honest enough to tell the Court that he would not remember all the witnesses he interviewed. This, according to him, did not mean that he would not remember if he had visited Mzolo.

[62] At this stage, Mr Guarneri requested the Court to admit hearsay evidence including what Ekha said to Captain Hlungwani in hospital. Mr Mashiane welcomed the request and referred the Court to **Exhibit "G"** which is an affidavit which Captain Hlungwani made on 30 July 2014. The affidavit forms page 120 of the Court record. The affidavit of the witness dated 23 December 2016 was received by the Court as Exhibit "RTH". It is similar to Exhibit "G."

NATHANIEL TUMELO SEKHULA

- [63] The witness was a member of the Johannesburg Metro Police Unit where he was a policeman since January 1996. He agreed that he had testified in the first trial of the accused. He stood by that evidence. He confirmed that he and his colleagues had arrested the accused on 24 December 2002. The accused's red Toyota Camry which he, at the time, drove was searched. They used a Patrol JMPD car on the day in question. Members of the public stopped them. They stopped facing the entrance of the building. A man later identified as Ekha came and held on to their motor vehicle, he was bleeding. He explained that people in the Camry which was coming from the basement had shot him.
- [64] The Camry which was identified as that belonging to the accused emerged driven by the accused. The accused cooperated when asked to come out and even allowed them to search the motor vehicle. A firearm which was found was licensed and belonged to the accused. The Accused, upon being asked about Ekha, told them that he had shot him because he (Ekha) had stolen his combi, a mini bus. He never saw the Camry with bullet holes. The windows were all intact. He remembered receiving Mr Mashiane's call early in 2017 when he was informed that 14 years after the first trial of the accused new evidence had come to the fore.
- [65] He testified that the accused, at the scene, did not tell them of any bullet holes on his motor vehicle or its windows which were not shattered. Significantly the accused never told them that he was attacked and that he had defended himself.
- [66] Cross examined he testified that his job was, inter alia, to inspect motor vehicles. He would not remember the number of motor vehicles he inspected in the past 14 years nor their make and models. He could not remember how many motor vehicles he found with bullet holes or shattered windows. He did not remember inspecting motor vehicles with bullet holes in 2002 and he would be lying if he said he had stopped a motor vehicle which had bullet holes.

[67] Mzolo's version of the events of 24 December 2002 was put to the witness. The witness denied the version and testified that he knew nothing about it. He denied specifically that Ekha apologised to the accused. He agreed that Ekha had been bleeding. He testified that he never saw the members of the South African Police Services pointing to the accused and asking him if he had been the person who had shot him and that Ekha by means of turning his head sideways had said no. Ekha had been crawling when he saw him. He agreed that the red Camry motor vehicle came out of the basement moving slowly. He further agreed that there were members of the public on the scene. The accused was handed to the South African Police Service at Hillbrow Police Station. In the main, the witness stuck to his evidence in the first trial.

TSHEPO SIPHO MOKWANA

- [68] Mr Mashiane submitted that the witness's evidence against the accused was on record. He further submitted that the witness's further evidence by way of affidavits was also on record.
- [69] Mr Mashiane further informed the Court that the evidence of the witness in the accused's first trial and the new evidence was contradictory and this, according to him, amounted to the witness recanting his evidence in the first trial.
- [70] Mr Mashiane submitted that the Full Court of this Division, on the basis of the fresh evidence, set aside the accused's conviction and sentence and referred the matter back to this court to hear the evidence as directed.
- [71] To use Mr Mashiane's words: he did not want "to play chess against himself". He, accordingly, on 12 October 2017, and in terms of Section **190(1) of the CPA**, applied that Mokwana be declared a hostile witness. Mr Guarneri apposed the application which, in the interests of justice, was granted. The matter was rolled over to 13 October 2017.

- [72] On 13 October 2017, Tshepo Sipho Mokwana testified. He confirmed that the Court had convicted him and sentenced him. He served his sentence at Zonder Water Prison. He went to Zonderwater in 2010 and returned to Johannesburg Prison where he was at the time of giving his evidence.
- [73] Someone, he did not know, appealed his conviction and sentence on his behalf in 2015. He agreed that his appeal was heard on 7 August 2015. He did not know that his appeal was handled by Adv. W.A Karam who, according to Mr Mashiane, was an experienced and able advocate. Mr Mashiane informed the witness that although he might not have known it his appeal had been successful and that he was, at the time of giving evidence, serving a term of 25 years imprisonment. The two life sentences were each converted to 25 years imprisonment in respect of the two counts of murder and the sentences were running concurrently. This, to him, became welcome news.
- [74] Mr Mashiane took the witness through his heads of argument which were drawn by Adv Karam to show him that the new evidence appeared nowhere therein between 2012 and 2016. The document was given to the witness to go and read. The matter was then postponed to 16 October 2017.
- [75] On 16 October 2017 the matter was postponed to 18 October 2017. Mokwana was unwell on 18 October 2017 resulting in the postponement of the matter to 19 October 2017.
- [76] On 19 October 2017 the matter proceeded. The witness agreed that the new version, in the form of affidavits, did not form part of his heads of argument. Mr Mashiane put it to the witness that if it did, indeed, the new version would be in the heads of argument. The witness had no comment to give.

[77] The witness testified that he shared a prison cell with the accused once he was taken back to Johannesburg Prison. He denied that that was when the new evidence started surfacing.

[78] The witness was handed three sets of documents which formed part of his new evidence. These are:

1. **Exhibit “G3”** appearing on page 126 of the court record which is a confession statement “allegedly” made by Tshepo Sipho Mokwana dated 21 January 2012.
2. **Exhibit “G2”** being an affidavit allegedly made by Tshepo Sipho Mokwana dated 4 September 2013 and
3. **Exhibit “G1”** being an affidavit allegedly made by Tshepo Siopho Mokwana dated 11 September 2013.

Exhibit “G1” appears on page 124 of the court record.

[79] Mr Mashiane explained to Mokwana that the Exhibits formed part of the new evidence which had been placed before the Courts. He was asked to look at **Exhibit “G3”** which has two pages. He was further told that the Exhibit was stamped and signed and also had the name Tshepo Sipho Mokwana. Asked if the signature was his, his answer was an emphatic “it is not my signature”. Asked if he was sure, he answered “it is not mine.” He was asked to take time and scrutinize the signature. The answer remained the same.

[80] He was asked to look at **Exhibit “G2”** and do what he did in respect of **Exhibit “G3.”** He told the Court that the signature of the deponent was not his. Given time to again look at the signature, he reiterated that the signature was, indeed, not his.

[81] Taken to the third document Exhibit “G1” and asked to do what he had done with **Exhibit “G2”** he, without doubt, told the court that the signature was not his. Asked to take time and to carefully examine the signature, his answer remained the same, namely, that the signature was not his. The effect of this exercise was that

he denied knowing all the three signatures appearing in **Exhibits “G1,” “G2” and “G3.”**

[82] Mr Mashiane told Mokwana that the three documents had caused us to return to Court in the case of the accused. Asked to comment his answer was “they are not my signatures” and added that he was sure.

[83] Informed that the accused had submitted the documents to the SCA stating that the signatures appearing therein were his (Mokwana), the witness appeared stunned and then said that he had no comment. Mr Mashiane then told the witness not to worry as the accused would later tell the Court as to who had signed the Exhibits. Asked again if he was not making a mistake he answered that the signatures were definitely not his. Mr Mashiane’s approach was suggestive enough to the accused telling him that he had to help us out. The accused did not rise to the occasion. He did not testify.

[84] Reminded that at some stage, during the second trial, he was asked to come into the court for Constable Sifiso Ndlovu to see him, he remembered and testified that he did not know him before but had seen him in prison with a file of documents which he asked him to sign. The witness asked him where the documents were coming from and upon getting no answer he (witness) refused to sign the documents which Ndlovu walked away with.

[85] Shown **Exhibit “G2”** and asked if he had seen it before, he testified that he first saw it in Court on that day when it was shown to him. He did not know where the original was. Informed that it was put to Constable Ndlovu when he was cross-examined, that a copy was handed to him (witness) he answered that that was incorrect.

[86] Referred to the top part of **Exhibit “G2”** which had the name: Tshepo Sipho Mokwana, and asked if he had written the name, he answered that he had not. He

also did not write the “JHB Med-B” appearing on the second line of **Exhibit “G2”**. He stressed that he had never made a statement to Constable Ndlovu.

- [87] He testified that he saw **Exhibit “G3”** for the first time in court when he was testifying. He never saw it in 2012. He never typed **Exhibit “G3”** nor give it to the accused to type. He had nothing to do with **Exhibit “G3”** and he was very sure. Mr Mashiane, according to him, would be unfair to ask him about the contents of the Exhibit. He did not know how the Exhibit ended up in the SCA. He could not type.
- [88] Going back to Exhibit “G1” the witness testified that he did not know the ex-officio Commissioner of Oaths Jeremy Angelo Bossr. He testified that he did not meet him on 11 September 2013. He did not sign **Exhibit “G1”** which he first saw in court. It, again, would be unfair to ask him about the contents of **Exhibit “G1,”** he said. He denied that Exhibits “**G1,**” “**G2,**” and “**G3**” were his statements and that he had signed them.
- [89] He testified that he and the accused knew each other very well when they shared a cell in Johannesburg Prison in 2010. He agreed that he and the accused discussed about their incarceration and accepted what had happened.
- [90] At this stage, Mr Guarneri asked for the postponement of the matter because he had not expected what he was hearing. The case was postponed to 11 December 2017. Mr Mashiane informed the Court that Mokwana was his last witness.
- [91] Mr Guarneri started his cross-examination on 11 December 2017. The witness recalled that he was taken into court while Constable Sifiso Ndlovu was testifying. He also explained that the Constable once visited him in prison wanting him to sign a statement. He agreed that he had been charged together with the accused with the murder of Lunga Zungu and Ekha Moyo and that he had pleaded guilty to the charges. He was referred to his Section 112(2) statement forming pages 130

to 135 of the court record and he confirmed that the signature on page 135 of the court record was his. He testified that he was not good in English.

[92] He was referred to paragraph 5.8 of the statement and he confirmed that the paragraph explained how Lunga Zungu was killed in the veld in Roodepoort. He confirmed that paragraph 5.9 contains what happened when Lunga was killed. He agreed that there was a plan to kill Ekha if he (Ekha) did not bring back the combi which had been removed from the basement on the day that Lunga Zungu was killed.

[93] Mokwana testified that Ekha Moyo had agreed to meet the accused in the basement of King Ramson building. Dladla fired shots at those who were shooting at him in self-defence. They then fled the scene. Asked as to who fired first between Eka and accused, he answered that he did not recall. He testified that Ekha was shot in the basement. The cross examination revealed that there were two camps. The one camp consisted of Ekha, Makhosini and Paul while the other camp consisted of the accused and Mokwana. The witness did not know which group initiated the fight in the basement.

[94] I need to mention that Mr Mashiane conceded that Mokwana was not an intelligent man. This was supported by Mr Guarneri. The other aspect that needs mentioning is that Mokwana testified for the second time after many years.

[95] The contradictions are not surprising if regard is had to the fact that the second trial took place many years after the first trial. One finds contradictions where the evidence relates to the witness's section 112(2) statement (**Exhibit "F"**), his confession to the magistrate and his statement to the police. This becomes even more understandable if regard is had to the fact that Mokwana is not intelligent and educated.

[96] Mokwana's evidence remains significant in that it is supported by independent witnesses. In sum, Mokwana's evidence in a number of respects is supported by

the witnesses such as Mbatha, Mandlhopa and the Metro police officers as my analysis of the evidence will demonstrate later.

[97] Mokwana, for instance, contradicted himself in the first trial and in the second trial. This, as I said, resulted from the lapse of time between the two trials, his education and intelligence.

[98] Mokwana denied that Percy Mashiane paid him to lie in court and that Mduduzi Mandlhopa and Innocent Mbatha visited him in prison. He testified that he knew Innocent Mbatha and not Mduduzi Mandlhopa. He, however, contradicted himself regarding how Ekha went into the basement. He disagreed that Ekha arrived in the basement on foot.

[99] Mokwana agreed that Lunga was killed first and in fact his evidence was: “we killed Lunga first before the incident of the basement.” Mokwana was asked if Ekha came with the plan that the accused be killed in the basement and his answer was “no.”

