HIGH COURT CASE NO. CC 113/2013

IN THE HIGH COURT OF SOUTH AFRICA

(Gauteng Division, Pretoria)

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG **Applicant**

and

OSCAR LEONARD CARL PISTORIUS **Respondent**

NOTICE OF APPLICATION FOR LEAVE TO APPEAL IN TERMS OF SECTION 316B(1) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

TO : The Registrar of the High Court
Gauteng Division, Pretoria
Private Bag X 67
PRETORIA
0001

AND TO : Brian Webber
Ramsay Webber Inc.
269 Oxford Road
ILLOVO

1.

PLEASE TAKE NOTICE that the Director of Public Prosecutions, Gauteng: Pretoria (applicant); intend bringing an application in the Gauteng High Court, Pretoria, for leave to appeal in terms of section 316B(1) of the Criminal Procedure Act 51 of 1977 against the sentence imposed by The Honourable Judge Masipa in the Gauteng High Court, Pretoria, in case number CC 113/13 on 6 July 2016.

2.

PLEASE TAKE FURTHER NOTICE that the grounds of appeal are as follows:

2.1 The Court misdirected itself in finding that the aggravating factors *in casu* are outweighed by the mitigating factors.

2.2 The following mitigating and aggravating factors were identified by the court:

2.2.1 **Aggravating factors**:

i. The accused used a lethal weapon, ie. a high calibre firearm, and ammunition.
ii. The accused fired not one but four shots into the toilet door.
iii. The accused fired the four shots knowing full well that there was someone behind the door.
iv. The toilet was a small cubicle and there was no room for escape.
v. The accused was trained in the use and handling of firearms.
vi. The accused never fired a warning shot.

2.2.2 **Mitigating factors**:

i. The accused approached the bathroom in the belief that an intruder had entered his house.
ii. The accused was without his prosthesis and felt vulnerable.
iii. The accused immediately took steps to save the deceased's life.
iv. The accused was distraught and kept on asking God to save the deceased's life.
v. At the commencement of the trial the accused apologised to the family of the deceased.
vi. The accused is genuinely remorseful.

2.3 The court, with respect, failed to take into account three major aggravating factors, namely:

i. It was in the bedroom that the accused had formed the intention to shoot and when he realised that there was someone behind the toilet door he fired four shots.
ii. The Supreme Court of Appeal as well as this Court rejected the defence that the accused acted in private defence or even putative private defence. Thus, there existed no justification for the accused's actions.
iii. And perhaps the most important factor that the court failed to take into account is that the accused "*fired four shots through the door. And he never offered an acceptable explanation for having done so.*"[1]

2.4 Whereas the Court found that murder is "*always a very serious crime*" and that "*[t]he fact that the accused thought that [the deceased] was [an] intruder does not make [the crime] less serious*", the Court nevertheless, with respect, misdirected itself in holding that the accused's belief that an

[1] **Director of Public Prosecutions, Gauteng v Pistorius** 2016 (1) SACR 431 (SCA) at para [49].

intruder had entered the house was a mitigating factor, especially when regard is had to the objective gravity of the crime and the fact that this Court and the Supreme Court of Appeal rejected the accused's version that he acted in putative private defence.[2]

2.5 This Court, with reference to the accused's version during the trial, remarked that when the accused "*discovered his mistake*" he put on his prosthetic legs and used the cricket bat to bash open the door. We respectfully submit that the Court misdirected itself in not focusing on the fact that the accused's actions in firing four shots at a human being behind a closed toilet door was no mistake.

