



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: 25 March 2022

Case No: SS36/2021

In the matter between:

THE STATE

and

NTUTHUKO NTOKOZO SHOBA

Accused

JUDGMENT

WILSON AJ:

- 1 On 4 June 2020, Tshegofatso Pule left the Westlake complex in Florida. She had been visiting Ntuthuko Shoba, the accused person in this case. She boarded a silver-grey Jeep driven by Muzikayisa Malepane. Mr. Malepane drove her to Noordgesig in Soweto. There, he shot her in the chest. He then drove with her to a secluded area in Durban Deep, near Roodepoort. He tethered her to a tree by her neck. The examination of Ms. Pule conducted

post-mortem states that she died of a combination of the gunshot wound and the application of external pressure to her neck. Ms. Pule was at the time carrying Mr. Shoba's baby daughter. She had reached 31 weeks' gestation. The foetus was viable, but the baby died from Ms. Pule's wounds.

2 These facts are not disputed. Mr. Malepane has pleaded guilty to Ms. Pule's murder. He is currently serving a twenty-year sentence, imposed by my brother Mokgoatheng J.

3 The question at the centre of this case is whether Mr. Malepane killed Ms. Pule at Mr. Shoba's request, and in the expectation that Mr. Shoba would pay him to do so. A further question is whether and to what extent Mr. Shoba assisted Mr. Malepane in murdering Ms. Pule.

4 Mr. Shoba was indicted before me on one count of premeditated murder, with an alternative count of conspiracy to murder, and one count of obstruction of justice. He pleaded not guilty to all three counts. The State's case rests principally on Mr. Malepane's account of the contract that he says Mr. Shoba made with him to kill Ms. Pule, and of the steps Mr. Malepane says Mr. Shoba took to implement that contract. The State led Mr. Malepane as its main witness. The State's other evidence was tendered to corroborate Mr. Malepane's version.

5 It is, accordingly, with an examination of Mr. Malepane's evidence that I must begin.

Mr. Malepane's story

6 Mr. Malepane says that he had known Mr. Shoba for over ten years, since they were at school together. Mr. Shoba disputes that he and Mr. Malepane ever attended the same school. It is clear, though, that Mr. Shoba and Mr. Malepane sometimes moved in the same circles, and that they knew each other long before the contract Mr. Malepane alleges came into existence. I am, however, satisfied that they were not close. Both Mr. Shoba and Mr. Malepane agree that neither had the other's telephone number until a few weeks before Ms. Pule's death, although they disagree about how they exchanged numbers, and, critically, which numbers they exchanged.

7 It is not disputed that Mr. Shoba visited Mr. Malepane in early May 2020. Mr. Malepane alleges that, during that visit, Mr. Shoba told him that he was expecting a child with Ms. Pule, but that, if the child was born, this would ruin his relationship with his "wife", and lose him a great deal of money. If Mr. Shoba did in fact refer to his wife, that was misleading. Mr. Shoba was not married, but he had hopes of marrying Rosetta Moatshe, and had commenced marriage negotiations with Ms. Moatshe's family.

8 Mr. Shoba is alleged to have said that Ms. Pule did not want to get an abortion, and that it was, as a result, necessary to kill her. Mr. Malepane alleges that Mr. Shoba approached him because he understood Mr. Malepane to be connected with the kinds of people who might take on that task.

9 Mr. Malepane said that he initially agreed to find someone else to carry out the murder. At some point, though, he decided to take on the task himself. Mr. Malepane's evidence was equivocal about whether he intended to carry

out the murder himself from the outset, but simply let Mr. Shoba think that he was looking for someone else, or whether Mr. Malphane decided to do the job himself sometime after Mr. Shoba's first visit.

10 Mr. Malepane did say that what Mr. Shoba was initially willing to pay for the task – R7 000, later increased to R20 000 – was far too little. Mr. Malepane was not consistent in his evidence about where and how the final contract amount was agreed. In his evidence in chief, he suggested that the final figure agreed – some R70 000 – was reached during his initial meeting with Mr. Shoba in early May. In cross-examination, however, Mr. Malepane suggested that the R70 000 figure was reached in the days and weeks following the initial meeting.

11 In any event, Mr. Malepane said that he held Mr. Shoba off for some time after their initial meeting. Mr. Malepane was vague in his evidence about why. He sought to project the image of a man of affairs, who was busy buying and selling cars, and that Mr. Shoba's contract was little more than a distraction to him – something he would get around to when he was ready.

12 Mr. Malepane alleges that there was eventually a subsequent meeting at the Florida licencing department. It is not clear whether what Mr. Malepane says was the first attempt on Ms. Pule's life was agreed at this meeting, or during one of the telephone calls that Mr. Malepane alleges passed between him and Mr. Shoba.

13 Nonetheless, Mr. Malepane says that the arrangement initially made was that Mr. Malepane would pick Ms. Pule up from a bogus job interview that Mr. Shoba would arrange on 29 May 2020. The bogus interview would take

place at a MacDonalds fast food outlet near Gold Reef City. Mr. Malepane said that he was to pick Ms. Pule up from the outlet, and take her to Mr. Shoba's house. It is not clear from Mr. Malepane's evidence what he thought would happen then, but Mr. Malepane said that Ms. Pule was supposed to be killed on that day. Ultimately though, Mr. Malepane said that Ms. Pule never turned up for the interview, and the plan to abduct her from the MacDonalds outlet had to be abandoned.