[100] Mokwana testified that the accused was not involved in the killing of Lunga but strongly disagreed that he was not there when Lunga was killed. He testified that the people who planned to rob Lunga of the combi were the same people that took it. The witness, in the first trial, testified that Lunga was shot in Rodepoort while he was in the motor vehicle and after he had been dragged out of the motor vehicle.

[101] Mokwana testified that the accused was not present when Lunga’s combi was stolen and when he was killed. Reminded by Mr Guarneri that he, in the first trial, had testified that the accused was present he asked: “what made me say accused was there when the car was taken, where was it taken to?” The Court then asked him if the accused was present at the time and he said that he was telling the truth. Lunga was enticed to go to Roodepoort where he met with his death. He denied that Lunga was a passenger next to him in the Camry. Asked if he drove the Camry on their way to Roodepoort he answered that he did not recall. The witness ‘again emphatically denied that he had signed any document in prison or at the

police station. He testified that he had been in prison for many years and that there were things that he no longer remembered. However, he remembered that he pleaded guilty.

- [102] At this stage Mr Guarneri submitted that the State was allowed to reopen its case in order to lead further evidence. He submitted that the State needed to accept that the alleged statements were made by Mokwana as declaring him a hostile witness was irregular. I do not agree. **Exhibit “G2”**, according to Mr Guarneri, ought to be excluded from the equation. **Exhibit “G3”**, according to him, did not appear to be an affidavit as it was a letter. He accepted that **Exhibit “G1”** was, indeed, an affidavit.
- [103] Mr Mashiane’s submission was that the order that remitted the matter to the trial court did not exclude **Exhibit “G2.”** Indeed, it included it. What needed to be born in mind, according to him, was that the accused approached the Court with the alleged new evidence consisting of the affidavit of the accused accompanied by the supporting documents which were admitted into evidence.
- [104] Mr Mashiane correctly submitted that if Mokwana disavowed the evidence all it meant was that the new evidence did not exist as it would have been fraudulently procured. There is merit in this submission.
- [105] It was, indeed, in a situation such as this that it was incumbent upon the accused to explain to the Court that the evidence came from Mokwana. The accused would then have to confront Mokwana telling him that he, indeed, produced the evidence. This then would result in the accused testifying in order to deal with the disavowal.
- [106] Mr Mashiane submitted that the State did not have a choice as it had to regard the evidence as having been accepted. What the Full Court directed, according to him, was not being reviewed. The view is correct as the Full Court’s order has to be implemented. It was Mr Mashiane’s submission that the Full Court only set aside the conviction and sentence and not the proceedings. This is again correct.

- [107] What the Court needed to consider, according to Mr Mashiane, was whether the affidavits were Mokwana's or not. If the answer was yes, then Mokwana would have to explain why he recanted his evidence during the first trial. If not that would end the enquiry.
- [108] Mokwana testified that the signatures appearing on the exhibits were not his. He emphatically denied this. Mr Mashiane informed the Court that the State was not conceding that the signatures were Mokwana's. Mokwana specifically denied that he had the habit of making statements which he later distanced himself from.
- [109] Mr Mokwana denied a substantial number of what Mr Guarneri put to him. These were versions which would assist the accused which the accused needed to testify about, had he so decided.
- [110] Mr Guarneri, dealing with **Exhibit "G1"** reminded Mookwana that he denied most of its contents. Mokwana remembered. He however, denied that that contradicted his evidence in the first trial. It must be remembered that Mokwana explained that he was not the author of exhibits "G1" up to "G3." Mokwana denied that accused was framed and that he had not committed the crimes. He specifically denied that those that agreed to implicate the accused were remunerated. Again sight should not be lost of the fact that Mokwana testified that he had nothing to do with the exhibits and their contents. This, again, required the accused to deal with in the witness box.
- [111] The version of Siphiwe Mzolo was put to Mokwana and he denied the version. He testified that the version was replete with lies.
- [112] Mr Guarneri asked Mokwana if he made a written statement on 11 January 2018 and his answer was in a question form. He asked if the Court had sent people to prison to get him to make a statement to them and and the Court, because it had not done so, answered in the negative. The significance of this question will become clearer later in this judgement. He testified that someone who was later identified as Mr Matshidza, an Attorney of this court, visited him in prison and

wanted him to sign the statement and that Mr Kroukamp, an officer of the Department of Correctional Services, later joined them.

[113] He was given a copy of a document by Mr Guarneri and asked to identify a signature appearing on the second page of the document and he identified it as his. He testified that he used Sesotho when he signed the document. Asked if Attorney Matshidza was present he answered that that was what led him to ask the Court if it had sent someone to him for the purpose of getting him to make a statement. He testified that the statement had been typed and only needed his signature. He told the Court that Mr Matshidza instructed him to sign the document. The Court asked him if he was instructed to sign and he answered that he, in fact, was ordered to sign the document.

[114] Mr Guarneri showed Mokwana the last page of **Exhibit “G1”** and asked him if he signed it and he denied signing it.

[115] Mr Guarneri indicated that he wanted a trial within a trial to be conducted. Mr Mashiane did not object and Mokwana was excused. The trial within a trial was to deal with the admission of the document which Mokwana signed on 11 January 2018.

[116] Mr Mashiane submitted that the witness that Mr Guarneri intended calling was Vhonani Rollert Matshidza. Mr Matshidza is an attorney and an officer of the Court. He further submitted that the witness surely was aware why he was needed and that it would be difficult for him to claim privilege if Mokwana happened to be his client. Mr Mashiane cautioned that the Court could make a credibility finding which might have negative results. Mr Guarneri and Mr Matshidza were happy to proceed with the trial within a trial.

[117] Mr Guarneri then called Mr Matshidza as his first witness. Mr Matshidza testified that he was an attorney who practiced from his house at [...] P Road, The Reeds, Centurion, and that he had 17 years' experience. He told the Court that he received several calls from the accused in 2014 and 2015. The accused informed

him that he needed his assistance as he had initiated an urgent application. The request related to his release from prison. It appeared to him that the accused had received advice from his inmates in prison. The accused also appeared to have no money. He further testified that the accused again called him around November-December 2017. Mr Matshidza testified that the accused told him that Mokwana had made an affidavit which only needed to be signed by Mokwana and commissioned in prison. The witness was to take the document to prison.

[118] The accused's mother, in Sandton, hand delivered the handwritten document to the witness in December 2017. The document is **Exhibit "G(4)(1)"**. The handwriting was not very legible. He then typed the contents of **Exhibit "G(4)(1)"** leaving space for Mokwana to sign. He made arrangements with the prison and sent his candidate attorney to go and get the document signed and commissioned. He identified Mokwana in court. Mr Ngoasheng, the candidate attorney, took the handwritten and the typed documents to the prison. The report that he later received was that Mr Mokwana had refused to sign the document that became Exhibit "G4" on the basis that he had not agreed with its contents.

[119] About three weeks after Mokwana refused to sign Exhibit "G4" he received a call from Mokwana . He reminded Mokwana that he had refused to sign the document whereupon Mokwana told him that there had been a misunderstanding between him and Mr Ngoasheng and insisted that the witness take the document to him for his signature. He prepared another document changing only the date. He made an appointment and went to prison to see Mokwana on 11 January 2018. He made two copies of the document and gave Mokwana one of the copies. Mr Guarneri gave him the original which was received by the Court as **Exhibit "G4"**. He met Mokwana in Johannesburg prison. Mokwana preferred to communicate in Sepedi. He testified that Mokwana had no question. The witness asked Mokwana why he, in the past, had refused to sign the document and his answer was that there had been a misunderstanding between him and Mr Ngoasheng. Mokwana explained that he was happy with the document. The witness was worried about Mokwana's

small signature but Mokwana confirmed that that was how he signed and that removed his concern.

[120] A prison official called their senior who came with the stamp. Their senior, a white official, put a stamp on the document after he asked Mokwana if he had understood the contents. He did not ask for the name of the prison official. Mr Mashiane asked Mr Matshidza to bring his file the next day which would be 30 January 2018. In the main, Mokwana had to say that he had killed the deceased and not the accused. Mokwana told the witness that he had not been threatened when he signed the affidavit. He testified that Mokwana used a cellular phone with numbers 0608873238 when he phoned him. Mokwana, according to him, was not ordered to sign the affidavit. The Commissioner of Oaths asked Mokwana if he had understood the contents of the affidavit and said to Mokwana that he understood that he (Mokwana) was to sign the affidavit. Mokwana was asked to raise his right hand and say “so help me God”. The witness was not related to the accused in any way and he would not have gone to Johannesburg Prison had Mokwana not called him. Mr Matshidza testified that he had destroyed the original document.

[121] Mr Mashiane cross-examined Mr Matshidza who, by then, had brought his file to court. He confirmed that he, in the file, had detailed notes relating to consultations and payments. He agreed that the file was the property of his client. Told that he was telling the Court that he had destroyed the original instructions he testified that they were not legal instructions per se as that was meant to assist him. He did not open a file regarding the issue of the statement. This was not understandable to Mr Mashiane who had asked for the file which was then handed to him to peruse. The Court did not understand it either. Mr Matshidza, later in his evidence, conceded that he had been given instructions. I need to place it on record that the yellow file that was brought to court by Mr Matshidza had accused’s name.

[122] Mr Mashiane demonstrated to the witness that he worked on the matter when he typed the contents of Exhibit “G(4)(1). The witness agreed. The witness further

agreed that he had not noted what he did in the file and that he had not shown in the file that he had received **Exhibit “G(4)(1)”** which is what he was supposed to have done in the first instance. Told that he had destroyed a document without instructions he testified that he had told the accused that they had been misleading him in that Mokwana had refused to sign the affidavit. Mokwana’s question to the Court, from here onwards, became understandable.

[123] Mr Matshidza testified that he had destroyed the original document because he thought that the document had been made up by the accused and his mother thinking that Mokwana would sign. Mr Mashiane immediately told Mr matshidza that his view was in line with the State’s case, namely, that the document had not come from Mokwana. He conceded that he was supposed to have given the document to the accused and not to shred it. He testified that the accused and the mother did not respond when he told them that they had been misleading him. Asked about the destroyed document, he testified that he destroyed the document when he came back from holiday on 6 January 2018. He went to Mokwana after the document had been destroyed. Mr Matshidza did not answer the simple question when Mr Mashiane needed to know if he had told Mokwana that he had destroyed the document. He, instead, told the Court that Mokwana did not ask for the original. He finally told the Court which had repeated the question that he had not told Mokwana.

[124] Mr Matshidza was not ready to admit that he definitely had worked on the matter, however, he finally conceded that he worked on the matter. He reported to the accused and the mother telephonically that Mokwana refused to sign the affidavit. Mr Matshidza conceded that most of the things he testified about were not in the file. This included the fact that they acted for the accused pro bono.

[125] Mr Mashiane put it to the witness that the fact that Mokwana refused to sign the affidavit should have impelled him to keep the original handwritten document safe. The answer to the question was not helpful. At this stage the witness started talking of the “instructions” that he was given. The question remained unanswered.

He testified that Mokwana did not know that the original handwritten document existed.

[126] Mr Matshidza was asked another simple question which was that it must have surprised him that it was not Mokwana but the accused who was producing the affidavit. Instead of answering the question, the witness testified that he would not have participated and assisted in the matter if he had known that Mokwana, at the time, was under cross-examination. This was after Mr Mashiane had explained that it was strange that the affidavit, **Exhibit “G4”** was created on 11 January 2018 when Mokwana was being cross-examined on the evidence that he had tendered in chief. The matter had been stood down for further cross-examination in January 2018. Confronted with this, Mr Matshidza told the Court that both Mokwana and the accused were laymen when it involved issues of law. Mr Matshidza ended up conceding that the way things had happened had, indeed, been supprising.

[127] Mr Mashiane told the witness that it was most unusual that while Mokwana was being cross-examined, accused would approach Mokwana for an affidavit recanting his (Mokwana’s) evidence. Mr Matshidza answered that a person could plead not guilty and then in the middle of the trial change the plea to guilty. This, in no way, answered the simple question of Mr Mashiane.

Mr Matshidza then came with derogatory answers telling the Court that Mokwana was showing signs of abnormality and that he was mentally challenged and looked like a hobo. This, indeed, was very much uncalled for particularly if regard is had to the fact that that was not how the Court perceived Mokwana. In addition, Mr Mashiane and Mr Guarneri were in full agreement that Mokwana was not intelligent. Mr Matshidza then apologized. He later conceded that how Exhibit G4 was procured had, indeed, been very supprising. Mr Matshidza further conceded that Mokwana could have been assisted by the prison officials if he, indeed, had needed help.