2.6 The Court, with respect, misdirected itself in underemphasising the trite principle enunciated in **S v Malgas**[3] and subsequent Supreme Court of Appeal *dicta*,[4] that when sentencing in terms of the minimum sentence legislation (the Criminal Law Amendment Act 105 of 1997 ("Act 105 of 1997")), "*it was no longer to be 'business as usual'*" and indeed, "*the emphasis was to be shifted to the objective gravity of the type of crime [committed] and the public's need for effective sanctions against it.*"

2.7 The Court, with respect, misdirected itself in underemphasising the trite principle that when sentencing in terms of the minimum sentence legislation, a court must assess whether in all the circumstances the sentence is "*proportionate to the crime committed*" and whether the sentence "*is a just one.*"[5]

---

[2] **Director of Public Prosecutions, Gauteng v Pistorius** 2016 (1) SACR 431 (SCA) at paras [53]-[54].
[3] 2001 (1) SACR 469 (SCA) at paras [7]-[8].
[4] See, for example, **S v Roslee** 2006 (1) SACR 537 (SCA) at para [32]; **S v Matyityi** 2011 (1) SACR 40 (SCA) at para [23]; **S v Nkunkuma and Others** 2014 (2) SACR 168 (SCA) at para [9]; **S v Brown** 2015 (1) SACR 211 (SCA) at para [119].
[5] See, for example, **S v Radebe and Another** 2013 (2) SACR 165 (SCA) at para [14].

2.8 The Court, with respect, misdirected itself in underemphasising the trite principle that when sentencing in terms of the minimum sentence legislation, a court is not given a "*clean slate*" on which to inscribe whatever sentence it thinks fit or appropriate, but the "*starting point in a matter such as this is the prescribed minimum sentences ordained by the legislature.*"[6]

2.9 While each case must be assessed on its own merits,[7] we respectfully submit that the Court nevertheless misdirected itself in underemphasising the trite principle that when sentencing in terms of the minimum sentence legislation, "*a severe, standardised, and consistent response from the courts*" is required in imposing an appropriate sentence, paying due regard to the sentence that ought "*ordinarily*" to be imposed for the commission of the listed crime in the specified circumstances.[8]

2.10 The Court, with respect, misdirected itself in underemphasising the trite principle that "[i]f *the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence*", thereby entitling the court to impose a lesser sentence, "*account must [nevertheless] be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.*"[9]

---

[6] See, for example, **S v Malgas** 2001 (1) SACR 469 (SCA) at para [8]; **S v Matyityi** 2011 (1) SACR 40 (SCA) at para [18]; **S v Nkunkuma and Others** 2014 (2) SACR 168 (SCA) at para [10]; **S v Brown** 2015 (1) SACR 211 (SCA) at para [119].
[7] Compare, for example, **S v Vilakazi** 2009 (1) SACR 552 (SCA) at para [15].
[8] **S v Malgas** 2001 (1) SACR 469 (SCA) at para [8].
[9] **S v Malgas** 2001 (1) SACR 469 (SCA) at para [25I-J].

2.11 The Court, with respect, misdirected itself in underemphasising the trite principle that even where substantial and compelling circumstances are found to exist which justify the imposition of a lesser sentence than the minimum prescribed sentence, "*the sentences the Act [Act 105 of 1997] prescribes create a legislative standard that weighs upon the exercise of the sentencing court's discretion. This entails sentences for the scheduled crimes that are consistently heavier than before.*"[10]

2.12 We respectfully submit that the Court materially misdirected itself in seemingly regarding itself as having a free and unfettered discretion to impose any sentence it considered appropriate upon finding that substantial and compelling circumstances were present, and in so doing overlooking the benchmark indicating the seriousness with which the Legislature views the crime of murder.[11]

2.13 The Court thus, with respect, misdirected itself in finding that long-term imprisonment would not serve justice in this case, also having regard to the following factors:

i. In summary, the Supreme Court of Appeal's findings, which are based on this Court's findings of fact, can only be described as that the accused fired four shots at the toilet door because he thought there was an intruder in the toilet.
ii. There was, however, no indication of a real and/or imminent or immediate threat.
iii. We respectfully submit that our courts are enjoined to severely punish accused persons who shoot and kill without reason.[12]

---

[10] **S v Abrahams** 2002 (1) SACR 116 (SCA) at para [25], per Cameron JA (as he then was).
[11] Compare, **S v Mvamvu** 2005 (1) SACR 54 (SCA) at para [17].
[12] Compare, for example, **S v Martin** 1996 (1) SACR 172 (W) at 176*j*-177*c*.

iv. The accused exhibited some regret when it turned out to be the deceased, but has as yet not given a credible explanation of why he fired the four shots.

