**REPORTABLE**

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

**CASE NO. AR 599/08**

In the matter between:

**SIMANGA WISEMAN MTHEMBU** APPELLANT

and

**THE STATE** RESPONDENT

**APPEAL JUDGMENT** Delivered on 17 September 2010

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**SWAIN J**

[1] The appellant, with the leave of the Court *a quo* (Nicholson J), appeals against his conviction on a count of murder and the sentence imposed of eighteen years' imprisonment.

[2] The appellant admits that he shot and killed Mfanafuthi Majozi, a twenty nine year old taxi driver on 09 April 2006 at or near Masons

Mill, Edendale Road, Pietermaritzburg. The appellant maintains that he did so in self-defence, in order to ward off a knife wielding attack upon him by the deceased.

[3] It is common cause that there had been an altercation between the appellant and the deceased earlier in the day, which apparently arose out of the fact that the appellant was aggrieved at the manner in which the deceased had driven his taxi.

[4] Unfortunately, the paths of the appellant and the deceased crossed again later in the day, when according to the appellant, the deceased drove his taxi in front of the appellant's vehicle, without due regard to the approach of the appellant's vehicle.

[5] At whose behest, whether that of the deceased or the appellant, the vehicles then stopped on the side of the road, is disputed. Be that as it may, once the vehicles had stopped, the deceased and the appellant emerged from their respective vehicles, an altercation ensued and the deceased was shot by the appellant, resulting in his death.

[6] Nicholson J in his Judgment summarised the competing versions of what occurred during this altercation, as attested to by Hlengiwe Ngcobo, the girlfriend of the deceased and Thulani Mafuko,

the conductor in the taxi driven by the deceased, on behalf of the State and that of the appellant.

[7] It is consequently unnecessary to set out the evidence in detail, suffice to say that:

[7.1] The learned Judge was correctly critical of the evidence of the appellant that at no stage was the appellant's finger upon the trigger of his firearm. When regard is had to the evidence of the State witnesses that several shots were fired, and the evidence of Dr. Maney, who conducted the post-mortem on the deceased, that there were a minimum of three bullet entrance wounds on the body of the deceased, I support the conclusion of the learned Judge that it was "incredible" that the deceased accidentally pulled the trigger of the firearm of the appellant at least thrice, wounding himself on each occasion.

[7.2] The learned Judge correctly rejected the appellant's evidence that he had not struck the deceased at all during the altercation. The medical evidence of Dr. Maney was that the body of the deceased exhibited deep abrasions on the bridge of the nose, the nose, the right side of the anterior chin, the inside of the right upper lip of the mouth and the left kneecap, all of which were blunt force injuries caused by a fist, booted foot or similar type of instrument.

[7.3] Crucial to the version of the appellant as to why he drew his firearm to ward off the attack by the deceased, was that at the

outset the deceased struck the appellant on the right side of his neck with his left hand and he realised that the deceased had a knife in his other hand. The appellant also described how both of his hands, as well as both of the deceased's hands, were together grabbing the knife and the firearm. However, both of the State witnesses denied that the deceased was armed with a knife . The legal representative of the appellant put it to Hlengiwe Ncgobo that she could not have seen the knife, because the deceased was wearing a long sleeved jersey, and the appellant would say that the knife was concealed in the sleeve of the jersey. However, when giving evidence, the appellant was asked whether he had seen from where the deceased had produced the knife, to which he replied

"I did not see the knife when we came together, I only saw the knife when it appeared".

which he said was at the stage when the deceased struck at him with the hand in which he had the knife. When I put this contradiction to Mr. Blomkamp, who appeared for the appellant, and suggested that it weakened the foundation of the appellant's claim to have acted in self-defence, he fairly conceded that he could not take the matter any further.

[8] Considering all of the above, I am satisfied that the learned Judge was correct in rejecting the appellant's version of events as false beyond reasonable doubt. The version of the State witnesses establishes that the appellant was the aggressor and possessed the necessary intent to murder the deceased.

[9] The appeal against the appellant's conviction on the count of murder accordingly falls to be dismissed.