Mr Matshidza was further asked if he did not find it very surprising that it was the accused and the mother who wanted the affidavit signed by Mokwana who was being cross-examined. He answered saying that he would not have assisted if he had known that the matter was partly heard. This, abundantly evinced that the witness was distancing himself from the accused's wrong conduct. The Court had to repeat the question whereupon Mr Matshidza agreed that it was indeed surprising. It seemed very clear to Mr Matshidza that accused and his mother communicated with Tshepo during trial.

[128] At this stage the witness informed the Court that he had found the original of **Exhibit "G4"** which was to be signed by Mokwana. This affidavit and the one that Mokwana signed on 11 January 2018 differ only in dates and that the original had required Mokwana to disclose his ID number. The draft taken to Mokwana discloses his prison number.

[129] Mr Ngoasheng did not leave Mokwana with a copy of the document which Mokwana refused to sign. Mr Matshidza did not comment when it was put to him that **Exhibit "G4"** was not the brain child of Mokwana who distanced himself from the affidavits referred to in **Exhibit "G4"**. He did not comment when told that the contents of **Exhibit "G4"** did not accord with the evidence of the independent witnesses.

[130] Mr Mashiane demonstrated to the witness that the contents of **Exhibit "G4"** were to a greater extent not factually correct, For instance, he submitted that Tshepo (Mokwana's) evidence was that he did not have any attorney by the name of Jeremy Angelo Bossr appearing on **Exhibit "G1"** page (124 of the court record). The witness testified that he would not be able to tell the Court if there was or not an attorney by the name of Bossr.

Mr Mashiane told Mr Matshidza that **Exhibit "G4"** could not have come from Mokwana as evidenced by paragraph 6 thereof which states: "*I further confirm that on the 24th day of December 2002, I did made (sic) and sign an affidavit under*

oath with my attorney Angelo Jeremy Bossr that I shot and kill (sic), Ekha Moyo with a firearm.” Told by Mr Mashiane that there was no affidavit dated 24 December 2002 he said he had no comment. He further had no comment when told that the accused procured the services of Bossr.

[131] To further prove that **Exhibit “G4”** was not factually correct the witness was referred to paragraph 7 of **Exhibit “G4”** which states:

“I do confirm that I made and sign (sic) another affidavit under oaths with two police officers from Mondeor Police Station commissioned by one Sifiso Ndlovu with his blank paper and his stamp of the presence of Fannie Modise and Sebastian Dladla on the 4th day of September 2013 and attest my signature thereof marked “G2”.

“G2” is “Exhibit G2” appearing on page 125 of the court record.

Mr Mashiane then asked if the witness would be able to dispute that the evidence of Sifiso Ndlovu to the effect that the person he assisted came to Mondeor Police Station and that the person was not Tshepo the witness answered that he would not be able to dispute that.

[132] Mr Matshidza was again referred to paragraph 9 of Exhibit “G4” and told that he would not know how the document would have come from Tshepo to accused’s mother and he answered that he would not know.

[133] The re-examination did not advance the accused’s case.

[134] The Court, to get clarity, asked the witness a few questions and he testified that the accused’s mother gave him the original handwritten document. The document, according to him, did not qualify to be called an affidavit. He gave shape to it because certain aspects were not there, however, he did not discuss the additions he effected with Mokwana.

- [135] Mr Guarneri then called Mr Kroukamp, the Deputy Director, employed by the Department of Correctional Services and based at Johannesburg Prison. He had 34 years' service and 10 years as Deputy Director. He testified that he commissioned **Exhibit "G4"** on 11 January 2018. He saw Tshepo in the corridors of the court building. A clerk called him on 11 January 2018 and he went to meet the lawyer in a glass office. The lawyer was still consulting when he joined them. He moved to the other side of the office where there was what he called a trapdoor. The glass was between him and the lawyer who was with the offender. The Lawyer, who is Mr Matshidza, asked him to commission **Exhibit "G4."** He handed him the **Exhibit "G4"** through the opening (trapdoor.)
- [136] He read the document which he handed back to the Lawyer and asked the offender to initial each page and sign the document. He put the stamp on the second page. He asked the questions appearing on page 2 of the document and wrote down the responses. The document was signed by him and the offender. He asked the offender who was Mokwana, to say "so help me God". The offender first raised his left hand and he corrected that. He then handed back the document to the lawyer. Mokwana was not bullied to sign the document. Mokwana appeared sober minded and he would not have commissioned the signing of the document had the offender been coerced to sign. He did not put pressure on him to get him to sign the document. Mokwana would be wrong to say that he was ordered to sign the document. He was satisfied that Mokwana knew what he was doing.
- [137] Mr Mashiane cross-examined the witness who agreed that paragraphs 9, 10, 11 and 12 refer to other documents. He testified that these other documents were not there when **Exhibit "G4"** was signed and commissioned. He agreed that Mokwana struggled with simple things such as raising his right hand. He spoke in English with Mokwana as Mokwana was one of his cleaners who could speak English. The witness testified that the conversation between the offender and the lawyer had been in English. This contradicted the evidence of Mr Matshidza who told the Court that he spoke Sepedi with Mokwana. He did not know the highest

standard that Mokwana passed. He was also not in a position to dispute that the Lawyer had to translate the contents of **Exhibit “G4”** for Mokwana. The witness had an understanding that Matshidza and Mokwana were Lawyer and client. He testified that he was not there when Matshidza consulted with Mokwana. He agreed that Mokwana would regard the witness as a man in authority. In fact that is what the witness was. Put to him that Mokwana testified and told the Court that people came to see him and that he was under the impression that they were sent by the Court and that he was ordered to sign a document, the witness told the Court that he had no comment to offer.

- [138] The accused closed his case in the trial within a trial. Mr Guarneri told the Court that the candidate attorney was made available to the State. Mr Mashiane informed the Court that he, in the interests of justice, would call Mr Ngoasheng as a witness.

NKUNYANE CEDRICK NGOASHENG

- [139] Mr Ngoasheng testified that he was employed by Mr Matshidza as his candidate attorney. He confirmed that he was sent to Mokwana in December 2017 with the handwritten document together with Exhibit “G4.” Mokwana was to sign **Exhibit “G4”** unfortunately he refused telling Ngoasheng that he had nothing to do with the two documents. He and Mokwana did understand each other. The witness spoke in Sepedi while Mokwana spoke Southern Sotho. This confirmed Mokwana’s evidence.
- [140] Mr Ngoasheng returned the documents to Mr Matshidza because Mokwana refused to sign them. Mokwana, according to him, looked at the documents and told him that they were not his documents.
- [141] Mr Ngoasheng was cross-examined by Mr Guarneri. He testified that Mokwana took time to read the documents. The witness was shown Exhibit **“G4(1)”** and he agreed that the document was the one that accompanied Exhibit “G4.” There was

no other document. He accepted that Mokwana could read English although he took long to get to the next page. The witness did not know Mokwana's level of education. He did not ask Mokwana if he could read and write English.

TSHEPO SIPHO MOKWANA

- [142] Mokwana was recalled to give evidence in the trial within a trial. Mr Mashiane informed him why he was needed and that he was under cross-examination in the main trial.
- [143] **Exhibit "G4(1)"** did not appear to be an original to all of us. It was a copy that Mokwana denied that he had written. He also did not commission anyone to write it. He did not know how the document came to be in the hands of the accused's mother. The signature "Tshepo" at the bottom was not brought about by him. He also did not know how the signature happened to be there. Mokwana testified that the signature on **Exhibit "G4"** was his. He testified that Matshidza came to prison the day he signed the document and told him to sign it. **Exhibit "G(4)(1)"** was the handwritten document.
- [144] Mr Mashiane asked him why he had asked the Court about the documents his answer was that he had wanted to know if the Court had sent Matshidza with the documents. He testified that someone explained to him what the document contained as he had been given a copy and he realised that it was not his statement.
- [145] Mokwana testified that Mr Ngoasheng read the statement to him and he told Ngoasheng that it was not his statement and he refused to sign it. His further testimony was that he had signed **Exhibit "G4"** because Mr Matshidza told him he had to sign it. He testified that he did not agree with the contents of the document.
- [146] Asked if he had called Mr Matshidza telling him that he was ready to sign the document he testified that he could not call someone he did not know. Mr

Matshidza, at the time, was unknown to him. He did not know cellular telephone number 060 8873 238. He testified that he, at the time, was only using a public phone. He did not have a cell phone in prison during January 2018. He testified that he never called Mr Matshidza giving him any kind of instruction. The document that he signed, aside from the handwritten document, was not accompanied by any document. He testified that he never discussed the matter with the accused while he was under cross-examination. He never asked the accused or his mother to assist with the drawing up of **Exhibit “G(4)(1).”**

[147] Mr Guarneri cross-examined Mokwana who testified that he did not properly understand English. He did not communicate with people in English. He was honest enough to tell the Court that his communication with Mr Kroukamp was not worth writing home about as it was limited to very simple things. He never had a real conversation with him. One, according to him, did not just see Mr Kroukamp as that needed special request and arrangement. He agreed he was a cleaner who was sometimes given instructions by Mr Kroukamp and said that Mr Kroukamp would do that on seeing Mokwana doing his job. He testified that he would see Mr Kroukamp once a month.

[148] Mokwana vehemently denied that he had written **Exhibit “G(4)(1)”**. He testified that he had never seen an inmate with a cell phone in prison. He again emphatically denied that he, in January 2018, had called Mr Matshidza who was unknown to him and whose cellphone number he never had. He denied having any telephonic conversation with him. He specifically testified that he used Southern Sotho when he spoke to Mr Matshidza who told him he was Venda speaking. He was, however, honest to tell the Court that he spoke and understood Sepedi. He testified that Mr Matshidza did not even take ten minutes with him. He denied that Mr Matshidza translated the contents of **Exhibit “G4”** to him and testified that a Prison Warder called Mr Kroukamp as he, at the time, was the only director available.

[149] He testified that Mr Matshidza told him that he had been sent to him by the Court and this, according to him, resulted in him asking for confirmation from the Court.

He told the Court that Mr Matshidza told him that he was an advocate. Told that Matshidza had never ordered him to sign **Exhibit “G4”** he answered that Matshidza told him to sign and this, indeed, is different from asking someone to sign somewhere. He testified that Mr Kroukamp, too, did not ask him to sign but told him to sign. He denied that Mr Kroukamp asked him to raise his right hand and that he, instead, raised his left hand. Mr Matshidza did not disclose this to the Court.

[150] In the meantime, Mokwana was released on parole and the matter was postponed to 6 March 2018 as he was not in court on 5 March 2018. Mr Mokwana testified that he saw Mr Matshidza for the first time in January 2018. He testified that Matshidza could not have got the contents of **Exhibit “G4”** from him as he did not even know him.

[151] Mr Guarneri addressed the Court and submitted that Mr Matshidza and Mr Kroukamp were reliable witnesses. Mokwana, according to him, was the author of **Exhibit “G4”**, which was worthy of admission.

[152] Mr Mashiane addressed the Court and submitted that it was easy to see that Mokwana was not the author of Exhibit “G4.” Mr Mashiane further submitted that the following had to be noted:

1. The origin of **Exhibit “G(4)(1)”** was not known. The accused’s mother was also not called as a witness to give an explanation as to where she had obtained **Exhibit “G(4)(1)”** from. The accused himself did not give evidence to demonstrate that Exhibit G(4)(1) had, indeed, come from Mokwana. The absence of this explanation is damning.
2. The contents of **Exhibit “G4”** were not in line with the evidence before the Court. This, indeed, is so. Mr Mashiane submitted that it would be strange and improbable to get statements such as the alleged statements where the

deponent was testifying against the accused. Indeed, Mokwana testified that **Exhibit “G4”** was not his statement.