14 Apart from a further occasion on which it is agreed that Mr. Shoba and Mr. Malepane saw each other amongst friends in Dobsonville, the two men did not meet again until the early afternoon of 4 June 2020. Mr. Malepane says that Mr. Shoba arrived at Mr. Malepane's house, and told him that Mr. Malepane would pick Ms. Pule up from Mr. Shoba's home at the Westlake complex, and take her to be hanged from the Maraisburg Bridge. Mr. Shoba accepts that he was at Mr. Malepane's house on that day, but denies that it was to arrange Ms. Pule's murder.

15 Mr. Malepane visited the Maraisburg Bridge, but decided that it was too public a place to stage Ms. Pule's hanging. He nonetheless went through with the plan to pick Ms. Pule up at Westlake that evening, at just after 10pm. He says that he arrived at the complex having been drinking consistently throughout the day. He met Ms. Pule and Mr. Shoba at the gate. He says that Mr. Shoba greeted him and encouraged Ms. Pule to get into the Jeep. Ms. Pule was initially reluctant to do so, but Mr. Malepane told her to "be free" and assured her that he was there to take her home. Responding to

his re-assurance, and Mr. Shoba's encouragement, Ms. Pule got into the Jeep, and Mr. Malepane drove her away.

16 Mr. Malepane and Mr. Shoba next saw each other on 6 June 2020. They met, apparently by chance, at a branch of Cashbuild in Meadowlands. Mr. Malepane alleges that they discussed the payment of the contract amount briefly, while standing outside the store. Mr. Shoba is alleged to have assured Mr. Malepane that he was getting the money together, and would pay Mr. Malepane soon.

17 Mr. Malepane was arrested on suspicion of Ms. Pule's murder just over a week later, on 15 June 2020.

18 There is no evidence before me – and Mr. Malepane did not suggest – that Mr. Shoba ultimately paid Mr. Malepane anything at all for the murder of Ms. Pule.

19 Mr. Makhubela, who appeared for Mr. Shoba before me, cross-examined Mr. Malepane extensively. His cross-examination consisted of four main lines of attack on Mr. Malepane's evidence.

20 First, Mr. Makhubela produced evidence that Mr. Malepane had threatened Mr. Shoba. Mr. Malepane had promised to arrange Mr. Shoba's assault in prison. He had also made a statement to the media to the effect that he hoped that Ms. Pule's family get to Mr. Shoba before he does. Mr. Malepane admitted the threats. He did not suggest that he did not mean them. The gist of Mr. Malepane's evidence was in fact that he would put Mr. Shoba in hospital if the opportunity presented itself.

- 21 Second, Mr. Makhubela put to Mr. Malepane that the story he had told in court was wildly at odds with the confession statement his first gave to the police. This fact had been canvassed by Mr. Mahomed, who appeared for the State, in Mr. Malepane's evidence in chief. But Mr. Makhubela covered the ground again in much more detail.
- 22 In his confession statement, Mr. Malepane put Mr. Shoba at the scene of Ms. Pule's murder. He made out that Mr. Shoba had stabbed Ms. Pule, had placed the ligature around Ms. Pule's neck, and had hauled Ms. Pule off the ground.
- 23 None of this is true. Mr. Malepane acknowledged that his confession statement to the police was dishonest. He explained that dishonesty by reference to his desire to tie Mr. Shoba more closely to Ms. Pule's murder. He wanted to punish Mr. Shoba for leading the police to CCTV footage of the Jeep used to pick Ms. Pule up at Westlake. He also suggested that he was wracked with guilt for what he had done. This is something to which I give some credence, given that Mr. Malepane broke down at least once during his evidence.
- 24 Nevertheless, it has to be accepted, and Mr. Malepane did accept, that he is not only a murderer, but a proven liar. Nobody suggests that Mr. Shoba was ever at the scene of Ms. Pule's death, or that Ms. Pule was stabbed, or that Mr. Shoba inflicted any of her wounds directly. The proposition that Ms. Pule was stabbed is also wholly inconsistent with the results of the post-mortem examination placed before me.

- 25 Mr. Makhubela's third line of cross-examination sought to establish areas of vagueness and inconsistency in Mr. Malepane's evidence. I have already adverted to some of these. But Mr. Makhubela pressed the point further. Mr. Makhubela challenged almost every aspect of Mr. Malepane's account of his movements on the afternoon and evening of 4 June 2020. For example, it was put to Mr. Malepane that he could not, as he had suggested, have dropped his cousin Tshepo off at a taxi stop before proceeding to the Westlake complex, because no taxis were allowed to run on 4 June 2020. Mr. Malepane said that there were, as a fact, taxis operating on that day, whatever the regulations said.
- 26 Mr. Makhubela also challenged Mr. Malepane to account for the hours that cell phone records show he drove around the Florida area after he picked Ms. Pule up and shot her. Mr. Malepane could not really do this, except to say that he was drunk and in shock at what he had done.
- 27 Mr. Makhubela also challenged Mr. Malepane's motive for incriminating Mr. Shoba. Mr. Malepane had said that he had decided to tell the police that Mr. Shoba directly inflicted the injuries that led to Ms. Pule's death because Mr. Shoba had led the police to CCTV footage of Mr. Malepane arriving at the Westlake complex.
- 28 However, on Mr. Malepane's own version, Mr. Shoba had assured him that the CCTV cameras at the Westgate complex were positioned so as not to be able to read numberplates of cars pulling up outside. CCTV evidence later presented to me demonstrated that this is not strictly true. There is in fact a camera angle that might reveal a numberplate. It was nonetheless put to Mr.