[10] Turning to the appeal against sentence. The offence fell within Part II of Schedule 2 of the Criminal Law Amendment Act No. 105 of 1997 (hereafter referred to as the Act) and the learned Judge was accordingly obliged to sentence the appellant as a first offender, to imprisonment for a period of not less than fifteen years, unless "substantial and compelling circumstances" existed in terms of Section 51 (3) of the Act, which justified the imposition of a lesser sentence.

[11] The learned Judge found that the appellant had shown true contrition and regret for what he had done, was a first offender and accepted that he was a good candidate for reformation "as provided for in the Correctional Services system". The learned Judge however identified the incident as one which fell within what has become known as "road rage". By reference to the decision of Borchers J in the case of

***State v Sehlako 1999 (1) SACR 67 (W)***

he held that the facts were very similar to the present case and endorsed the view of Borchers J that

"In my view even where an accused's personal circumstances are extremely favourable as they are in this case, they must yield to society's legitimate demand that its members be entitled to drive the roads without risk of being

murdered by other irate drivers".

[12] In Sehlako the accused was sentenced to eighteen years' imprisonment. The learned Judge found there was very little to differentiate that case from the present one, and sentenced the appellant to eighteen years' imprisonment.

[13] In aid of his attack upon the sentence imposed, Mr. Blomkamp relied upon the decision of Wallis J, in whose decision van der Reyden J and Niles-Dunér J concurred in

***State v Mbatha 2009 (2) SACR 623 (KZP)***

[14] His submission was that the learned Judge had failed to indicate to the appellant's legal representative, that he had in mind the possibility of imposing a sentence greater than the statutory minimum, in reliance upon the following dictum in

Mbatha at para 26

"[26] Consistent with what I have already said about the proper approach to sentence when the court contemplates a sentence greater than the statutory minimum, and consistent also with those cases that have held that if the State intends to rely upon the minimum sentencing legislation the accused must be forewarned of that fact, preferably in the indictment, I think that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation was a defect in the proceedings".

From the record it is clear that the learned Judge did not expressly inform the defence that he was contemplating imposing a sentence higher than the prescribed minimum.

[15] It therefore becomes necessary to examine what was said by the learned Judges in Mbatha, as to "the proper approach to sentence when the court contemplates a sentence greater than the statutory minimum" in order to properly decide the point in issue.

[16] The questions which the court in Mbatha posed and sought to answer were as follows:

[16.1] "Does the court simply have a free and unbounded discretion once it concludes that a sentence greater than the statutory minimum is appropriate?"

[16.2] "What influence does the statutory minimum have in the determination of sentence in such a case?"

**Mbatha at 629 para 12.**

[17] The answers furnished in Mbatha were as follows:

[17.1] By reference to the decision in

***State v Malgas 2001 (1) SACR 469 (SCA)***

it was held that the proper starting point in determining an appropriate sentence, in a case falling within the minimum sentence legislation, is the prescribed minimum sentence and thereafter the court considers whether the circumstances are such that a departure from that sentence is justified.

**Mbatha at pg 629 d – e.**

[17.2] This must remain the correct approach when the court is contemplating imposing a greater sentence than the prescribed minimum, in the same way as where it is contemplating imposing a lesser sentence, otherwise the process of determining an appropriate sentence will be bifurcated in a most undesirable way.

**Mbatha at pg 629 g – h.**

[17.3] If such an approach is not followed once a court decides that there are no substantial and compelling circumstances present "it will then abandon all that has gone before and simply determine in the exercise of its discretion an appropriate sentence, having no regard to the legislation".

**Mbatha at pg 629 h – i.**

[17.4] Such an approach disregards one of the purposes of the legislation, which is to provide a measure of uniformity and not simply to limit in one direction the discretion of courts in imposing sentence in particular cases, whilst leaving them entirely at large in the other direction.

**Mbatha at pg 630 a – b**

[17.5] The legislation has sought to limit the extent to which sentence may be dependent upon the personal views of the Judge as to the efficacy of imprisonment for a longer or shorter period, or any other factor that may vary from Judge to Judge. The seriousness of particular crimes is reflected in the fact that they should in general attract sentences that are severe, standardised and consistent.