3. Significantly, Mr Mashiane submitted that Mokwana, even before he answered Mr Guarneri’s question, when cross-examined, asked the Court if it had sent people with documents for him to sign in prison. Indeed, Mokwana, responding to Mr Guarneri’s question said that what happened in prison impelled him to ask the question. This, also, begs the question why Mokwana would ask the question if there was nothing seriously wrong. This question is suggestive of the fact that Mokwana must have been very sceptical of what was happening.
4. Mr Ngoasheng told the Court that Mokwana told him that the statements were not his and that he was not prepared to sign. He did not sign the document.
5. Mr Matshidza acted for the accused and not Mokwana. There is no evidence from the accused or his mother to properly deal with the fact that Mokwana refused to sign his document. The explanation would demonstrate that despite the denial, Mokwana was the author of **Exhibit “G4”**
6. That Mokwana telephoned Mr Matshidza asking him to bring the documents that he had previously refused to sign and then telling him that he was, at the time, ready to sign the document does not seem convincing. Besides, Mokwana testified that he did not know Mr Matshidza. He also did not know or have his cell phone number.
7. If Exhibit G4 had been created by Mokwana how, on earth, would he refuse to sign it. Having regard to the fact that Mokwana neither had Mr Matshidza’s cell phone number nor knew him, logic would dictate that this could not have happened as Mr Matshidza testified.
8. Mr Matshidza testified that because he needed space for Mr Mokwana’s signature and that Exhibit G(4)(1) did not qualify as an affidavit, he had to have it typed. It is noteworthy that:

8.1 **Exhibit G(4) (1)** has been signed by a Tshepo. It has space for the prison official and Tshepo to use.

8.2 The signatures on **Exhibits “G(4)(1)”** and **“G(4)”** are conspicuously different. Mr Guarneri also so conceded.

There is no explanation for this difference. The explanation that Mr Matshidza gave, namely, that he prepared **Exhibit “G4”** because of the problems highlighted above, according to Mr Mashiane, is self-defeating. It, indeed, is.

9. Finally, Mokwana testified that he signed **Exhibit “G4”** because the people who came with the document told him that they were from the Court. In the light of Mokwana’s scepticism it becomes difficult to gainsay this.

[153] The evidence, in the trial within a trial, is explicitly indicative of the fact that Mokwana could not have been the author of **Exhibit “G4”** and **G(4) (1)**. I, as a result, ruled that Exhibits G4 and G(4)(1) were inadmissible because Tshepo Mokwana was not the author thereof.

[154] At this stage, Mr Mashiane closed the State’s case in the main trial.

[155] Before Mr Guarneri proceeded with the defence case, Mr Mashiane asked to address the Court on Section 60(11)(B)(c) of the CPA. He submitted that he had asked the Court in terms of the Section to regard the record of the bail proceedings as forming part of the record of the trial. The section reads:

“The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.” **(My emphasis)**

Mr Mashiane submitted that the bail application record formed part of the main trial as the accused was duly informed. Mr Guarneri disagreed. Mr Mashiane then formally applied that the Court so order. Mr Guarneri opposed the application on the basis that the accused, at the time of the bail application, had not been warned.

[156] Mr Mashiane, indeed, asked the Court to warn the applicant (the accused) before the bail application was made. Mr Bauer who represented the accused did not object. Mr Mashiane informed the Court that he needed the accused, who the Court was told, needed no interpreter as he was comfortable with English, to understand the implications of Section 60(11)(B)(c). Mr Bauer asked to approach the accused and the two discussed.

[157] Mr Bauer then informed the Court that the accused understood English and that he fully understood the purport of the section. The Court asked the accused if it, indeed, was so and the accused confirmed it. The Court after listening to arguments from both sides and considering the law, dismissed Mr Guarneri's objection and the contents of the section were then read into the Court record. The record of the bail proceedings then formed part of the record of the trial of the accused and the evidence led in the bail application became admissible in these proceedings.

[158] Mr Guarneri then called the following witnesses:

LOVEMORE MOYO

Lovemore lived in Port Elizabeth. Sibonginkosi Moyo was his aunt. He testified that she passed on on 20 February 2017. Ekha Moyo was his Cousin. He last saw him in Johannesburg General Hospital.

- [159] Mr Guarneri advised the Court that they were going to lead hearsay evidence which, provisionally, ought to be admitted. Mr Mashiane had no difficulty with that provided the defence would later duly prove it.
- [160] The witness testified that he was with his aunt and uncle when he last saw Ekha. He testified that Ekha told his aunt and uncle in his presence that Tshepo Mokwana had shot him. Tshepo was Ekha's friend.
- [161] The witness was cross-examined by Mr Mashiane. He testified that initially he was called to Court by a lawyer who introduced himself as Bossr. He testified that he was one day in the company of the lawyer and Mokwana who told the lawyer that he had shot Ekha Moyo. They met Mokwana in prison. Asked what had become of the statement that Mokwana had made, he first said that they already knew that Tshepo had killed Ekha. The Court repeated the question and he answered that he did not know what the lawyer did with the statement.
- [162] Mr Mashiane asked the witness to produce his ID and he answered that the document was stolen from him at Johannesburg Station on that day. He produced a document bearing a stamp of Hillbrow Police Station where he reported the theft of his document. He testified that he moved to Port Elizabeth in 2015 after he stayed at S in Dobsonville. Getting back to the issue of the passport he testified that he had lost it in Hillbrow. He contradicted his evidence that he had lost his document at Johannesburg Station.
- [163] He testified that he would be surprised to learn that he was the first person to inform the court that the aunt passed on. She stayed at [...] S, Dobsonville. Captain Risimati Thomas Hlungwani was in hospital with them. He was asked if he was not making a mistake and his answer was that he was not. He was informed that someone had said that Ekha had told the Captain that the accused had not shot Ekha and that the Captain had denied this, his answer was far from answering the question. He testified that three policemen had taken statements

from Ekha who demanded to be discharged from hospital. He later learnt that Ekha was discharged from hospital. He testified that Ekha died at his friend's house where he stayed for two days before died. This evidence seriously contradicted the evidence that Ekha had died in hospital. The evidence also, had never been placed in dispute.

[164] Asked why Captain Hlungwani would deny having been told by Ekha that he had not been shot by the accused, his answer was that Ekha had even asked for forgiveness from the accused. This introduced very fresh evidence. Told that there was evidence to the effect that Ekha was said to have apologised at the scene of the crime and not in hospital he came with an unhelpful answer telling the Court that Moyo was employed by the accused and that he had stolen the accused's motor vehicle. He testified that Mokwana and Ekha were employed as drivers by the accused. Mr Mashiane told the witness that the evidence was heard for the first time and that the accused, himself, had never mentioned this. His answer was that that was what he knew. He evaded the question. He did not know why the accused did not tell the Court that he had employed Ekha and Mokwana.

[165] Told that Mandlhopa was there when Ekha was shot and that he had given a version of how Ekha was shot , he testified that he did not know why Mandlhopa would testify as he did. Informed that the accused, at the scene of crime, had told Mbatha that he had shot Ekha because Ekha had stolen his combi, he answered that he was not there when the shooting took place and that he did not have such evidence. Told that Ekha had told the Metro police officers that he had been shot by the one who was coming from the basement driving a Camry motor vehicle, he answered that Ekha had told them that the person who had shot at him was Tshepo who had intended to shoot the accused. This was also a new and strange version which came to the fore as the witness introduced fresh evidence.

[166] Mr Mashiane put it to the witness that Tshepo, at no stage, was told that he had by mistake shot at Ekha when he wanted to shoot the accused. He testified that

Tshepo had admitted in the presence of attorney Bossr that he had accidentally shot Ekha. Told that Mr Thompson who represented the accused had never put this to Mokwana, he said he had no comment to make. He also had no comment to offer when he was told that Mr Guarneri had also not put that to Mokwana. Mr Mashiane told the witness that his evidence was in line with the statements that Mokwana distanced himself from, he then told the Court that Mokwana had made such statements. How he knew this became very surprising. He did not know why Mokwana could deny that the statements were his.

[167] Reminded that Captain Hlungwani had denied that Ekha told him that he had been shot by Tshepo, he testified that Tshepo sent people to go and fetch Ekha from hospital. This contradicted his earlier evidence to the effect that Tshepo sent people to go and fetch Ekha from hospital and that Ekha had died at his friend's house. Mr Mashiane told the witness that Captain Hlungwani merely investigated a case of a missing person whereupon he said that Captain had made the statement and that he had been present in hospital. Told that Ekha was said to have apologized at the scene of the crime, he answered that he was told that Ekha apologized at the scene of crime and again in their presence in hospital. Fresh evidence which contradicted his earlier evidence never stopped coming in.

[168] The witness had no comment when Mr Mashiane told him that it was never put to Captain Hlungwani that Ekha apologized to accused in hospital. He testified that Mokwana, in prison, had said: brothers, I am sorry I shot Ekha by mistake". This made his version very intriguing. He was surprised to learn that Bossr's statement that he testified about where Mokwana admitted shooting Ekha was not before the court.

[169] Mr Guarneri informed the Court that Mzolo was not in court. The matter was then postponed to 9 April 2018. Mr Guarneri, on 9 April 2018, informed the Court that the accused needed to take a decision regarding his way forward. The Court adjourned and upon resumption at 12H05 Mr Guarneri informed the Court that the defence would not be calling further witnesses but intended to apply that certain

hearsay evidence be admitted in terms of Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. He informed the court that certain evidence would be admitted in terms of Section 3(1)(a) of the same Act. This evidence related to what Ekha told Captain Hlungwani in hospital. This portion of the evidence appears on page 587 of the record of the proceedings. The Captain testified that Ekha told him that the person who shot Lunga Zungu was Tshepo. Mr Mashiane confirmed that he had no problem if this piece of evidence was admitted. He, however, had problems with the admission of the piece of evidence which related to the person who had shot Ekha as that was not common cause.

[170] At this stage, the interpreter was excused because the accused indicated that he followed the English that was used in court.

[171] Mr Guarneri, at this stage, handed up a document headed:

“Application for admission of hearsay evidence in terms of Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.” He informed the Court that same was handed to Mr Mashiane for the State. Mr Mashiane confirmed this. It is important to quote subsections 3(1)(c) and 3(4) of Act 45 of 1988..

Section 3(4) reads:

“(4) For the purposes of this section –

“hearsay evidence” means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence”

“party” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.”

Section 3 provides:

3(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) *each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
- (b) *.....*
- (c) *The court having regard to-*
 - (i) *The nature of the proceedings;*
 - (ii) *The nature of the evidence;*
 - (iii) *The purpose for which the evidence is tendered;*
 - (iv) *The probative value of the evidence;*
 - (v) *The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
 - (vi) *Any prejudice to a party which the admission of such evidence might entail; and*
 - (vii) *Any other factor which should in the opinion of the court be taken into account,*

Is of the opinion that such evidence should be admitted in the interests of justice.”

[172] It is important to note that in issue is whether or not the evidence that, in his presence, Ekha Moyo told the witness's aunt and uncle, namely, that Mokwana shot him, should be admitted into evidence.

[173] Mr Guarneri submitted that the enquiry is discretionary and that the factors mentioned in section 3(c) are peremptory. This submission seems to be in order. (See Shaik and Others 2007(1)240 SCA at [170]; S v Molimi 2008(2) SACR 76 CC and Zeffertt and Paizes: The South African law of Evidence page 399.)

(i)THE NATURE OF THE PROCEEDINGS

Everybody agreed this is a criminal trial.

Mr Guarneri submitted that the reception of evidence against an accused person is different from when such evidence is adduced by the accused especially where the evidence is highly relevant in demonstrating the accused's innocence. (See Zeffertt and Paizes (Supra) at 399; S v Dyimbane and Others 1990 (2) SACR 502 (SE) at 504 and S v Ramavhale 1996(1) SACR 639 (A) at 647(H).

[174] **(ii) THE NATURE OF THE EVIDENCE.**

Mr Guarneri submitted that the evidence was not complicated and that Lovemore Moyo was the deceased's cousin. This, according to him, was never rebutted by the State. This, in this case, is unnecessary to rebut. It does not further the accused's case. Mr Guarneri submitted that the Statement to be admitted was not complex. The issue is not whether the Statement is complicated or complex but whether the statement was, after all, made.

[175] **(III) THE PURPOSE FOR WHICH THE EVIDENCE IS TENDERED**

Mr Guarneri submitted that the evidence was tendered to prove that Mokwana shot the deceased and that this contradicts Mokwana's evidence. Again, the question remains: was the statement made by Ekha, the deceased? In the light of the available objective evidence this is highly unlikely.

[176] **(IV) THE PROBATIVE VALUE OF THE EVIDENCE.**

Mr Guarneri submitted that the declaration had high probative value as same was not complex. It merely informed one as to who had shot Ekha. Mr Guarneri further submitted that the declaration was more in line with Mokwana's Section 112(2) guilty plea statement. What should not be lost sight of is that the evidence, considered in its entirety, does not support the submission.