Malepane that he could not have been unduly surprised or worried when he found out that Mr. Shoba had led the police to the CCTV footage.

29 Finally, Mr. Makhubela put Mr. Shoba's version to Mr. Malepane. The core of that version was that Mr. Malepane was a small time gangster. He had a side-line in illegally selling cigarettes during the ban on their trade in terms of regulations made under the Disaster Management Act 53 of 2005, which lasted for much of 2020. Mr. Shoba was a smoker in need of a supply of cigarettes, and arranged to buy them from Mr. Malepane. This, Mr. Makhubela put to Mr. Malepane, explains all of their contact, including Mr. Shoba's visits to Mr. Malepane's home.

30 Mr. Shoba's version was that this arrangement sprung from a chance meeting on Main Reef Road. Calling from one car to another while stationary at a robot, Mr. Shoba alleged that Mr. Malepane offered to sell cigarettes to Mr. Shoba. Mr. Shoba said that the men agreed that he would obtain Mr. Malepane's number from a mutual friend who was also Mr. Malepane's neighbour, and then contact Mr. Malepane to arrange the transaction.

31 Mr. Malepane denied that this conversation ever took place. He also denied that that he illegally sold cigarettes. He readily accepted, though, that he lived what he called a "gangster life", which included the sale of alcohol in breach of the Disaster Management Regulations. Muzi Khumalo, a friend of Mr. Malepane who gave evidence for the State, also suggested that the cars Mr. Malepane dealt in were stolen.

32 Mr. Makhubela's cross-examination was clearly directed at painting Mr. Malepane as a liar with an agenda to implicate Mr. Shoba in Ms. Pule's

death come what may. In argument, he characterised Mr. Malepane as something of a fantasist, a “storyteller” who had spun an incredible tale about Mr. Shoba’s involvement in a crime he had in fact carried out on his own.

The discharge application

33 It was principally on that basis that Mr. Makhubela applied, at the close of the State’s case, for Mr. Shoba’s discharge under section 174 of the Criminal Procedure Act 51 of 1977. I refused that application, and undertook to give my reasons in this judgment. These, briefly, are my reasons.

34 Mr. Malepane’s evidence was not so unsatisfactory that it could be rejected in its entirety, which is what Mr. Makhubela urged me to do. A court will seldom disregard a witness’ evidence merely because it contains some untruths, or even because the witness dislikes the person against whom the evidence is tendered. Even a serial liar sometimes tells the truth. Even a witness with an axe to grind may give evidence that is clear and honest against the object of their animus. It is necessary, in these situations, to carefully evaluate the evidence given and consider whether it is so tainted by bias, inconsistency or improbability that none of it can safely be accepted.

35 Mr. Malepane’s evidence was not of that nature. It is true that, by the time Mr. Makhubela’s cross-examination had concluded, Mr. Malepane’s evidence was far from untarnished. However, at its core, it contained a number of unchallenged assertions that required an explanation from Mr. Shoba. First, there was the undisputed fact that there had been at least two meetings between Mr. Shoba and the man everyone accepts killed Ms. Pule.

Second, there was Mr. Malepane's unchallenged assertion that he had no prior relationship with Ms. Pule, that he in fact did not know her, and had no motive for or means of making contact with her other than with Mr. Shoba's assistance and at Mr. Shoba's behest. Third, there was Mr. Malepane's unchallenged evidence that he had picked Ms. Pule up from Mr. Shoba's complex on the night he killed her, and that Mr. Shoba was present when he did so.

36 These aspects of the evidence were enough in themselves to put Mr. Shoba on his defence. He would, at the very least, have to confirm that his contact with Mr. Malepane was intended to procure cigarettes, and not to arrange Ms. Pule's murder.

37 That said, Mr. Malepane's evidence must clearly be treated with caution. He is the single witness to most of the events he narrated. He is, on his own version, an accomplice, a liar and someone with an axe to grind against Mr. Shoba – although he says that his animus against Mr. Shoba arises from Mr. Shoba's participation in Ms. Pule's murder. Despite these obvious notes of caution, there was, for the reasons I have given, clearly material in Mr. Malepane's evidence on which a reasonable court acting carefully might convict Mr. Shoba. That is why I refused the discharge application.

38 In any event, the State's case did not begin and end with Mr. Malepane's testimony. Mr. Mohamed also placed material before me that tended to corroborate Mr. Malepane's version.