2.14 We respectfully submit that the Court misdirected itself in overemphasising the misperception in the public domain as to what preceded the commission of the crime, and underemphasised the trite principle that Act 105 of 1997, as an "*expression of policy in a statute*", "*shows the disquiet experienced by the public, represented through the Legislature, at the prevalence of certain offences and their effect. The imposition of minimum sentences is a clear indication of what is perceived to be in the public interest. It is trite that the public interest, or the interest of the community as it is often put, is a factor that should be considered when the sentencing discretion is exercised... The provisions of the Act inform courts of the attitude of society to crimes of a particular nature, specified in a schedule to the Act*".[13]

The State neither before this court nor before the SCA argued that any "misperceptions" should be taken into account. We, respectfully agree with the court that our courts will deal only with facts placed before them and not with assumptions and not with suspicions. The court then, with respect, proceeded and took the 'misperception' into account as a factor that cannot be ignored and that to do so, may not serve the ends of justice. We reiterate, respectfully that the court overemphasised this "misperception" as a factor to take into account for purposes of sentence.

2.15 We respectfully submit that the Court overemphasised the personal circumstances of the accused, particularly the disability of the accused and the fact that the accused was on his stumps when committing the murder and "*felt vulnerable*" at the time, treating such, with respect,

---

[13] **S v Jimenez** 2003 (1) SACR 507 (SCA) at para [9].

erroneously as mitigating factors, when regard is had to all the circumstances of the case.

2.16 We respectfully submit that the high-water mark for the accused is that he felt vulnerable - if that is the only reason why he fired the shots it should rather be aggravating than mitigating. He formed that intention in the bedroom and then proceeded to the bathroom.

2.17 The Court, as to the question of the "*vulnerability*" of the accused and how such affected the accused's conduct when murdering the deceased, with respect, misdirected itself in overlooking or underemphasising the following finding it made in its judgment on sentence pertaining to the culpable homicide charge:[14]

> "*There was, however, a feeling of unease on my part as I listened to one witness after another, placing what I thought was an over-emphasis on the accused's vulnerability. Yes, the accused is vulnerable, but he also has excellent coping skills. Thanks to his mother, he rarely saw himself as disabled and, against odds, excelled as a top athlete, became respected worldwide and even went on to compete against able bodied persons. For some reason, that picture remains obscured in the background. In my judgment to get to the real picture, the correct approach would be to balance the two.*"

2.18 The Court, with respect, misdirected itself in overlooking or underemphasising the Supreme Court of Appeal's observations as to how the accused excelled in life, especially in relation to his athletics achievements, despite his "*severe physical handicap*",[15] which effectively

---

[14] At **p. 12-13** of the **Judgment** on **Sentence**.
[15] **Director of Public Prosecutions, Gauteng v Pistorius** 2016 (1) SACR 431 (SCA) at para [11].

affirmed the Court *a quo's* "*unease*" as to the overemphasis of the accused's "*vulnerability*".

2.19 The Court, with respect, misdirected itself in overlooking or underemphasising the Supreme Court of Appeal's finding that the accused's subjective intention was unaffected by "*the accused's physical disabilities, the fact that he had not been wearing his prostheses at the time and that he had thus been particularly vulnerable to any aggression directed at him by an intruder*", as well as on account of his general anxiety disorder, by reason that:[16]

> "*On his own version, when he thought there was an intruder in the toilet, the accused armed himself with a heavy calibre firearm loaded with ammunition specifically designed for self-defence, screamed at the intruder to get out of his house, and proceeded forward to the bathroom in order to confront whoever might be there. He is a person well-trained in the use of firearms and was holding his weapon at the ready in order to shoot. He paused at the entrance to the bathroom and* ***when he became aware that there was a person in the toilet cubicle, he fired four shots through the door****. ****And he never offered an acceptable explanation for having done so****.*"

2.20 The Court, with respect, underemphasised the trite principle that "*in determining whether there are substantial and compelling circumstances, a court must be conscious that the Legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. It is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances include those factors traditionally taken into account in sentencing - mitigating*

[16] *Ibid* at paras [48]-[49] (emphasis added).

factors. Of course these must be weighed together with aggravating factors."[17]

2.21 We respectfully submit that it was a procedural irregularity not to formally record what the substantial and compelling circumstances are which justified the imposition of a lesser sentence than the minimum prescribed sentence of 15 years' imprisonment.[18] It is unclear to the Applicant what precisely those circumstances are.