[177] **(V) THE REASON WHY THE EVIDENCE IS NOT GIVEN BY THE PERSON UPON WHOSE CREDIBILITY THE PROBATIVE VALUE OF THE EVIDENCE DEPENDS.**

The answer is simple, the deceased is dead. Although Zeffertt and Paizes (*supra*) at 408 and *S v Mbanjwa and Another* 2000(2) SACR 100 (D) 113e and *S v Waldeck* 2006(2) SACR 120 (NCD) at 132d seem to hold the view that death would be most compelling of the possible explanations to receive hearsay evidence into evidence, evidence at the disposal of the Court, does not permit the reception of such evidence.

[178] **(VI) ANY PREJUDICE TO A PARTY WHICH THE ADMISSION OF SUCH EVIDENCE MIGHT ENTAIL**

Mr Guarneri relied on *S v Ndlovu* 2002 (2) SACR 325 (SCA) at [50] to submit that “the very fact that the hearsay justifiably strengthens the proponent’s case warrants its admission, since its omission would run counter to the interests of justice”. In *S v Ndlovu* (*supra*) at [50] the Court held that “where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot constitute “prejudice” and cannot count as prejudice for statutory purposes, since in weighing the interests of justice the Court must already have concluded that the reliability of evidence is such that its admission is necessary and justified.”

The problem that we face in this case is that the objective evidence of the independent witnesses, at the disposal of the Court, runs counter to the admission of the hearsay evidence that Mr Guarneri asks the court to admit.

[179] **ANY OTHER FACTOR WHICH SHOULD IN THE OPINION OF THE COURT BE TAKEN INTO ACCOUNT**

The Court has evidence which it cannot ignore. The evidence deals, a severe blow to the defence's version. It, indeed, would not be in the interests of justice to ignore such weighty evidence. The version of the defence is replete with contradictions and improbabilities to an extent that it would, indeed, be very dangerous to admit the hearsay evidence.

[180] As alluded to above, Mr Mashiane very strongly opposed Mr Guarneri's application. Mr Mashiane submitted that the following formed the basis of his opposition:

1. The evidence of Lovemore Moyo to the effect that he overheard Ekha telling the aunt and uncle that Tshepo had shot him was inconsistent with the evidence of Captain Hlungwani. Mr Mashiane submitted that (iv) above, was a very important consideration in determining whether or not the hearsay evidence should be admitted. Lovemore told the Court that Captain Hlungwani was present when he overheard Ekha telling them that Tshepo had shot him. Captain Hlungwani, in so many words, testified that Ekha never uttered such words. Nothing was said to indicate that the uncle could not come and verify the declaration. It was merely said that the aunt passed on but no death certificate was produced. There was also no evidence by someone else which would show that the aunt indeed, passed on. The Aunt, Sibonginkosi Moyo, deposed to an affidavit on 11 September 2013 about the events of 2002. Mr Mashiane submitted that no one told Warrant Officer Senoamadi who was looking for her that she had passed on. He, according to Mr Mashiane, was told that she no longer stayed at the given address. Mr Mashiane submitted that that was a convenient way of trying to explain why she could not come and tell the Court more about this hearsay evidence. Who, in light of the available evidence, would fault Mr Mashiane for holding such a view?

2. THE UNCLE

Similarly, Mr Mashiane was told that the uncle had relocated to Zimbabwe. Nothing further was done. No effort was made to try and find the uncle. Mr Mashiane submitted that no acceptable explanation was proffered for not producing more conclusive evidence about the uncle and that we, resultantly, could not cross (iv) above, without this explanation.

3. Mr Mashiane submitted that the Act could not be used to override the tendered evidence. The submission, in my view, has merit.
4. Mr Mashiane further submitted that this section could also not be used to bypass the acceptable and objective evidence. I again agree.
5. Mr Mashiane then justifiably asked what we would do with the evidence of Mandlhopa, Mbatha, the Metro Police Officers which contradicts the evidence sought to be admitted. Worse still, Mr mashiane further submitted that there was still the evidence of the accused in the first trial which could not be done away with. The accused told the Court that no one else other than him shot Ekha and that he shot Ekha in self-defence.
6. Admitting the hearsay evidence, according to Mr Mashiane, would defeat the purposes of (vi) and (vii) above. I agree. He submitted that it, 'indeed, would be in the interests of justice if the court refused to admit the hearsay evidence.

7. THE CREDIIBILITY OF LOVEMORE MOYO.

Mr Mashiane submitted that Lovemore's credibility was left in tatters. He testified that Ekha apologised in hospital when the defence's version is that Ekha apologised directly to the accused at the entrance to the basement. While Mr Mashiane agreed that the aspects to be considered in (i) –(vi) were peremptory, one could not ignore (iii), (iv) and (vi). He concluded that the hearsay evidence in casu materially contradicts Mokwana's evidence and that of Mandlopa, Mbatha and Metro Police officers. Mr Mashiane submitted that

even if the fact that Lovemore Moyo is Ekha's cousin could not be rebutted, it still did not mean that Lovemore's evidence contained the truth. Put differently, it has to be shown that Lovemore's evidence was credible and reliable.

8. Mr Mashiane disagreed that Mokwana's Section 112(2) guilty plea was in line with the hearsay evidence that ought to be admitted. The submission is correct. Nowhere in the Section 112(2) statement does Mokwana say that he shot Ekha.

[181] Mr Mashiane submitted that Mr Guarneri put it to Mokwana that the accused was not there when Lunga was killed and Mokwana's immediate response was that he disagreed. Mr Mashiane conceded that Mokwana was not one of the cleverest people. Indeed, Mr Guarneri, too, so conceded. To substantiate this, Mr Mashiane demonstrated that in response to a question Mokwana asked "when a car is taken where is it taken to?" he further said we were taking the car to accused 1. There is, indeed, evidence that Mbatha's combi was in the basement and that is where Mandllhopa found Mbatha's combi which was taken back to Soweto.

[182] Mr mashiane submitted that it was common cause that `Lunga was shot for the very same combi that belonged to Mbatha. This, in my view, is the most probable submission. Mokwana asked where did you think we were taking the combi to? Ekha had to die because of this combi.

[183] Mr Mashiane submitted that the evidence was very straight forward. Indeed it remained very straight forward. He submitted that it was not in the interests of justice that the hearsay evidence relating to Ekha be admitted. The submission is plausible.

[184] Regarding the deceased Zungu, Mr Mashiane submitted that the accused was present when Zungu was killed. Evidence, in the first trial, revealed that the accused was the last to shoot Lunga Zungu once he was dragged out of the motor vehicle where he was shot at close range. Evidence further evinced that the

accused was part of the plan that Zungu be killed and his combi taken. Mokwana, in the first trial, testified that accused searched Zungu and took out from his pocket R300-00 that Zungu had. This included Zungu's ID and the keys of the combi. Mbatha testified that they had to use spare keys to remove the combi from the basement.

[185] Mr Mashiane validly asked why accused would shoot Ekha if he had nothing to do with the combi. Evidence disclosed that the accused had said that Ekha would be killed unless he produced the combi which had been removed from the basement. Mr Mashiane submitted that different people, in this case, had different duties to do. This is the evidence that is at the disposal of the Court.

[186] Mr Mashiane reiterated that the accused was convicted on the basis of the doctrine of common purpose. There is abundant evidence confirming this.

[187] Mr Mashiane finally submitted that the hearsay evidence deserved to be thrown into a dustbin.

[188] The Court, for reasons I have disclosed above, and in the interests of justice, refused to admit the evidence that Lovemore, in hospital overheard Ekha telling his aunt and uncle that Mokwana had shot him.

[189] At this stage, Mr Guarneri brought an unclear application. The application became clearer after Mr Mashiane asked for clarity as it was difficult to follow what Mr Guarneri was saying.

[190] The Court asked if Mr Guarneri's application was that the State ought to furnish the defence with copies of **Exhibits "G"** and "H." Mr Guarneri confirmed that that was the gist of his application.

[191] Mr Mashiane submitted that the issue was never raised in the first trial and that it was also not an issue on appeal. Mr Guarneri informed the Court that the application was based on the fact that the State had to provide the Court record.

[192] Mr Mashiane opposed the application. He informed the Court that the defence was being opportunistic. This, because the application ought to have been brought within a reasonable time. The accused, according to him, was convicted and sentenced 13 years ago. He conceded that although the State was the custodian of the documents, the wheels of justice did not stop with the conviction and sentence of the accused.

[193] Mr Mashiane submitted that it was common cause that the documents that Mr Guarneri referred to, in the meantime, went missing. He, however, submitted that the accused approached the SCA after 14 years asking for leave to appeal and permission to lead further evidence. Mr Mashiane submitted that the accused never complained to the SCA about the documents. The accused's conduct had, according to Mr Mashiane, resulted in the second trial. He further submitted that the accused had persuaded the SCA and the Full Court of this Division without the Exhibits. It must be remembered that the accused's case rests on the affidavits that Mokwana allegedly deposed to recanting his earlier evidence. Mr Mashiane found it particularly strange that Mr Guarneri could bring the application when their case involved the affidavits that Mokwana was said to have made subsequent to the conviction and sentence of the accused.

[194] The issue, in my view, is crisp. It is either that Mokwana made the statements or that he did not. I have demonstrated that Mokwana was not the author of the statements or affidavits and I, accordingly, so ruled.

[195] Mr Mashiane referred to the judgement which I delivered in 2004 which appears on page 39 of the court record. He submitted that the Court, therein, extensively dealt with Exhibits "G" and "H". I agree. Mr Mashiane, to assist the defence, mentioned that the Court from page 48 line 8 to page 52 line 25, dealt with Exhibit "G." Exhibit "H," Mr Mashiane proceeded, was dealt with by the Court from page 57 first paragraph to page 59 line 10. Mr Mashiane further submitted that the defence could not now complain about Exhibits "G" and "H." in any event, the accused in this second trial, had to demonstrate that the alleged affidavits had

been deposed to by Mokwana and that they were his affidavits. Mokwana distanced himself from the affidavits telling the court that they were not his and that he in fact had nothing to do with them. The State led evidence to this effect. Glaringly missing is the evidence of the accused who did not testify in the trial within a trial and the main case.

[196] The most important question that one should ask oneself is: why did the accused not testify if, indeed, Mokwana had made the statements. Mokwana's denial impelled the accused to testify and to call his mother. He failed to do both.

[197] Mr Guarneri referred to the case of **Klaas Lesetja Phekane** case **CCT61/61 [PHANE v S [2017] ZACC44]** in an endeavour to persuade the Court to grant his application. Mr Mashiane, correctly in my view, submitted that Phakane's case and the case in casu, differ remarkably in their facts. He submitted that while in the Phakane matter the Court quoted the statements verbatim in its judgement, the Court, in this matter did, not quote the statement verbatim but dealt extensively therewith as alluded to above.

[198] Mr Mashiane submitted that in the Phakane matter no adequate record was provided while the Court, in this case, provided an adequate record which enabled the accused to approach the SCA and the Full Court of this Division. He further submitted that this was not an issue when the accused prosecuted his appeal and this, according to Mr Mashiane, demonstrated that the accused was just opportunistic. It appears so.

[199] The Court carefully listened to counsels' submissions and arguments and found that the issue now before it is crisp. The facts of the Phakane case are, indeed, distinguishable from those of the current matter. I, in the result, dismissed Mr Guarneri's application as baseless.

[200] At this stage, Mr Guarneri asked that the matter be rolled over to the following day. He had wanted to consult with his management at Legal Aid South Africa and he assured the Court that he would be able to argue the matter the following day. He

needed someone more senior to be with him in Court. Mr Mashiane strenuously opposed the application. Reluctantly, I rolled the matter over to 11 April 2018.

[201] On 11 April 2018, Mr Guarneri brought an application for permission to be allowed to withdraw from the case. He advised the Court that he could not carry on with the matter as an impasse with his client had arisen. This had become apparent. Mr Mashiane confirmed that he and Mr Guarneri had talked about it and agreed that nothing could be done about it. This, indeed, was unfortunate. The matter had to be postponed to 13 April 2018 for new counsel to be appointed. The accused confirmed that he was ready to be assisted by new counsel. Mr Guarneri withdrew from the matter.

[202] On 13 April 2018 Mr Hlazo appeared for the accused and the matter was postponed to 23 July 2018 to allow him time to familiarise himself with what had transpired in the case.

[203] On 23 July 2018 Mr Hlazo was assisted by Mr Mashiane as his record only ran up to the end of March 2018. Mr Mashiane reminded the Court that Mr Guarneri had informed the Court that he would not be calling further witnesses. The accused's case, at this stage, had not been closed. Mr Hlazo advised the Court that he had consulted with the accused who had instructed him to call Siphiwe Mzolo as his witness.