39 It is to that evidence that I now turn.

The evidence that corroborated Mr. Malepane's version

The MacDonalds job interview

40 The State's first witness, Thepiso Tsita confirmed that Ms. Pule was invited to an interview at a MacDonalds in Ormonde, which is near Gold Reef City. The invitation was sent by SMS to Ms. Pule. It purported to be from a woman called Zanele or Zandile (Ms. Tsita could not remember which), who said she acted on behalf of Kelly Recruitment. Ms. Tsita saw the SMS messages. On 29 May 2020, Ms. Tsita saw further SMS messages from Zanele or Zandile, which told Ms. Pule that she should go to the MacDonalds in Ormonde, where a Jeep would be waiting to pick her up. Ms. Tsita confirms that Ms. Pule did not go in the end. This, it seems to me, is entirely consistent with Mr. Malepane's account of 29 May 2020.

41 Ms. Tsita's evidence was essentially unchallenged in cross-examination. Mr. Makhubela pointed out that the details of the MacDonalds interview had been trailed in the media before the trial, but he did not challenge Ms. Tsita's version that she saw the SMS messages that attempted to arrange it. Nor did he suggest that she was mistaken or dishonest about them.

The disputed cell phone

42 Mr. Malepane says that he communicated with Mr. Shoba using a cell phone number that turned out to be different from the number registered to Mr.

Shoba. It was alleged that Mr. Shoba asked Mr. Malepane to use a particular 081 number. Before me, Mr. Shoba denied any knowledge of this number or any connection with it.

43 Mr. Shoba's ordinary cell phone number is an 076 number. The State's theory is that Mr. Malepane and Mr. Shoba would communicate about the planning of Ms. Pule's murder on the 081 number, so as to avoid having to explain frequent communication between the two men on Mr. Shoba's 076 number.

44 To link Mr. Shoba to the 081 number, the State led extensive and undisputed evidence of cell site analyses, which tended to show multiple occasions on which the 081 number and Mr. Shoba's 076 number were used at roughly the same place at about the same time.

45 The cell phone records placed before me were voluminous, but Mr. Makhubela and Mr. Mohamed distilled them to an agreed Exhibit, marked "T", which contained the cell site evidence that was put to Mr. Shoba in cross-examination. By agreeing that the evidence was put, Mr. Makhubela was of course not agreeing that it incriminated Mr. Shoba. Nor was Mr. Mohamed agreeing that the evidence put to Mr. Shoba was the only cell site evidence that the State regarded as incriminating. Exhibit T constitutes nothing more than an agreed summary of the information relied on by the State during its cross-examination of Mr. Shoba.

46 Exhibit T summarises seven separate occasions between 20 May and 5 June 2020 on which both Mr. Shoba's 076 number and the 081 number routed communication through identical or neighbouring cell phone towers

within a few minutes of each other. On three occasions, it was shown that the 076 number had made a call to Ms. Pule's phone within minutes of the 081 number calling Mr. Malepane's phone. On each of the other four occasions, it was shown that the 081 number had called Mr. Malepane's phone at around the same time and in the same area that Mr. Shoba's 076 number had been used to make a call.

47 It is important to be clear about the limits of the cell site evidence. It did not pinpoint the location of the 081 and 076 handsets. It merely showed that they had been activated within the range of a particular cell phone tower at a particular time. Where they were routed at the same time through the same cell phone tower, the handsets could have been in possession of the same person. But they could just as easily have been at opposite ends of the coverage area of the relevant tower, each in the possession of a person with no knowledge of the other's existence.

48 The cell phone towers in question were the Florida Park tower, the Florida Sanlam tower, the Durban Deep tower and the Cresta tower. Each had a coverage area of between 1.4 and 2.7 square kilometres. Obviously, one instance of the 076 and 081 numbers being used in the range of the same tower at about the same time would have meant nothing. Even the repeated use of the two numbers in the same area at the same time would not demonstrate much on its own.

49 However, the corroborative value of the cell site evidence increases when regard is had to the three occasions on which the 081 number was used to call Mr. Malepane shortly before or after the 076 number called Ms. Pule; the

fact that on the seven separate occasions on which one or other phone was used, at least one of them was being used to communicate with either Ms. Pule or Mr. Malepane; the fact that all seven occasions were over the relatively compressed period between 20 May and 6 June 2020; and, finally, the fact that, on one occasion, the evidence puts both the 081 and 076 numbers in Cresta at around the time Mr. Shoba accepts he was at the Cresta Mall on 30 May 2020.

50 Again, I caution that the cell site evidence could never be enough on its own to incriminate Mr. Shoba, much less convict him. However, I accept that it is weighty enough to provide some corroboration to Mr. Malepane's assertion that Mr. Shoba used the 081 number to communicate with him.

The Westlake CCTV evidence

51 The third main source of corroboration for Mr. Malepane's version is the CCTV footage of the entrance to the Westlake complex on the evening of 4 June 2020. What that evidence showed was the subject of fairly extensive debate. The parties were initially content to place the material before me in the form of a memory stick containing the footage, which I was invited to watch at my leisure. The State extracted a series of still images from that footage, which were used in evidence and marked as Exhibit "H".

52 There was never any dispute that the footage showed Mr. Shoba and Ms. Pule walking out of the main gate of the complex at around 22h06 on 4 June 2020. A silver-grey Jeep had just pulled up outside. But the footage then skips three minutes to around 22h09, at which point the Jeep is pulling away and Mr. Shoba is walking back through the gate.