**Mbatha at pg 630 g – h**

[17.6] The proper approach therefore is that the starting point is the statutory minimum sentence, which is the sentence that Parliament has prescribed as appropriate for the crime in question, having regard to both the general nature of that crime and the interests of the public. As the statutory approach is a standardised one requiring generally that there be a consistent response to particular crimes, the court needs to identify the circumstances that take a particular case out of the ordinary, so as to render the prescribed minimum sentence an inadequate response to the particular crime. It must ask itself whether there are factors present in the particular case which create a significant and material distinction between that case and other cases involving the same offence.

**Mbatha at pg 631 b – d**

[17.7] In many ways the enquiry will be the converse of that

undertaken when the court is considering whether there are substantial and compelling circumstance for imposing a lesser sentence, provided it is borne in mind that in the case of an increased sentence the discretion of the Court is broader and more flexible and is not constrained by that statutory yardstick.

**Mbatha *supra* at pg 631 g – h**

[17.8] There is as much a necessity for the court in its judgment on sentence to identify on the record the aggravating circumstances that take the case out of the ordinary, as there is for it in the converse situation to identify those substantial and compelling circumstances that warrant the imposition of a lesser sentence than the prescribed minimum. The trial judge should identify the circumstances that impel her or him to impose a sentence greater than the prescribed minimum and explain why they render the particular case one where a departure from the prescribed sentence is justified. The factors that render the accused more morally blameworthy must be clearly articulated.

**Mbatha at page 631 g – h**

[18] It seems to me that the cornerstone of the above reasoning and conclusions reached in Mbatha, is that the intention of the Legislature in passing the Act was to prescribe that the minimum sentences provided for should be imposed as appropriate sentences and not merely to prescribe appropriate minimum sentences, for the crimes in

question. The distinction is not merely one of terminology, but is one of substance.

[19] It is in this basic premise that I, with respect, disagree with the approach and conclusions reached by the learned Judges in Mbatha, as outlined above, for the following reasons:

[19.1] The statement in Malgas that the prescribed periods of imprisonment "are to be taken to be ordinarily appropriate" was uttered by the Supreme Court of Appeal in the context of determining when a departure from the statutory minimum sentence was justified. Acknowledging this, Wallis J however held the view that the starting point must be the prescribed minimum sentence and the court must then consider if a departure is justified in imposing a greater, or lesser, sentence. Although the prescribed minimum sentence should be the starting point, this is solely for the purpose of deciding whether a sentence less than the prescribed minimum sentence, should be imposed. The exercise of a discretion by the presiding officer to impose a sentence greater than the prescribed minimum sentence, does not have to be justified by reference to the prescribed minimum sentence. There can be no danger of an undesirable bifurcation in the sentencing process referred to by Wallis J, if it is borne in mind that the object of the Act was simply "to provide for minimum sentences for certain serious offences". Once the presence or absence of substantial and compelling circumstances is determined, then the exercise of the discretion, required of the presiding officer, by the Act, is complete. If no such circumstances are found to be present, I respectfully

disagree that the determination of an appropriate sentence will result in an impermissible abandonment of "all that has gone before". That the presiding officer thereafter need have no regard to the legislation, will simply be because the object of the legislation will have been achieved, i.e. a determination that a sentence less than the prescribed minimum sentence should not be imposed, because of the absence of substantial and compelling circumstances.

[19.2] The object of the Legislature was

"….to ensure that consistently heavier sentences are imposed in relation to the serious crimes covered by Section 51 and at the same time promoting 'the spirit, purport and objects of the Bill of Rights' "

***State v Dodo 2001 (3) SA 382 (cc) at 393 C – D***
***State v Abraham 2002 (1) SACR 116 (SCA) at 126 C***

Consistency in the imposition of heavier sentences was therefore sought to be achieved by the passing of the Act, and not consistency or uniformity in the passing of all sentences, in respect of the specified offences.