[204] **SIPHIWE SKO MZOLO**

Mr Mashiane informed the Court that the witness in the box was not the Mzolo that the defence had intended calling. However, this aspect was later abandoned by Mr Mashiane. He, however, had no objection that the witness be called although Mr Guarneri had intimated to the Court that he would not be calling further witnesses. The witness, strange enough, could not remember his date of birth disclosed by his ID. He told the Court that he was born on 12 April 1983 while his ID showed that he was born on 5 November 1983. He later testified that he had made a

mistake. Mr Hlazo needed time to consult and the matter was rolled over to 24 July 2018.

- [205] On 24 July 2018 the witness testified that he knew the accused who was Sebastian Dladla. He knew him from the time he worked for Sizwe Security. He worked at King Ramson building on 15 December 2002. Dladla, as a regular visitor, used to sign in before he went into the building. He also knew Mokwana and Ekha Moyo.
- [206] He testified that he was on duty on 24 December 2002 when Ekha was shot. He guarded the building. He had a register which had information of people who went in and out of the building. He testified that Ekha Moyo, Paul, Makhosini and Tshepo Mokwana came to the building. They arrived at approximately 13H30. Ekha drove the Peugeot motor vehicle that they came in. They signed and told him that they were going to basement number two. They usually came and parked their motor vehicle in the basement.
- [207] Ekha asked him to tell the accused to follow them to basement Number 2 when he arrived. Dladla, alone, arrived shortly thereafter driving a Camry motor vehicle. The accused drove into the basement where he was needed. After 15 minutes of the accused arriving, he heard gunshots from the direction of the basement. He proceeded to the basement and met Ekha and his friends exiting the second basement and going to the first basement. He asked them what was happening and they informed him that nothing was happening and that he had to go back to his post. Despite having heard the gunshots, the witness testified that he went back to his post. It is most surprising that he was convinced by this. The witness, strange enough, also did not ask them about the gunshots that he had heard.
- [208] All four were walking when he met them. He went back to where Jabulani Ngcobo, his colleague was. He testified that he, again, heard approximately four gunshots from next to the first basement. He left Ngcobo in the guardroom and went back to the first basement where he found Ekha on his knees next to Mokwana, Paul and

Makhosini who had firearms in their hands. On seeing him, the three ran away leaving Ekha behind still on his knees and crying. Again, surprisingly enough, the witness did not ask them why Ekha was on his knees and crying. He also did not ask them why they ran away on seeing him particularly after he heard the second set of gunshots. The witness's behaviour was highly suspect.

[209] He approached Ekha and asked him what was happening. Ekha told him that he had been shot by Mokwana. He testified that Ekha stood up and held on to whatever he could get and walked to the reception area. The witness did not assist Ekha who could hardly walk. This, again, is strange behaviour. He testified that Ekha fell down in front of the reception. Dladla the accused, was not with them in the first basement.

[210] He asked people to accompany him to the second basement to look for the accused. He found the accused trying to make a call. He asked the accused what was happening and the accused told him that Mokwana and others had tried to kill him by shooting at him. He told the accused that Ekha was shot in the first basement by Mokwana and the others. He left the accused in the second basement and proceeded to the guardroom where he found Ekha as he had left him. He found Metro police officers and many other people. The accused emerged after fifteen to twenty minutes driving the Camry motor vehicle. The Metro Police officers stopped the accused and asked him to alight. They searched him and the motor vehicle and found a firearm in the Camry. The accused was Arrested and placed in the motor vehicle. The South African Police removed the accused from the Metro police officers' motor vehicle and placed him in their motor vehicle. Ekha was taken to hospital in an ambulance. He never saw Mokwana, Paul and Makhosini again. He made a statement to the police about the incident on 26 December 2002.

[211] In reply to a question he testified that he did not participate in the first trial because nobody had called him. This was caused by the fact that nobody knew his address at the time. The Court asked him if he had given his address to the police officers

he answered that he had done so. This then Contradicted what he had just said. He heard about the name of Thomas Hlungwani for the first time in 2003. He testified that Hlungwani came to Ramson Flat in December 2003 and introduced himself to him. Hlungwani asked him about the incident of 2002 and he explained everything to him. I need to mention that this Hlungwani is Captain Hlungwani. The Captain told him that he would tell him (Mzolo) once he was needed in court. Although he made the second statement to Captain Hlungwani, no one told him that he was needed in court. The witness had forgotten that he had told the court that no one had his address and that he, as a result, could not be reached.

[212] The witness was only told by Attorney Bossr in 2013 or 2014 that he was needed in court and that was ten years later. He, at the time, was not aware that the first trial had been concluded. He testified that the attorney never told him that the trial had reached its end. The Court asked him where he had seen the attorney, he answered that he did not recall. This was intriguing. He testified that he never saw the attorney again. Mr Hlazo, in July 2018, was the one who called him and asked him to come and testify.

[213] Mr Mashiane cross-examined him. It was very clear that the witness was referring to attorney Bossr when he mentioned the name of attorney Bosswell. The clarity is evident from page 119 of Exhibit "F" which is the statement that disclosed the name of the Commissioner of Oaths as Jeremy Angelo Bossr. The witness testified that his highest level of education was Grade 12 which is matric. He testified that he could write and read English. He read the statement and was satisfied with its contents.

[214] Mr Mashiane took him to page 1 line 6 of the statement and read the sentence into the court record. The witness, before the interpreting was done said "yes" confirming that the affidavit was about the case in which the accused was convicted and sentenced and that he was the security guard in King Ramson building in Joubert Park. The building is on the corner of King George and Wolmarans streets. The witness understood that this meant that the accused had

been sentenced and that the case had been finalized. Asked as to where he got this information from for him to be able to tell Bossr, he persisted that it was Bossr who, in fact, had told him that. He agreed that the paragraph was not saying that Bossr had told him as he was the one who was speaking in the paragraph. Informed that there was then a contradiction in his testimony, he answered that he was telling the truth when he, himself, said that the case had been finalised. He was then told that if Bossr, as he then stated, had told him then the document was not a true reflection of his truth.

[215] Pressed to deal with the question he then said that Bossr and nobody else had told him. He testified that between 2002 and 2014 nobody but Bossr had told him. The witness would either be quite or gave wrong answers when he answered the questions. Reminded that he, at some stage, had testified that nobody had told him and that he, at the time, had not been telling the Court the truth, he answered that he had made two affidavits, the one on 11 September 2013 and the other on 9 September 2014.

[216] The Court established that the affidavit dated 11 September 2013 was part of a larger document and page 1 thereof was headed:

(a) Annexure "A"

(b) Page 60-61

Page 60 is the first page of the affidavit and page 62 is the last page of Exhibit "F" in the matter.

Mr Mashiane explained that he, in fact, had given the witness the affidavit which was dated 11 September 2013. He uplifted it from the appellants heads which were filed by Legal Said South Africa after the accused approached the SCA and when his appeal was to be heard by the Full Court on 3 March 2017. The document formed pages 60 to 62 of the bundle. Mr Mashiane explained that he was not even aware that the document was dated differently to Exhibit "F." the document, however, was a replica of Exhibit "F." The difference only lied in the dates. The two

documents, Mr Mashiane explained, did not come from the State. Mr Hlazo agreed that the contents of the two documents, indeed, were the same. Mr Hlazo asked the Court to allow him a moment to go through the two documents.

[217] Mr Mashiane, upon resumption, informed the Court that the two documents were Exhibits “M” and “F,” except for the different dates “M” was a replica of “F”. Mr Mashiane gave the witness a clean copy of Exhibit “F” for the purposes of cross-examination. This was confirmed by Mr Hlazo.

[218] Mr Mashiane then commended the witness for having unearthed the document. Mr Mashiane went on with his cross-examination. He told the witness that it had been agreed that Bossr had informed him that the accused’s case had been finalised which meant that his earlier statement that Bossr had not told him that the case had been finalised was incorrect. He kept quiet and thereafter told the Court that Bossr had told him. This was after the question was repeated by the Court. The witness exclaimed and said EISH! And then, in English, added that he was confused. He then said that the correct version had been that Bossr had told him.

[219] Mr Mashiane told the witness that Mokwana had testified and told the Court that he himself, Ekha Moyo, Makhosini Nkosi and the accused were friends, his answer was that he was seeing Makhosini and Paul for the first time while he used to see Mokwana, Ekha and the accused together. He agreed that they were friends because they had come together. Accused, Tshepo and Ekha, according to him, knew each other very well. He was sure about this, although he had forgotten the surname of Makhosini and Paul. He refreshed his memory in 2013 when he made his statement from the register that he kept and established that Makhosini’s surname was Nkosi.

[220] Mr Mashiane informed the witness that the accused, in 2003, testified and told the court that Ekha and those he was with approached him with Ekha in front. He did

not know those that Ekha was with. Shown that this, in the light of his evidence was surprising, he agreed. This is a very serious contradiction. The matter was postponed to 25 July 2018.

[221] Mr Mashiane took the witness to what he had said to Bossr about the incident. In paragraph 2 of **Exhibit “F”** the witness states that on 24 December 2002 at 12h30 Ekha Moyo, Paul, Makhosini Nkosi and Tshepo sipho Mokwana found him at his post at King Ramson Building. They came in a Peugeot motor vehicle with registration number J[...] GP. The motor vehicle was driven by Ekha. At approximately 13H15 the accused arrived driving a red Camry with registration number **M[...] GP**.

[222] They all signed before they entered the basement. Mr Mashiane asked the witness if he was sure of the sequence as they went into the basement. The witness answered in the affirmative. The accused’s evidence, in the first trial, had been that he was the first to drive into the basement. He agreed that the accused was not telling the truth. Mr Mashiane, concerned with how the witness answered the question, informed him that he was taking time before he answered the question which required either a yes or no. He informed the witness that he had taken 30 minutes to get just a yes which was required from the witness. He also noticed that the witness struggled when he answered the simple questions. The witness explained that he was normally not quick when he responded. This, according to Mr Mashiane, was because the witness would first be evasive and then answer the question. Asked to comment the witness said he had no comment.

[223] Paragraphs 3, 4 and 5 were read into the record and the witness confirmed the contents. The witness testified that he heard about 6 or 7 gunshots after accused had gone into the basement. He agreed that he made his statement 12 years after the incident. Mr Mashiane reminded the witness that the previous day, on 24 July 2018, he had testified that he had heard about 7 gunshots. Asked as to what helped him remember the number of the gunshots that he had heard, he first

answered that he had noted that down in the occurrence book (the “OB”), and then confirmed that his statement did not disclose this. He apologised when he was asked why the statement did not disclose that. Reminded that he had no OB to remember the number of gunshots and that he had testified without it, he remained quiet. The question had to be repeated and he then answered that he had not used the Occurrence Book. He was asked if it was easy to remember things when one used the Occurrence Book, this time, without much ado, he answered and said yes. This contradicted his earlier answer that he usually did not respond quickly.

[224] The witness testified that he did not ask Paul, Makhosini and Tshepo where the accused was when he met them in the first basement. Asked why he did not think of it, He testified that the accused told him that Ekha had stolen his Combi. Reminded that the accused had told him that Ekha had stolen his combi; that he knew on 20 December 2002 that Ekha had stolen his Combi; that 4 days later, on 24 December 2002 Ekha and the accused met in the basement and that he had heard gunshots while Ekha and Dladla were still in the basement and asked if, indeed, it was not necessary to find out where the accused was when he met Ekha, Paul and Tshepo in the first basement, he answered that he thought they had solved their problem. This is particularly strange because problems are not amicably solved by gunshots.

[225] He testified that he did not see Ekha and the others with firearms when he first saw them. Upon being asked if he had asked them as to where the gunshots had come from, he answered that he had. Asked what their answer was, he told the Court that they had told him that there had been nothing wrong. This contradicted his earlier evidence. This is extremely strange and intriguing because they were gunshots that he heard and to say that they told him there had been nothing wrong and that he believed it is most absurd.

[226] He testified that five minutes after he returned to the guardroom he again heard about 4 further gunshots. He testified that Tshepo was aware of the gunshots.

Ekha and the others never told him that there was never any shooting. The witness was informed that there was evidence on record that Ekha went to the basement with Mandlhopa, and that Mandlhopa's version was not in line with this. He testified that the evidence did not disclose that gunshots were heard twice, first from the second basement and second from the first basement. Informed that Mandlhopa had testified that the shooting only ensued when he and Ekha approached the accused and the others, he answered that he did not know why Mandlhopa testified like that.