53 Brian Watson, who is a trustee of the Westlake complex body corporate and who has had sixteen years' experience of operating the CCTV equipment at the complex, gave evidence for the State. He explained that the reason why the CCTV footage skipped for three minutes between about 22h06 and 22h09 was that the recording mechanism on the camera is activated only by the movement of the gate itself, or any motion between the camera and the gate. Accordingly, the CCTV camera would stop recording if the only motion within its field was on the other side of the gate. Mr. Watson also explained that, because of access control restrictions put in place in response to the COVID-19 National State of Disaster, the main gate was in fact the only means of entry to and egress from the complex at the time.

54 The natural inference to be drawn from all of this is that the Jeep, Ms. Pule and Mr. Shoba were outside the main gate of the complex for approximately three minutes. But Mr. Shoba vehemently denied, in his evidence, that this could have been so. In closing argument, I put to Mr. Makhubela that the CCTV footage – the accuracy of which was not placed in dispute – was conclusive in this respect. Whatever the passage of time felt like to Mr. Shoba, it must have been around three minutes.

55 The inference was accepted at the time, and I reserved judgment on the basis that it was uncontested. Shortly after I reserved judgment, however, Mr. Shoba indicated that he wanted to re-open his case in order for me to view the CCTV footage in open court, and to hear argument on what inferences could be drawn from it. That application was made on 4 March 2022. The State did not oppose it. I granted the application. The parties'

representatives and I viewed the material in open court on that day. The critical parts of the footage were viewed at least twice.

56 At the end of that exercise, it was accepted that the only inference to be drawn from the CCTV footage was that Ms. Pule and Mr. Shoba were in fact outside the gate and next to the Jeep for just under three minutes. This is, again, corroborative of Mr. Malepane's version that he picked up Ms. Pule at around 22h00 in a Jeep. The time Mr. Shoba spent outside the gate was sufficient for there to have been a short conversation between Mr. Malepane, Mr. Shoba and Ms. Pule of the nature Mr. Malepane alleged.

Cluster of calls from the 081 number to Mr. Malepane on the evening of 4 June 2020

57 Finally, the State placed reliance on a record of cell phone communication between the 081 number and Mr. Malepane on the afternoon and evening of 4 June 2020, which formed part of Exhibit "I2" before me. The heaviest reliance was placed on a 13 second voice call from the 081 number to Mr. Malepane just minutes before Mr. Malepane said he drew up at the Westlake gate.

58 The CCTV footage showed Ms. Pule and Mr. Shoba walking up to the complex gate at 22h00, before going back into the complex at 22h01. The call from the 081 number to Mr. Malepane was placed at 22h04. It was routed through the Florida Park cell phone tower, which covers the Westlake complex. The CCTV footage shows Mr. Shoba and Ms. Pule coming back outside at 22h06. This was, Mr. Mohamed urged, consistent with Mr. Shoba discovering that Mr. Malepane was not outside at 22h00 as agreed, and using the 081 number to hurry Mr. Malepane along to pick up Ms. Pule.

59 I have already found that, despite its imperfections, Mr. Malepane's evidence would have been enough to put Mr. Shoba on his defence. But when read with the corroborating evidence I have set out above, the core of Mr. Malepane's evidence takes on a reliable character. By the time the State closed its case, Mr. Shoba had a lot to explain.

Mr. Shoba's evidence

60 Mr. Shoba was the first witness called for the defence. Much of his evidence was taken up with a description of his relationship with Ms. Pule, an account of his interactions with Mr. Malepane, both before and after 4 June 2020, and an account of what happened on the evening of 4 June itself.

Mr. Shoba's relationship with Ms. Pule

61 Mr. Shoba had been in a long-term relationship with Ms. Moatshe for around 13 years before Ms. Pule's death. They had taken out a joint bond on a property in 2015, and he had initiated premarital negotiations with Ms. Moatshe's family at some point thereafter. The relationship ended in early 2020, shortly after Ms. Moatshe's mother died of cancer. It was clear from his evidence, however, that Mr. Shoba hoped for and expected a reconciliation. Mr. Shoba emphasised that Ms. Moatshe has remained supportive of him throughout these proceedings.

62 Mr. Shoba met Ms. Pule in 2018. Despite at the time being in what he presented as a committed relationship with Ms. Moatshe, it is clear that he then began a parallel relationship with Ms. Pule. Mr. Shoba said that Ms. Pule understood and was happy with the nature of their relationship, that she

knew about Ms. Moatshe, and that she understood that his relationship with her was no more than casual.

63 In early 2019, Ms. Pule fell pregnant, but that pregnancy was terminated, apparently by mutual agreement between Ms. Pule and Mr. Shoba. Later in 2019, Ms. Pule fell pregnant again. She did not tell Mr. Shoba about the pregnancy until 28 January 2020. By that time, Ms. Pule must have been around 11 or 12 weeks pregnant. It is not clear whether she would have been able to arrange a termination at will at that stage, but Mr. Shoba was emphatic that Ms. Pule did not want one, and that he respected that decision.

64 Mr. Shoba narrated much of the last few months of his relationship with Ms. Pule by reading out extracts from their WhatsApp conversations, which were placed before me as Exhibit "D". The bulk of the exchange spanned the period from 28 January to 4 June 2020. It started with Ms. Pule telling Mr. Shoba about the pregnancy, and ended with Ms. Pule arriving at the Westlake complex on 4 June 2020.