2.22 We respectfully submit that *error in objecto* or an accused acting with *dolus indeterminatus* cannot merely be a mitigating factor. The factors have to be related, or relevant, to the accused's actions. The accused intended (*dolus eventualis*) to shoot and kill a human being and he "*never offered an acceptable reason for having done so*".

2.23 We respectfully submit that the Court misdirected itself in having maudlin sympathy for the accused, whereas it is well-settled in our law that the element of mercy "*has nothing in common with maudlin sympathy for the accused*"[19] and "*undue sympathy*" for an accused is not to be construed as a substantial and compelling circumstance justifying a departure from the minimum prescribed sentence.[20]

2.24 The Court, with respect, misdirected itself in underemphasising the principle enunciated in **S v Matyityi**, that sentences also need to be "*victim-centred*" and that the victim or the victim's family must be "*afforded a more prominent role in the sentencing process*".[21]

---

[17] **S v Sikhipha** 2006 (2) SACR 439 (SCA) at para [16].
[18] **S v Karolia** 2006 (2) SACR 75 (SCA) at para [32].
[19] **S v Rabie** 1975 (4) SA 855 (A) at 861C-D.
[20] **S v Malgas** 2001 (1) SACR 469 (SCA) at paras [9], [25D].
[21] 2011 (1) SACR 40 (SCA) at para [16].

2.24.1 The Court, with respect, misdirected itself in underemphasising the interests of the victim and the victim's relatives. We respectfully submit that the court failed to take into account the horrific experience that preceded the deceased's death. The court with respect underemphasised the pain and desperation that the deceased had to endure, albeit fleetingly, especially when it is taken into account that the first shot was the one to the hip of the deceased.

2.25.1 Moreover, the court with respect overlooked the fact that the accused intentionally loaded his firearm with Black Talon ammunition, knowing full well what it was capable of doing.

2.25.2 The Court, with respect, materially misdirected itself in finding that "*healing has already started as both Mr Steenkamp and Mrs Steenkamp have stated that they have forgiven the accused.*"

2.25.3 We respectfully submit that the Court misinterpreted the "*forgiveness*" by the Steenkamp family.

2.26 The Court materially misdirected itself in not grading the degree of *dolus eventualis* in determining the seriousness of the murder perpetrated, for purposes of sentence.[22] We respectfully submit that the Court misinterpreted and/or overlooked the Supreme Court of Appeal's findings as to the degree of foreseeability. We respectfully argue that the Court was bound by the inferences drawn by the Supreme Court of Appeal based on the factual findings of this Court.

2.26.1 The Court, with respect, materially misdirected itself in finding that there is "*no suggestion in the judgment of the Supreme Court of Appeal*" that the

---

[22] Compare, **S v Dladla en Andere** 1980 (1) SA 1 (A) at 3E-G; **S v Mienies** 1978 (4) SA 560 (A) at 562A-G.

dolus eventualis of the accused bordered on *dolus directus*, whereas the Supreme Court of Appeal held thus on the aspect:[23]

> *"As a matter of common sense, at the time the fatal shots were fired, the possibility of the death of the person behind the door was* ***clearly an obvious result****. And in firing not one, but four shots, such a result* ***became even more likely****. But that is exactly what the accused did… A person is far more likely to foresee the possibility of death occurring where the weapon used is a lethal firearm (as in the present case) than, say, a pellet gun unlikely to do serious harm. Indeed, in this court, counsel for the accused, while not conceding that the trial court had erred when it concluded that the accused had not subjectively foreseen the possibility of the death of the person in the toilet, was unable to actively support that finding. In the light of the nature of the firearm and the ammunition used and the extremely limited space into which the shots were fired, his diffidence is understandable."*