[227] Mr Mashiane read paragraph 6 of his statement into the record. The witness was then asked why he had wanted to know more about Dladla, he answered that that was because he had seen what had happened. This is again intriguing particularly if it is remembered that he all along had not been asking about the accused. This time, he testified that he was worried about the accused because the others had run away and he knew that the accused had also gone to the basement.

[228] Mr Mashiane asked him why he was only concerned about the accused after Ekha had told him that he had been shot by Tshepo. He, as usual, was first quiet and then said that he had never worried himself about the accused. He had only remembered that the accused had also gone to the basement. He was asked why he did not check on the accused when he heard the first shots being fired. His testimony was that he had not thought about it. He was told that the accused, from the word go, had been a victim and he agreed. Taken back to paragraph 6 of his statement he was asked how he could have concluded that the accused was telephoning 10111. He answered that he asked the accused who told him that he was telephoning 10111. This was heard for the first time and contradicted his earlier evidence. Told that the accused had never told the Court that he tried to telephone 10111, his answer was that he had nothing to say. He was surprised that the accused never testified about this.

[229] He confirmed what paragraph 6 of his statement says that the accused told him that Ekha and the others shot at him intending to kill him. Informed that the

accused had never disclosed that he answered he had no comment to offer. He, however, said that that surprised him.

[230] He confirmed seeing bullet holes on the window and the door of the accused's Camry. The holes, according to him, were so positioned that anyone could see them and added that the accused would also testify about the bullet holes. The accused heard this but never testified. His further evidence was that the police officers also saw the bullet holes. Told that the accused had never told the Court that his motor vehicle had been shot at, the witness said he was surprised. He was further surprised that the accused had never told the Metro police officers that he had been the victim in the incident and that he could even prove it by showing them the bullet holes.

[231] Mr Mashiane told the witness that Mbatha, who arrived shortly after the incident, testified that he had spoken to the accused at the entrance to the basement and that the accused had never told him that he had been the victim in the whole incident, the witness again said that that surprised him.

[232] He was further surprised to learn that Metro Police officers who also were there at the entrance had seen the accused's motor vehicle and that the vehicle, according to them, had no bullet holes. He found it further surprising to learn that the police officers, even in 2003, were never told that the accused's motor vehicle was shot at and that it had bullet holes. The other police officers, too, according to the evidence, did not see the bullet holes. This, too, surprised him and he had no comment.

[233] The witness testified that he told the accused that Ekha was shot by his friends. He was surprised that it was never put to the witness that Mzolo, the witness, had told the accused that Ekha's friends had shot him. He was most surprised to hear that the accused had testified that he had shot Ekha in self-defence. The witness, again, was surprised to learn that accused had never testified that Ekha had apologised. He did not know why the accused was pointed out by the police who

asked Ekha if the (accused) was not the one who had shot him and that, using sign language Ekha had said he was not the one.

[234] The witness testified that he was surprised that none of the police officers had testified about Ekha apologizing. He was reminded that he, at some stage, knew that the accused trial was finalised, he testified that Thomas Hlungwani (the Captain) informed him in January 2003 that the trial was finalised. Reminded that he had been so informed by Bossr, he said he had forgotten that he had spoken about this with the Captain.

[235] The witness was asked why the Captain would want to involve him as a witness when the matter had been disposed of, he answered that he did not ask the Captain if the matter was finalised. The Court asked the witness if this made sense, his answer was that it indeed, did. This is absurdity at its best. Mr Mashiane told the witness that he did not understand him and the witness asked that the question be repeated. Mr Mashiane told the witness that, it, indeed, did not make sense that the Captain would still need him when the matter was disposed of and the witness agreed.

[236] He testified that he was scared and surprised by the fact that the Captain's evidence was that he had never met the witness; that he had never investigated the murder of Ekha and that the Captain had never said that the witness existed. Mr Mashiane informed the witness as to when the matter was finalised and judgement given the witness exclaimed saying shhh! and said that he was confused.

[237] Mr Mashiane wanted to know where the witness had made the statement and he told the Court that he had made it at Johannesburg Central Police Station. It was pointed out that he made a statement before attorney Bossr who was the Commissioner of Oaths yet this, according to him, happened at Johannesburg Central Police Station, he said yes. He was told that attorney Bossr could not be found and his answer was that he had no answer. He was further informed that

according to the documents Bossr also took Tshepo Sipho Mokwana's statement and that Mokwana testified that he had never met Bossr. He said he could not dispute it.

[238] Mr Mashiane told the witness that it was most surprising that he saw the injured Ekha who needed assistance yet he ignored him and went to look for the accused. His comment was that his colleague assisted Ekha. This is a very strange behaviour on the part of the witness. Told that he had never told the Court that his colleague assisted Ekha, he apologised and then agreed.

[239] The witness could not tell the Court why the Metro Police were not told that his colleague had assisted Ekha. This surprised him. There was also no explanation why the Metro Police were never told that the accused was taken to Hillbrow Police Station by the South African Police and not them.

[240] The witness testified that he made statements on 26 December 2002, and in January 2003. He agreed when told that he had never told the Court that he had made four statements. The witness was informed that two of the statements never reached the police and the Court, and he responded telling the Court that he had no comment. He also had no comment when it was put to him that the accused had never told the Court about his statement. He conceded that his evidence to the effect that the Captain had come to him in December 2002 was incorrect as his latest version was that this had taken place in January 2003 when he made his statement to the Captain. He did not know why the accused did not testify about the witness's existence in the first trial.

[241] The witness had nothing to say when it was put to him that his evidence was contradictory. He finally had no comment when Mr Mashiane finally put it to him that his evidence was highly improbable. Indeed, the evidence was improbable. Mr Hlazo closed the defence case. In light of Mzolo's statement, Mr Hlazo requested that he be given time to revisit the evidence to enable him to give meaningful

closing arguments. The matter was postponed to 27 July 2018 for the closing arguments.

[242] On 27 July 2018 the parties addressed the Court on the merits of the case.

[243] Mr Mashiane submitted that the Court was charged with the duty to hear further evidence. The accused approached the SCA with an application for leave to appeal and to lead further evidence. The SCA was furnished with affidavits which, according to the accused, constituted the further evidence. The SCA considered the matter and referred it back to the Full Court of this Division. The Full Court, too, considered evidence and referred the matter back to this Court for purposes of hearing further evidence as directed by it. The evidence placed before the SCA is the evidence that was placed before the Full Court.

[244] It is noteworthy that the evidence that came before the SCA and the Full Court worried the two Courts. The Full Court held the view that this Court was the right court to hear the evidence and then consider the matter in the light thereof. Without this evidence, it would not have been easy to arrive at a just decision. This, because the witnesses would testify and be cross-examined. This placed this Court in a better position particularly if regard is had to the fact that this was the trial court.

[245] The Court has to establish why the evidence could not be tendered in the first trial. It also had to find out what it was that caused Mokwana to recant his evidence in the first trial. In the final analysis, the Court would then be in a position to produce an informed decision. Evidence in the second trial, was led and the witnesses who testified were thoroughly cross-examined.

[246] I have in my judgement, closely considered and dealt with the evidence of each witness. The analysis of the evidence of each witness will reveal if such witness was good, bad, honest, reliable or unreliable.

[247] The accused did not testify in the trial within a trial that Mr Guarneri asked the Court to hold. He also did not testify in the second trial. I shall deal with such failure later in my judgement.

[248] I shall, where necessary, refer to the evidence of the witnesses who testified to demonstrate why such evidence should be seen as acceptable or worthy of rejection.

[249] **MDUDUZI MANDLOPA**

He testified in the first trial of the accused. The Court accepted his evidence and found that he was a reliable witness. The new or further evidence necessitated his being recalled in the second trial. His evidence as Mr Mashiane submitted remained acceptable and reliable. The Court, again, accepts the evidence.

[250] **INNOCENT MBATHA**

He too testified in the first trial of the accused. The new evidence caused him to be recalled. The Court, in the first trial, found him an honest, trustworthy and reliable witness. Mr Mashiane submitted that his evidence, after the second trial, remained unscathed. I agree. I need to mention that Mandlopa and Mbatha corroborated each other in every material respect.

[251] **SIFISO NDLOVU**

He testified for the first time in the second trial due to the application that the accused brought in the SCA. The State called him to show that the person that he assisted at Mondeor Police Station was not Tshepo Mokwana. The person that he served and assisted, according to him, could not have been Tshepo Siphoh Mokwana because the person walked freely, uncuffed and unshackled. Tshepo Siphoh Mokwana, at the time, was serving his sentence at Johannesburg Prison commonly known as Sun City. This was clearly demonstrated. He was a reliable witness who was completely dependable. The Court accepts his evidence.

[252] **RISIMATI THOMAS HLUNGWANI**

The witness, too, testified as a result of the matter having been referred back to this Court by the Full Court. The witness's evidence, briefly, is that he did not know Sipiwe Mzolo and that he had never visited him. He denied telling Mzolo that he would contact him if his evidence became necessary in Court. He denied that Ekha, in hospital, had told him that he had been shot by Tshepo Sipho Mokwana and not the accused. The witness conceded that he had made an affidavit which disclosed that Tshepo Sipho Mokwana had killed Zungu, the deceased in Count 2. If regard is had to the evidence, in the first trial, that Ekha was not with them when Zungu was killed, this hearsay evidence cannot be correct Ekha was said to have disappeared while they were on their way to Roodepoort. The witness was honest trustworthy and reliable. His evidence is accepted.

[253] **NATHANIEL TUMELO SEKHULA**

He is the Metro police officer based in Johannesburg. He testified in the accused's first trial. He testified that he still stood by such evidence. His evidence, at the end of the cross-examination, remained intact. The Court accepted his evidence in the first trial of the accused. The evidence remains acceptable and the Court accepts it.

[254] **TSHEPO SIPHO MOKWANA**

Before the witness testified, Mr Mashiane informed the Court that he was bringing an application in terms of Section 190 of the Criminal Procedure Act 51 of 1977, to have the witness declared a hostile witness. Mr Guarneri opposed the application. Mr Mashiane then summarised the history of the matter taking it from the first trial, through to the SCA and the Full Court which referred the matter back to this Court.

- [255] Mr Mashiane specifically submitted that affidavits were made allegedly by Tshepo Sipho Mokwana and that they formed the basis of the second trial. Such affidavits, according to him, had been accepted as evidence by the SCA and the Full Court. It was on the basis of this, Mr Mashiane continued, that the affidavits needed to be looked at in the light of Mokwana's evidence in the first trial. IF Mokwana stood by his evidence in the first trial, then the next thing that needed to be established was whether he had made the affidavits which were alleged to be his. If not, the accused would have to explain whose affidavits they were and where he had found them.
- [256] Mr Mashiane submitted that Mokwana could not, simultaneously, be a State witness and a defence witness. He, as he put it, needed to help Mokwana who appeared to be sitting on two chairs, to decide as to which chair he preferred. It was Mr Mashiane's words that he could not play chess against himself. This, to the Court, made sense. There was, according to him, no basis on which the defence could oppose the application. I agree.
- [257] On the basis of the affidavits which became evidence and his evidence in the first trial, Mokwana was declared a hostile witness.
- [258] Mr Mashiane then proceeded and asked Mokwana questions. Mokwana denied that he had made the affidavits and also denied their contents. Regarding **Exhibit "G1"** on pages 121 to 124 of the court record, Mokwana denied that he knew practicing attorney Jeremy Angelo Bossr who had commissioned the affidavit on 11 September 2013. According to him, Bossr was never his attorney.
- [259] Mokwana denied that the signature on **Exhibit "G2,"** which is an affidavit dated 4 September 2013, appearing on page 125 of the court record, was his. This is the affidavit that I referred to when I dealt with the evidence of Sifiso Ndlovu, a Constable at Mondeor Police Station. Mokwana's denial is understandable because he was in prison when the affidavit was allegedly made.