65 Mr. Makhubela sought to present the conversations as evidence of an ordinary relationship that had its ups and downs. He urged an interpretation of the messages that would create at least some reasonable doubt about whether Mr. Shoba could in fact kill Ms. Pule and his unborn child. I am willing to accept that the WhatsApps do not incriminate Mr. Shoba directly, but they do not convince me that he was particularly enthusiastic about the pregnancy.

66 Mr. Shoba accepted Ms. Pule's decision not to have an abortion. He attended doctor's appointments with Ms. Pule. He arranged with her to buy baby clothes. He sent her money. He frequently ordered her Ubers. But he did much of this only after putting Ms. Pule off or failing to respond promptly to her messages. The exchanges are underpinned by what comes across as Mr. Shoba's emotional unavailability, and Ms. Pule's periodic expression of deep distrust in Mr. Shoba, and his sporadic attempts to re-assure her that he was genuinely interested in her and the child. Ms. Pule was obviously hopeful of some sort of future with Mr. Shoba, and perhaps even life as a family. But Mr. Shoba was very clearly not open to this. He did, though, continue to have sex with Ms. Pule from time to time.

67 In sum, the WhatsApp exchange neither inculpates nor exculpates Mr. Shoba. But it confirms a range of important background facts: that Mr. Shoba and Ms. Pule were having a relationship; that the relationship had resulted in Ms. Pule's pregnancy; that Mr. Shoba learned of the pregnancy in late January 2020; that he sometimes gave Ms. Pule money; that arrangements were made for Ms. Pule to go with Mr. Shoba to Cresta Mall to buy baby clothes on 30 May 2020; and that Ms. Pule was with Mr. Shoba on 4 June 2020. It also gives an impression of the tenor of the relationship. But the exchange cannot be pushed much further than that.

Mr. Shoba's relationship with Mr. Malepane

68 Mr. Shoba accepted that he knew Mr. Malepane, and had known him for over a decade. They were not close. Mr. Shoba sometimes visited a friend

who lived across the street from Mr. Malepane, but their acquaintance was casual.

69 Mr. Shoba says that his closer engagement with Mr. Malepane began at some point during what has become known as the “hard” lockdown, during March and April 2020. Mr. Shoba and Mr. Malepane met at an intersection on Main Reef Road. They were stopped at a robot in their cars alongside each other. Mr. Shoba spoke to Mr. Malepane through his passenger side window. The men exchanged pleasantries. Mr. Malepane told Mr. Shoba that he had cigarettes to sell, and that he could supply them in bulk. Mr. Shoba was attracted by that idea, and said that he would get Mr. Malepane’s contact details from their mutual friend, who lived across the road from Mr. Malepane.

70 The exchange ended there. Mr. Shoba admits visiting Mr. Malepane on 3 or 4 occasions. He accepts that two of these occasions were sometime in early May 2020 and again on 4 June 2020. However, Mr. Shoba says that these engagements were strictly limited to the purchase of cigarettes. Any telephone calls to Mr. Malepane from Mr. Shoba’s 076 number at around that time were also about nothing more than the purchase of cigarettes. Mr. Shoba denied, as I have said, that he ever used, or had access to, the 081 number.

71 The only other time Mr. Shoba accepts that he was in Mr. Malepane’s presence was when he saw Mr. Malepane at Cashbuild on 6 June 2020. There, his exchanges with Mr. Malepane were limited to greetings, as he entered the store. Mr. Malepane did not have a mask, and so could not go

inside. Mr. Shoba denies that they discussed anything of substance on that day, let alone that he promised to compensate Mr. Malepane for killing Ms. Pule.

72 Mr. Malepane denies running into Mr. Shoba on Main Reef Road. He also denies selling Mr. Shoba cigarettes. In this second denial Mr. Malepane's evidence is corroborated by Mr. Khumalo, who gave evidence for the State, and by Mr. Malepane's former partner, who was called by the defence after the State released her as a witness. Both said that Mr. Malepane was not selling cigarettes during the tobacco ban. In response to a question from me, Mr. Malepane's former partner said that she would have known if Mr. Malepane was selling cigarettes from the house they shared. She also said Mr. Malepane was not particularly secretive about how he made his money.

The events of 4 June 2020

73 This brings me to Mr. Shoba's account of the events of 4 June 2020 itself. Mr. Shoba alleged that, having purchased cigarettes from Mr. Malepane earlier in the day, he received Ms. Pule at his Westlake home at around 6pm. Mr. Shoba said that purpose of the visit was to make a list of baby clothes that they had been unable to get from Cresta the weekend before. Ms. Pule had a telephone conversation with a friend via a WhatsApp voice call, using Mr. Shoba's Wi-Fi connection. Mr. Shoba heard the conversation, because it was conducted on Ms. Pule's phone's speaker. Ms. Pule's friend, Ms. Senokoane, confirmed this conversation in her evidence for the State. That conversation was also, apparently, about baby clothes.

74 Mr. Shoba says that Ms. Pule was on her phone using his Wi-Fi connection for much of the visit. She was texting, but did not make or receive any voice calls, other than the call with Ms. Senokoane. They watched TV together and had takeaway food. Mr. Shoba received a call from Ms. Moatshe, after which, he says, Ms. Pule became “sulky”.