[19.3] In order to ensure that consistently heavier sentences were imposed, the intention of the Legislature was to limit the discretion of courts in one direction, i.e. the imposition of sentences less than the prescribed minimum, and to leave the courts' discretion unlimited in the other direction, i.e. to impose sentences heavier than the prescribed minimum. I, with respect, disagree with the view of Wallis J that this will mean that courts will be left "entirely at large" to

impose heavier sentences. The exercise of such a discretion would be as described in Malgas at pg 478 d as follows:

"Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence".

[19.4] I respectfully disagree that it was the intention of the Legislature to ensure that severe, standardised and consistent sentences be imposed and thereby limit the extent to which sentence may depend upon the personal views of the Judge, or any factor that may vary from Judge to Judge. In this regard, the following passage in Malgas (pg 472 para 3) is apposite:

"[3] What *is* rightly regarded as an unjustifiable intrusion by the Legislature upon the legitimate domain of the courts, is legislation which is so prescriptive in its terms that it leaves a court effectively with no sentencing discretion whatsoever and obliges it to pass a specific sentence which, judged by all normal and well-established sentencing criteria, could be manifestly unjust in the circumstances of a particular case. Such a sentencing provision can accurately be described as a mandatory provision in the pejorative sense intended by opponents of legislative incursions into this area. A provision which leaves the courts free to exercise a substantial measure of judicial discretion is not, in my opinion properly described as a mandatory provision in that sense. As I see it, this case is concerned with such a provision".

If the intention of the Legislature in passing the Act was to prescribe that the minimum sentences provided for should be imposed as appropriate sentences, and not merely to prescribe appropriate minimum sentences, for the crimes in question, this may, in my view,

result in the courts not being "free to exercise a substantial measure of judicial discretion" in the passing of such sentences. Such an interpretation would border upon the minimum sentencing provisions being regarded as "mandatory" within the meaning of that term as set out in the quoted passage.

[19.5] Other than a consideration of the well known principles relevant to imposing a just and appropriate sentence, I can see no justification for a trial court being obliged to record the aggravating circumstances that justify a sentence being imposed in excess of the prescribed minimum sentence. There can be no need for the presiding officer to identify the circumstances that impel her or him, to impose a sentence greater than the prescribed minimum, and to justify such a departure, other than reasons to be advanced to show the sentence imposed is just and appropriate in all of the circumstances.

[20] I am therefore satisfied that the conclusions reached by the learned Judges in Mbatha, in answering the questions posed in that case, as set out in paragraph 16 *supra* are, with respect, incorrect. I accordingly, with the agreement of Jappie J and Gorven J, do not consider myself to be bound by such conclusions. In addition, I agree with the reasons of Gorven J for departing from Mbatha, furnished by way of a separate Judgment in this matter.

[21] In the result, I do not agree with the submission of Mr.

Blomkamp that the failure of the learned Judge to apprise the defence that a higher sentence than the minimum was contemplated, was a defect in the proceedings. It is of course desirable that a presiding officer, receive and consider submissions on the severity of any sentence, that she or he may consider passing, in order to ensure that the sentence imposed is just and appropriate, which is what the learned Judge did.

[22] This Court can of course only interfere with the sentence imposed by the trial court, where it is vitiated by a material misdirection, or where the disparity between the sentence of the trial court and the sentence which the Appellate Court would have imposed, had it been the trial court, is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".

**Malgas *supra* at pg 478 e – h**

[23] The sentence imposed by the learned Judge suffers from none of these defects and accordingly must stand.

The order I make is the following:

> The appeal against conviction and sentence is dismissed.

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**SWAIN J**

**I agree**

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**GORVEN J**

**I agree**

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**JAPPIE J**

***Appearances /***

***Appearances:***

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| **For the Appellant** | **:** | Mr. P. Blomkamp |
| **Instructed by** | **:** | Kunene Attorneys<br>Pietermaritzburg |
| **For the Respondent** | **:** | Mr. R. du Preez |
| **Instructed by** | **:** | Director of Public Prosecutions<br>Pietermaritzburg |
| **Date of Hearing** | **:** | 15 July 2010 |
| **Date of Filing of Judgment** | **:** | 17 September 2010 |