- [260] Mokwana denied that the signature on the “confession statement” dated 21 January 2012 was his. He distanced himself from its contents.
- [261] The affidavit, **Exhibit “G4”**, according to Mokwana, was signed by him at Johannesburg prison on 11 January 2018 when same was brought to him by Attorney Matshidza. He admitted signing the **Exhibit** but distanced himself from its contents. He testified that he signed the document while under the impression that Matshidza had been sent to him with the document for him to sign. It will be remembered that before he answered Mr Guarneri’s questions regarding **Exhibit “G4,”** he asked the court if it, indeed, had sent Matshidza with the document for him to sign. The Court fully understands why Mokwana asked the question. He, indeed, would not ask the question if he had created **Exhibit “G4.”**
- [262] Mr Mashiane conceded that Mokwana was not very bright and Mr Guarneri agreed.
- [263] The Court, in its judgement, during the first trial, pointed out that Mokwana in certain respects contradicted himself. Mr Mashiane also so conceded. However, the Court, again, in its judgement, pointed out that it accepted Mokwana’s evidence where such evidence was supported by the evidence of other independent witnesses. Significantly the Court finds corroboration of Mokwana’s evidence in the second trial.
- [264] It is noteworthy that Mokwana’s new evidence is supported by-
1. Constable Sifiso Ndlovu.
 2. The evidence of Captain Hlungwani in so far as the Captain denies that he had anything to do with Siphiwe Mzolo.
 3. Mandlopa regarding the issue of identification of those that killed Ekha.
 4. Mbatha who spoke to the accused when the accused told him that he had shot Ekha because Ekha had stolen his combi; and
 5. Sekhula and

6. The accused in certain respects, in his evidence in the 'first trial.

[265] Mokwana, in the first trial, testified that the accused told them that he would kill Ekha unless he (Ekha) produced the combi that he had removed from the building. Ekha did not produce the combi which was taken by Mbatha and he was killed. The accused, in so many words, testified that he had killed Ekha in self-defence. This supports Mokwana's evidence.

[266] Mokwana testified that Lunga Zungu, deceased in count 2, was killed in Roodepoort and left in the veld. He explained how Lunga would get the music system for his combi that he had wanted, in Roodepoort. Zungu was lured to Roodepoort where he met his death. His body was left in the veld only to be retrieved from the mortuary.

[267] It is clear from the evidence that Zungu was killed because the taxi that he drove was needed by the accused who acted together with his friends. Those that were with Mokwana when Zungu was shot and killed are again seen together in the basement where Ekha was shot. If they had nothing to do with the death of Ekha and the robbery of Mbatha's combi which culminated in the death of Zungu why then would they again assemble in the basement? No evidence was adduced to show that Ekha stole the accused's combi. What comes out clearly from the evidence is that the combi belonged to Mbatha. To try and distance himself from the robbery, accused planned the story that Ekha stole his combi. The accused employed a failed strategy which, indeed, was stillborn.

[268] Mr Guarneri introduced **Exhibit "G4"** and Mokwana told the court that he signed the affidavit but did not read its contents. He testified that the affidavit was also not read to him before he signed it. Mokwana asked the court if the court had sent Matshidza to him with the **Exhibit**. This was immediately after he was asked if he had made a written statement on 11 January 2018. The Court immediately

became very anxious and curious. This, was because the question surprised everybody.

[269] Mr Guarneri applied that a trial within a trial be held to determine the admissibility of **Exhibit “G4”**, the statement that Matshidza took to Mokwana. Mr Mashiane did not object and Mokwana, in the meantime, was excused.

[270] **ATTORNEY VHONANI ROLLERT MATSHIDZA**

Mr Guarneri called him as his first witness in the trial within a trial. I have dealt with Mr Matshidza’s evidence. He did not impress the Court as a witness. I only find his evidence helpful where it is corroborated by the evidence of his candidate attorney. I found his evidence in certain respects improbable. He testified that he sent his candidate attorney Ngoasheng to Johannesburg prison with **Exhibits “G4”** and **Exhibit “G(4)(1)”**. Exhibit “G4” was meant to be signed by Mokwana. Mokwana, on seeing the documents, distanced himself from their contents, telling Ngoasheng that they were not his, that he knew nothing about them and that he would not sign Exhibit “G4”. Ngoasheng returned the documents to his principal, Matshidza. This is the part of Matshidza’s evidence that can safely be accepted.

[271] **HENDRICK JOHANNES KROUKAMP**

He was called to where Mr Matshidza had been talking to Mokwana. His evidence is that he was asked to commission **Exhibit “G4”**. He testified that Mokwana understood English. The Court battled to understand how Mokwana could have raised his left hand instead of his right hand if he indeed, understood English. The Court was not quite satisfied with his evidence. In any event the Deputy Director went to Mokwana and Mr Matshidza after Mr Matshidza had already spoken to Mokwana. The Assistant Director conceded that Mokwana regarded him as someone who wielded authority. Indeed, he had such authority.

[272] **NKUNYANE CEDRICK NGOASHENG**

The witness corroborated Mokwana's evidence to the effect that the documents were not his and that Mokwana spoke Southern Sotho. Mokwana, according to him, refused to sign the documents. Ngoasheng impressed the Court which found him a good and reliable witness. I need to mention that Ngoasheng was called by Mr Mashiane after the witness was made available to the State by the defence. This approach begs the question why the defence did not want to call him as their witness. The answer, in my view, is simple. The witness supports Mokwana.

[273] **TSHEPO SIPHO MOKWANA**

He was called by the State in the trial within a trial. He distanced himself from **Exhibit "G4"** allegedly one of his affidavits. This is the document which according to Mr Matshidza, did not meet the requirements of an affidavit. Mr Matshidza testified that the document was given to him by the accused's mother. Mokwana told the Court that he also had nothing to do with **Exhibit "G(4) (1)"** which, according to Mr Matshidza, formed the basis of **Exhibit "G4"**

[274] Mokwana testified that Mr Matshidza told him that he had to sign **Exhibit "G4."** It appears from Mokwana's evidence that he regarded that as an order. It becomes clearer if one keeps in mind that Mokwana asked the Court if it had sent Mr Matshidza to him with **Exhibits "G4"** and **"G4(1)."** Mokwana denied that he had called Mr Matshidza and asked him to take Exhibit G4 to prison for him to sign. To explain the denial properly Mokwana testified that he neither knew Mr Matshidza nor his cellphone number. This remained undenied by Mr Matshidza.

[275] Mokwana's evidence in the trial within a trial was supported and the Court found it probable. After the State closed its case in the trial within a trial the Court accepted Mokwana's evidence and then ruled that **Exhibits "G4"** and **"G4(1)"** were inadmissible.

[276] The Court admitted the first part of Ekha's hearsay evidence and dismissed the second part as inadmissible where Ekha was said to have told Lovemore's aunt in the presence of the uncle and the Captain that he had been shot and killed by Mokwana..

[277] I have dealt with Mr Guarneri's request that the defence be furnished with Exhibits "G" and "H." The Court ruled that the request had no merit and dismissed it.

[278] Mr Mashiane's application that the record of proceedings in the bail application form part of the proceedings in the trial was granted.

[279] **SIPHIWE SKHO MZOLO**

Mr Hlazo who took over the defence of the accused after Mr Guarneri withdrew from the case called Mzolo as the defence witness. Mr Mashiane submitted that Mzolo was introduced late in the case. This happened after the accused was convicted and sentenced. The answer to the question why Mzolo was not called during the first trial was not convincing. Indeed, as Mr Mashiane correctly submitted Mzolo's evidence was diametrically opposed to the accused's evidence. They both contradicted themselves and each other.

[280] The accused, in the first trial, testified that he had shot Ekha in self-defence. He, in so many words, told the Court that he fired the shots at Ekha who had been shooting at him. The accused testified that Mokwana was not there when Ekha was shot and could not have killed Ekha. The accused testified that he was surprised when Mokwana pleaded guilty to the murder before Satchwell J. I shall not repeat the several differences in the evidence of the accused and Mzolo. I dealt with them when I dealt with the evidence of each witness.

[281] Mzolo was not a good witness. He did not remember his date of birth. He remained silent when he was asked short and simple questions. He was evasive and contradicted himself. He was never a reliable witness. The Court, without much ado, rejects his evidence as false beyond doubt.

LOVEMORE MOYO

[282] He was never a good witness. He failed to impress the Court as a witness. His evidence does not add value to the accused's case.

THE ACCUSED

[283] Coming to the accused, the Court in the first trial, dealt with his evidence. This time the accused, notwithstanding the damning evidence which needed his response, decided not to testify in the trial within a trial and the main trial.

[284] The witnesses testified and gave evidence which required the accused to respond. For instance, there is evidence to the effect that affidavits were allegedly made by Mokwana in prison in the presence of the accused and that a Mrs Fannie made copies of Exhibit G2 on page 125 of the court record and that a copy thereof was given to the accused. The accused needed to respond to this by either denying or confirming it. Sifiso Ndlovu called the accused a "good liar" and the accused, despite having heard it, did not refute this. He needed to testify and tell the Court that Ndlovu denied that he, indeed, assisted the accused because he had been told to do so. Mr Mashiane told Mokwana, when he testified and told the Court that the affidavits were not his, that the accused would tell the Court where he got the affidavits from. This notwithstanding, the accused chose not to testify. Exhibit G4, according to Mr Matshidza, came from the accused's mother. One would have expected the accused to help the Court solve the puzzle. His mother, too, did not testify.

- [285] Mr Matshidza's evidence does not seem to confirm that Mokwana took the required oath before he signed **Exhibit "G4"**. The documents that Mokwana allegedly refers to in Exhibit "G4" were not with Exhibit "G4" when it was signed. Mokwana testified that he saw **Exhibit "G1", "G2" and "G3"** for the first time in court. Regarding **Exhibit "G2"** Mokwana denied that he wrote "Johannesburg Medium B" appearing on the front page of Exhibit "G2." The age that appears there, according to him, was not even his.
- [286] The accused's position, as the evidence stands, is untenable. He tendered no evidence to gainsay the evidence of the witnesses in the second trial. The evidence placed a heavy burden on the accused who decided not to deal with the challenge. Without his evidence and the evidence of those who could have supported him, where does this leave the accused? Mr Mashiane correctly submitted that we are only left with his evidence in the first trial. The Court dealt with that evidence and made a finding which resulted in his conviction and sentence. If anything, the new evidence bolstered the State's case. The accused's failure to testify in the second trial bolstered the State's case. This, because the accused's version that was put to the State witnesses is not evidence. The evidence needed to be repeated under oath. This never happened. (*See State v Katoo 2005(1) SACR 522 (SCA) at 529 [19]; Osman and Attorney-General Transvaal 1998(2) SACR 493 (CC); State v Tandwa and Others 2008 (1) SACR 613 (SCA)*)
- [287] The fact that the accused decided not to give evidence in the second trial leads to one and one conclusion only, namely, that he knows that Mokwama never made the affidavits, the subject matter in the second trial. He further was aware of the fact that the worst would eventuate had he testified. His failure to testify and call the necessary witnesses does not take away the fact that sufficient damage to his case has been done by his conduct. Those that were called to assist him simplified the case for the State. Mr Guarneri realised this and possibly duly advised the accused who seemed not ready to take Mr Guarneri's advice. Mr Guarneri, before he withdrew from the case, informed the Court that he and the accused had

reached an impasse. This was after Mr Guarneri had informed the Court that the defence would not be calling any further witnesses.

[288] The new evidence, in my view, serves to demonstrate that the accused orchestrated the creation of the affidavits which are alleged to belong to Mokwana. The accused, indeed, seems to have played a major role when the affidavits were made. Only the accused and his mother are in a better position to tell us how the affidavits were created and by whom. All we know from the evidence of Mr Matshidza is that the affidavits were to facilitate the release from prison of the accused. As Mr Mashiane correctly submitted, it was never anticipated that the idea would be stillborn. The endeavours strengthen the State's case. If there were any doubts regarding the guilt of the accused, such doubts should by now, have been removed. The accused employed unlawful means in his attempt to gain his release from prison.

[289] I, consequently, find that:

1. The new and further evidence has been tendered and verified.
2. The accused and others mentioned in the evidence together planned to rob Lunga Lancelot Zungu of the combi that belonged to Mbatha and which he used as a taxi.
3. Zungu was killed and the combi was taken as I explained in my judgement in the first trial.
4. The accused discovered that the combi was removed from where he would find it. Ekha became the prime suspect
5. Mbatha, with the help of Mandlopa, Ekha and others, retrieved the combi.

6. The accused became very furious and vowed to kill Ekha unless he produced the robbed combi.
7. Ekha did not produce the combi and he was murdered.
8. Evidence evinces that the accused together with Mokwana and others acted together in pursuit of common purpose when the crimes were committed.
9. The version of the accused which is not supported by that of his witnesses is not reasonably possibly true. It is beyond doubt false and is rejected. The State, successfully, proved the guilt of the accused beyond reasonable doubt.

[290] The accused, consequently, is again, convicted as charged.

MW MSIMEKI

JUDGE OF THE HIGH COURT, GAUTENG
LOCAL DIVISION, JOHANNESBURG