75 Later, Ms. Pule announced that her ride was outside, and asked to be let out. Mr. Shoba escorted Ms. Pule outside. He said that she spoke to the driver. He says that the driver was wearing a cap and a mask, and he did not recognise the car or the driver. He says he was standing around 7 or 8 metres from the Jeep, but he heard the conversation between the driver and Ms. Pule. He heard Ms. Pule say to the driver “you’re sloshed”.

76 Both Mr. Makhubela and Mr. Mohamed asked Mr. Shoba whether he was concerned about letting Ms. Pule get into a strange car with a man he did not recognise. Mr. Shoba answered that he was not particularly concerned because Ms. Pule seemed to know the driver.

77 Mr. Shoba says that this was the last contact he had with Ms. Pule.

The conclusions to be drawn from the material evidence

78 I have now set out the material evidence led at Mr. Shoba’s trial. It is, of course, not a chronicle of the trial, but it constitutes the evidence that is directly relevant to assessing whether the State has met its burden in this case. I now turn to consider whether the State has discharged that burden.

The murder charge

- 79 To convict Mr. Shoba of murder, I must be satisfied beyond reasonable doubt that he made an agreement with Mr. Malepane that Mr. Malepane would kill Ms. Pule, and that Mr. Shoba took steps to aid Mr. Malepane in doing so. A mere agreement would result only in a conviction for conspiracy to murder. To be guilty of murder, Mr. Shoba must also have assisted Mr. Malepane in implementing the agreement (see *R v Njenje* 1966 (1) SA 369 (SRA) at 377).
- 80 The relevant cases have a great deal to say about what it means to be sure of something beyond reasonable doubt. Nothing I could say here would add anything to the way the test has been explained in the past. The simplest way to conceive of the test is, in my view, to ask what facts I can be sure are true, and then to decide whether there is any reasonably possible account of those facts, however unlikely, that is consistent with Mr. Shoba's innocence.
- 81 It does not matter whether I subjectively believe that Mr. Shoba is guilty. Nor does it matter if I subjectively disbelieve parts or the whole of his story. What matters is whether, objectively evaluated, the facts proved before me are consistent with the reasonable possibility that he is innocent. If they are, then I must acquit him. The mirror image of that test is that the State must have established that Mr. Shoba's knowing and intentional participation in the murder is the only reasonable conclusion to be drawn from the proven facts.
- 82 On evaluating the material evidence as a whole, it seems to me that there is no account of the facts proven before me that is consistent with Mr. Shoba's innocence.

83 In the first place, Mr. Shoba's explanation for his dealings with Mr. Malepane may safely be rejected as false. It is denied by two witnesses whose credibility and reliability have never been challenged, and by Mr. Malepane himself. I do not accept that Mr. Shoba's visits and telephone calls to Mr. Malepane were about the purchase of cigarettes, because I do not accept that Mr. Malepane ever sold them.

84 That begs the question of what Mr. Shoba's visits were really about. Once I have rejected Mr. Shoba's evidence that they were about cigarettes, there is no evidence before me that they were about anything other than arranging Ms. Pule's death. As I have already pointed out, the core of Mr. Malepane's evidence in this respect was virtually untouched by Mr. Makhubela. Mr. Malepane did not know Ms. Pule. He had no obvious motive or opportunity to kill her other than those Mr. Shoba gave him. Mr. Shoba accepted under cross-examination that the State had investigated the possibility of another connection between Ms. Pule and Mr. Malepane, and had turned up no evidence that there was any such connection.

85 Moreover, having treated Mr. Malepane's evidence with requisite caution, I see no alternative but to accept that the material core of Mr. Malepane's evidence is clear and satisfactory in every material respect. I have already given my reasons for reaching that conclusion.

86 I have also sought and established critical respects in which Mr. Malepane's evidence is corroborated. The most important corroboration comes from what happened outside the Westlake complex on the evening of 4 June 2020. Mr. Shoba says that Ms. Pule initiated her departure by saying that her

ride was waiting outside. But of course it was not waiting outside. CCTV footage showed that Mr. Shoba and Ms. Pule went outside at 22h00, and no-one was there. A call was then placed to Mr. Malepane from the 081 number, and routed through the cell phone tower that covers the Westlake complex. Mr. Shoba and Ms. Pule then returned to the gate as Mr. Malepane arrived.

87 Although there was some debate towards the end of the trial about whether Mr. Shoba had conceded that Mr. Malepane was driving the Jeep that picked Ms. Pule up on 4 June 2020, it cannot seriously be suggested on the evidence that it was anyone other than Mr. Malepane. That being so, I find it impossible to conceive that Mr. Shoba did not instantly recognise him. Although I must accept Mr. Shoba's version that Mr. Malepane was wearing a cap and a mask, Mr. Shoba says that he heard a conversation between Mr. Malepane and Ms. Pule. He must at least have recognised Mr. Malepane's voice. On his own version, he had spoken to Mr. Malepane on several occasions before. On the first recent occasion Mr. Shoba says they spoke, they were calling from car to car on Main Reef Road.