2.27 We submit with respect that the Court's material misdirection in not grading the accused's *dolus eventualis* as bordering on *dolus directus*, is also borne out by the following facts accepted by the Supreme Court of Appeal:

> *"[T]he deceased must have been standing behind the door when she was first shot and then collapsed down towards the toilet bowl. Although the precise dimensions of the toilet cubicle do not appear from the record, it is clear from the photographs that it is extremely small… And it is also apparent… that all the shots fired through the door would almost inevitably have struck a person behind it. There had effectively been nowhere for the deceased to hide."*[24]

---

[23] **Director of Public Prosecutions, Gauteng v Pistorius** 2016 (1) SACR 431 (SCA) at para [50] (emphasis added).
[24] *Ibid* at para [38].

"*Capt Mangena testified that the Black Talon ammunition the accused had used was specifically designed for the purpose of self-defence. It would penetrate a wooden door without disintegrating but would mushroom on striking a soft, moist target such as human flesh, causing devastating wounds to any person who might be hit. The veracity of this is borne out by the photographs depicting the injuries the deceased sustained, correctly described by the trial court as being 'horrendous'.*"[25]

"*On his own version, when he thought there was an intruder in the toilet, the accused armed himself with a heavy calibre firearm loaded with ammunition specifically designed for self-defence, screamed at the intruder to get out of his house, and proceeded forward to the bathroom in order to confront whoever might be there. He is a person well-trained in the use of firearms and was holding his weapon at the ready in order to shoot. He paused at the entrance to the bathroom and when he became aware that there was a person in the toilet cubicle, he fired four shots through the door. And he never offered an acceptable explanation for having done so.*"[26]

2.28 We respectfully submit that a proper grading of the accused's culpability would lead to a much more severe sentence. We furthermore respectfully submit that this misdirection in itself will entitle a Court of Appeal to interfere with the sentence.

2.29 The Court, with respect, misdirected itself in not having a material appreciation for the evidence of Captain Mangena as to the reconstruction of the crime scene, particularly in relation to the size of the toilet cubicle, the fact that the deceased was standing and facing the toilet door when the

---

[25] *Ibid* at para [39].
[26] *Ibid* at para [49].

accused fired the first shot, and the use by the accused of very lethal ammunition and the severe effect it had when striking the flesh of the deceased.

2.30 The Court, with respect, misdirected itself in finding that the accused has genuine remorse, whereas the Supreme Court of Appeal made it patently and repeatedly clear that "*one really does not know what his explanation is for having fired the fatal shots*",[27] which the accused again in sentencing afresh proceedings failed to explain to the Court, thereby failing to take the Court into his confidence.

2.31 Although the Court took into account and indicated that it weighed heavily with the Court that the accused tried to approach the Steenkamp family after his release, the Court, with respect, failed to take into consideration that such happened only two months before re-sentencing. The accused did not approach the Steenkamp family prior to that.

2.32 The Court, with respect, misdirected itself in finding that the accused has genuine remorse, whereas Prof. Scholtz mentioned in his report that the accused took the life of the deceased "*without intending to do so*".[28] The fact remains, with respect, that the accused had intention to kill a human being.

2.33 We respectfully repeat our argument that the accused has failed to show remorse for his actions and that he intended (*dolus eventualis*) to kill a human being. It remains our respectful submission that this is the type of remorse that courts would recognise – not, with respect, the regret of having killed one's girlfriend by "mistake".

---

[27] **Director of Public Prosecutions, Gauteng v Pistorius** 2016 (1) SACR 431 (SCA) at paras [17], [49], [53].
[28] See the Report by Dr. Scholtz at p. 28 l. 761 (**Exhibit "Sa"**).