88 Despite seeking to create the impression of a concerned and expectant father, Mr. Shoba does not appear to have been worried that Ms. Pule was getting into a car, late at night, with a man who she had herself pointed out was drunk. Mr. Shoba accepted that the Jeep did not look like an Uber, and probably was not an Uber. He says he was not concerned because Ms. Pule appeared to know Mr. Malepane. But that is plainly insufficient. I am driven to conclude that, had he genuinely not known who was driving the car, Mr

Shoba would have shown some interest in the identity of the man who had arrived, drunk, to pick up the mother of his unborn child.

89 The only reasonable explanation for Mr. Shoba's apparent lack of interest is that he knew exactly who had come, and what was going to happen to Ms. Pule when she drove off with him. He had in fact arranged with Mr. Malepane to collect and then kill Ms. Pule. Ms. Pule did not say that her ride was waiting outside. Mr. Shoba had told her that he, as was normal, had arranged a lift for her. They went outside to find that there was no-one waiting. Mr. Shoba then called Mr. Malepane from his 081 number to hurry him up. Mr. Malepane arrived a short time later.

90 Accordingly, I reject Mr. Shoba's version of what happened when Ms. Pule left the Westlake complex on 4 June 2020. It is not reasonably possibly true.

91 By contrast, to reject the State's case, I would have to find that Mr. Malepane had lied about virtually everything he had said, but had nonetheless been fortuitously assisted in his lies by four extraordinary pieces of luck. These are: the fact that the phone Mr. Malepane says Mr. Shoba used to contact him to arrange the murder turned up in the same area at about the same time as Mr. Shoba's registered phone on no less than 7 occasions in the two weeks before Ms. Pule was killed; that the 081 number placed a call to Mr. Malepane in the minutes between Mr. Shoba and Ms. Pule's first and second trip to the complex gate; that Mr. Shoba would be remarkably uncurious about Mr. Malepane picking up Ms. Pule from his residence at Westlake; and that Mr. Malepane's real motive for the murder and the nature of his relationship with Ms. Pule – whatever they were – would remain undetected.

92 I would also have to accept that Mr. Malepane was prepared to commit a gruesome murder for no detectible motive, and then to concoct a story that implicated Mr. Shoba – again without any apparent pre-existing animus towards Mr. Shoba that would motivate him to do so. I would, finally, have to accept that both Mr. Khumalo and Mr. Malepane’s former partner are lying or mistaken when they say Mr. Malepane did not sell cigarettes during the ban on tobacco sales.

93 There are simply no facts before me that would support any of these conclusions. But the facts that have been proved all point in one direction: that Mr. Shoba arranged for Mr. Malepane to kill Ms. Pule; that he first attempted to do so by having Mr. Malepane meet Ms. Pule at the Ormonde MacDonalds outlet; and that, when that plan failed, he knowingly and intentionally delivered Ms. Pule into Mr. Malepane’s hands on the night of 4 June 2020.

The obstruction charge

94 It remains to deal with the third count on the indictment: that of obstructing justice. It seems to me that the State has not been entirely consistent in its approach to this charge. The evidence it initially led appeared to be setting up a case that Mr. Shoba had tampered with the cell phone he handed over to the police when they were investigating Ms. Pule’s disappearance and murder. It was said that there were incriminating WhatsApps deleted from that phone. However, these incriminating WhatsApps were never produced. Nor was it proved how Mr. Shoba had tampered with the phone or deleted them.

- 95 Recognising that this was likely fatal to the State's case on the obstruction charge, Mr. Mohamed changed tack. He argued that Mr. Shoba had obstructed justice when he gave a false version to the police about Ms. Pule's disappearance.
- 96 It is in principle possible for a person to obstruct justice by giving a false statement to the police with the intention of exculpating themselves from an offence they know they have committed (see *S v Burger* 1975 (2) SA 601 (C) and *S v Mene* 1988 (3) SA 641 (A) at 660 to 662). However, in my view, much will depend on the nature of the statement and the extent to which the statement was intended to, or necessitated by the need to, avoid self-incrimination, the privilege against which is enshrined in section 35 (3) (j) of the Constitution, 1996. The difficult question, it seems to me, is whether, the false statement forming the basis of the charge was the only realistic alternative to an act of self-incrimination.
- 97 I would have a great deal of difficulty in convicting a person who had lied to the police solely to avoid incriminating themselves. But it is in any event far from clear where the line between obstruction of justice and justified avoidance of self-incrimination is to be drawn.
- 98 Very little argument was addressed to me on this issue. More fundamentally, though, Mr. Shoba was not given an opportunity to comment, in cross-examination, on the specific statements the State alleges were false. Nor was it put to Mr. Shoba that he had concocted a story with the intent to obstruct the investigation into Ms. Pule's death.

99 There is no basis on which I can convict Mr. Shoba on the obstruction charge.

The verdict

100 For all these reasons, I have reached the following verdicts –

100.1 On Count 1 of the indictment, I find the accused GUILTY of the premediated murder of Tshegofatso Pule.

100.2 On Count 2 of the indictment, I find the accused NOT GUILTY of obstructing justice.

HEARD ON: **S D J WILSON**
Acting Judge of the High Court
24, 25, 26, 27, 28, 31 January; 2, 3, 8, 10, 14, 15
February; and 4 March 2022.

DECIDED ON: 25 March 2022

For the State: F Mohamed
Instructed by National Prosecuting Authority

For the Accused: N Makhubela
Instructed by Mophosho Attorneys Incorporated