2.34 The Court, with respect, misdirected itself in finding that the accused has genuine remorse, whereas the report of Ms. T L Bayi, a counselling psychologist of the Department of Correctional Services, dated 15 June 2015 (which report formed part of the evidence of Prof. Scholtz), indicates that the accused "*explains that he fails to identify himself as having committed a crime as his intentions were to protect the victim.*"

2.35 The Court correctly, with respect, rejected the evidence of Prof. Scholtz that the accused's position has deteriorated to such an extent that he requires hospitalization and correctly found that the accused must have lied with regard to the incident of the hanging by a fellow inmate. Therefore, the Court should have rejected the view expressed by the witness that the accused would not be able to testify. This in fact confirms the accused's unwillingness to be truthful, and indeed, to take the court into his confidence.

2.36 The accused's failure to testify ought to have been a major factor that should have been taken into account on the question of whether the accused has genuine remorse. We respectfully submit that the conviction on murder required that the accused evince true remorse before court.

2.37 The Court, with respect, misdirected itself in underemphasising the trite principles that "*before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions*", and that there is "*a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse.*"[29]

---

[29] **S v Matyityi** 2011 (1) SACR 40 (SCA) at para [13].

2.38 Our ineluctable submission, with respect, is that the Court materially misdirected itself in underemphasising the trite principle that with no known answer to the question why the accused committed the crime, "*the accused is at risk of appearing to have acted without reason and to deserve the harshness which accompanies wanton criminality which is executed without anything which reduces moral reprehensibility. An accused assumes some risk by failing to testify in that there is then often a preclusion of opportunity to give an answer to that crucial question.*"[30]

2.39 The Court, with respect, misdirected itself and/or overemphasised the possibility of rehabilitation of the accused in finding that "*the accused is a good candidate for rehabilitation*", whereas "*seeds of rehabilitation can, in a manner of speaking, germinate only if the convicted person him/herself has, first and foremost, expressed contrition for his/her criminal wrongdoing, thereby accepting the gravity of the criminal act of which he/she has been convicted*".[31] We, in any event, respectfully argue that rehabilitation is possible during a substantial period of imprisonment.

2.40 We respectfully submit that the Court misdirected itself in underemphasising the trite principle that to focus on the well-being of the accused at the expense of the other aims of sentencing, namely retribution, deterrence and the interests of the community and that of the victim, is to distort the process and to produce a warped sentence.[32]

2.41 We furthermore respectfully submit that the Court misdirected itself in underemphasising the trite principle that to elevate the personal circumstances of the accused above that of society in general and the

---

[30] **S v Martin** 1996 (1) SACR 172 (W) at 176*j*-177*c*.
[31] **S v Dyantyi** 2011 (1) SACR 540 (ECG) at para [26]. See also, **S v Van Rensburg** 2015 (1) SACR 114 (NCK) at para [7].
[32] **S v Lister** 1993 (2) SACR 228 (A) at 232*h*; **S v SD** 2015 (2) SACR 363 (SCA) at para [18].

victim or the victim's family in particular "*would not serve the well-established aims of sentencing, including deterrence and retribution.*"[33]

2.42 The Court, with respect, misdirected itself in underemphasising the trite principle enunciated by the Supreme Court of Appeal in **S v Vilakazi**, namely: "*In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background.*"[34]

2.43 We respectfully submit that the Court misdirected itself in overstating the personal circumstances of the accused whilst underemphasising the personal circumstances of the deceased and the seriousness of the offence of murder, as well as in underemphasising the fact that life was the most valuable asset of the deceased, which was taken away from her, and the fact that the resort by the accused to the use of his firearm and the killing of the deceased was gratuitous and too readily done.[35]

2.44 The Court misdirected itself in giving too little or no weight to the fact that the deceased was an innocent victim of a needless serious crime, and indeed, that the deceased's right to life was needlessly taken from her. We reiterate the Court's view that murder is always a very serious crime and the fact that the accused thought that it was an intruder does not make the crime less serious. We submit, with respect, that insufficient weight was given to the fact that the accused's immediate and unnecessary resort to gun violence to kill the person behind the toilet door, was, without more, indicative thereof that the accused flagrantly disregarded the sanctity of the life of a human being, and indeed, that the accused regarded such life as cheap or of little or no value; *a fortiori* where the accused "***gambled***" with the life of such person, reckless to the consequences.

---

[33] **S v Ro and Another** 2010 (2) SACR 248 (SCA) at para [20].
[34] 2009 (1) SACR 552 (SCA) at para [58].
[35] Compare, **S v Combrink** 2012 (1) SACR 93 (SCA) at para [22].

2.45 We respectfully submit that the sentence imposed demonstrates that the Court gave too little or no weight to the fact that the deceased had nowhere to hide in the small toilet cubicle when the shots fired by the accused ripped through her flesh.

2.46 The Court, with respect, underemphasised the trite principle, as reaffirmed by the Supreme Court of Appeal in **Hewitt v The State**, that "*[s]crupulous care must be taken not to over-emphasise the appellant's personal circumstances without balancing those considerations properly against the very serious nature of the crimes committed; the aggravating circumstances and the consequences for the victims and the interests of society.*"[36]

2.47 We respectfully argue that the sentence is shockingly inappropriate and that the Court misdirected itself in underemphasising the principle expressed by Bosielo JA in **Director of Public Prosecutions, North Gauteng v Thabethe**, namely: "*It is trite that one of the essential ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public.*"[37]

2.48 The Court, with respect, misdirected itself in finding that "*the accused is a good candidate for rehabilitation and that the other purposes of punishment, although important, ought not to play a dominant role in the sentencing process*", whereas the trite principle is that "*[s]erious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.*"[38]

---

[36] (637/2015) [2016] ZASCA 100 (9 June 2016) at para [11].
[37] 2011 (2) SACR 567 (SCA) at para [20].
[38] **S v Swart** 2004 (2) SACR 370 (SCA) at para [12].

2.49 The Court misdirected itself in underemphasising the trite principle that "*[i]t is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.*"[39]

2.50 It is our respectful submission that the Court misdirected itself in underemphasising the trite principle that "*the element of deterrence in the sentencing process is a material factor in the community's perception of justice and legal convictions.*"[40] The emphasis, in this regard, must necessarily be on the killing of a human being who was behind a toilet door and who presented no danger to the accused, as well as on the fact that the accused formed an intention to shoot in the bedroom and when he reached the bathroom he immediately did so.

2.51 We respectfully submit that the court underemphasised the trite principle that "*[t]aking the life of a fellow human being is always a serious offence which leads to outrage and demands heavy punishment.*"[41]

2.52 We furthermore respectfully submit that the Court's material misdirection in failing to grade the degree of *dolus eventualis* would warrant interference with the sentence on appeal.

3.

The sentence of six years' imprisonment on the murder charge, with respect, attracts the epithets "shocking", "startling" and "disturbingly inappropriate", having

---

[39] **R v Karg** 1961 (1) SA 231 (A) at 236A-B.
[40] **S v Mnisi** 2009 (2) SACR 227 (SCA) at para [19].
[41] **S v Thathana** 2008 (1) SACR 494 (W) at 495*g*.

regard to the objective gravity of the crime and the interests of society and those of the victim and the victim's family, which outweigh the personal circumstances of the accused in a case of this nature where the elements of retribution and deterrence predominate, and when the benchmark which the legislature has ordained in Act 105 of 1997 is taken into account.

4.

We respectfully submit that the sentence of six years' imprisonment does not adequately reflect the seriousness of the crime of murder and the natural indignation and outrage of the public.

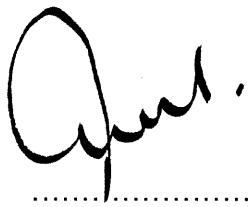
5.

In conclusion, we respectfully submit that the sentence of six years' imprisonment, in all the circumstances, is disproportionate to the crime of murder committed *in casu*, that is to say, shockingly too lenient, and has accordingly resulted in an injustice and has the potential to bring the administration of justice into disrepute.

6.

PLEASE TAKE NOTE that this application was drafted without having had the benefit of a signed judgment by this Honourable Court.

SIGNED and **DATED** at **PRETORIA** on this the **21st** day of **JULY 2016**.



.....

GC NEL (with him A Johnson and D Broughton) on behalf of applicant.