CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 308/20

In the matter between:

LIQHAYIYA TUTA Applicant

and

THE STATE Respondent

Neutral citation: *Tuta v The State* [2022] ZACC 19

Coram: Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ

Judgments: Unterhalter AJ (majority): [1] to [81]
Kollapen J (dissenting): [82] to [187]

Heard on: 8 February 2022

Order issued on: 13 May 2022

Reasons issued on: 31 May 2022

Summary: Jurisdiction — oral submissions — arguable point of law — application of incorrect legal test — no prejudice arising

Extempore judgment — ambiguity in judgment — rules of interpretation — rights of the accused

Putative private defence — application of incorrect legal test — misapplication of established legal principle — arguable point of law

REASONS FOR ORDER

UNTERHALTER AJ (Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring):

Introduction

[1] The applicant, Mr Liqhayiya Tuta, was tried before the High Court of South Africa, Gauteng Division, Pretoria[1] (High Court). He was convicted on a count of murder and a further count of attempted murder. The applicant was sentenced to life imprisonment on the count of murder and 15 years' imprisonment on the count of attempted murder. He has approached this Court to seek leave to appeal, and an order setting aside his conviction and sentence.

[2] On Friday, 13 May 2022, this Court made the following order:

1. Leave to appeal is granted.
2. The appeal is upheld and the conviction and sentence are set aside.
3. The order of the High Court of South Africa, Gauteng Division, Pretoria is replaced with the following:
   "The accused is found not guilty and acquitted."
4. The Head of the Kgosi Mampuru II Central Correctional Centre, Pretoria, alternatively the Head of the Johannesburg Correctional Service, or the Head of the relevant facility where the applicant has been transferred to, is directed to release the applicant, Mr Liqhayiya Tuta, from prison immediately.

[1] *S v Tuta* [2019] ZAGPPHC 1059 (High Court judgment).

5. Reasons for this order shall be given at a later date.

[3] Paragraph 5 of the order stated that reasons would be given at a later date. These are the reasons.

Background

[4] On 2 March 2018, at about 23h00, the applicant accompanied his friend to his residence in Sunnyside, Pretoria. The applicant and his friend realised that they were being followed by a red unmarked motor vehicle with its occupants wearing civilian clothing. The applicant and his friend panicked and ran away, believing that the occupants of the vehicle intended to harm them. They ran in different directions.

[5] The two occupants of the unmarked motor vehicle were, in fact, police officers. They were on duty patrolling Sunnyside, Pretoria, in civilian clothing. According to the testimony of Constable Lawrence Makgafela (Constable Makgafela), he and his partner, Constable Nkosinathi Kenneth Sithole (Constable Sithole), attempted to arrest the applicant after he and his friend ran away. The police officers suspected the applicant of being in possession of a stolen laptop because, according to the testimony of Constable Makgafela, it appeared as if the applicant was hiding a laptop under his tracksuit jacket. They pursued him, first in the unmarked car, and thereafter on foot. Constable Makgafela ran after the applicant and his friend. Constable Makgafela testified further that, even though he was wearing civilian clothing, he also wore a bullet proof vest bearing the South African Police Service (SAPS) insignia. He removed the vest to give chase to the applicant, after realising that it slowed him down. Constable Makgafela and his partner overpowered the applicant, and whilst his partner held the applicant down, Constable Makgafela went to the vehicle to fetch handcuffs. The applicant, using a flick knife that was in his pocket, then stabbed Constable Sithole. When Constable Makgafela returned, the applicant stabbed him in the head. Constable Sithole was admitted to Muelmed Hospital on 3 March 2018, and

died on the same day. Constable Makgafela was hospitalised for 34 weeks and now lives with a severely injured left eye that has affected his eyesight.[2]

[6] The applicant gave evidence. He admitted to stabbing both police officers, and testified that he thereafter left the scene immediately to seek help. He testified that, after failing to receive assistance from security guards in the vicinity, he went to his residence. There he told the security guard what had happened, and also called his sister to tell her.

[7] The following day, the applicant, accompanied by his sister, went to the police station to report the matter. They were informed by the police that a case could not be opened because the applicant could not identify his attackers. The applicant left his contact details and residential address with the police officer on duty. He was arrested later that day at his residence. The applicant handed over the denim jacket that he had been wearing the previous night. When the police demanded he hand over the stolen laptop, the applicant informed them he had not been carrying a laptop.

Litigation history

High Court

[8] The applicant was charged with one count of murder for killing Constable Sithole, and one count of attempted murder for stabbing Constable Makgafela in the head. He pleaded not guilty to both counts. On 19 September 2019, the applicant was convicted on the charges of murder and attempted murder.[3] The minimum sentence for killing a police officer is life imprisonment and the High Court found no substantial and compelling circumstances that permitted it to impose a lesser sentence.[4] The applicant was sentenced to 15 years' imprisonment on the count of attempted murder.

[2] Id at para 5.1.

[3] Id (judgment on sentence) at paras 3 and 16-8.

[4] Id (judgment on sentence) at para 15.

[9] The applicant made an application to the High Court for leave to appeal against his conviction. On 13 December 2019, that application was refused.

Supreme Court of Appeal

[10] On 13 January 2020, the applicant lodged an application for leave to appeal with the Supreme Court of Appeal. That application was dismissed on 30 April 2020 on the basis that it had no reasonable prospects of success.

[11] On 22 June 2020, the applicant filed an application to the Supreme Court of Appeal in terms of section 17(2)(f) of the Superior Courts Act,[5] requesting the President of the Supreme Court of Appeal to reconsider the Court's decision to refuse the application for leave as there were exceptional circumstances to do so.[6] On 25 November 2020, the President of the Supreme Court of Appeal dismissed the application for reconsideration.

Before this Court

[12] The applicant's written and oral submissions differ in material respects. Therefore, I shall treat them separately. The parties were directed by this Court to file supplementary written submissions to address the question whether the finding of the trial court that there were no substantial and compelling circumstances so as to deviate from the minimum sentence is a matter of sentencing discretion or a value judgment. This particular issue was not previously raised by the parties.

[5] 10 of 2013.

[6] Section 17(2)(f) of the Superior Courts Act confers a discretion on the President of the Supreme Court of Appeal, in exceptional circumstances, to refer a decision of that Court, refusing an application for leave to appeal, to the Court for reconsideration and, if necessary, variation.

Applicant's written submissions

[13] The applicant advanced two grounds which, he contended, engage this Court's jurisdiction and serve as the basis for the applicant's leave to appeal against his conviction.

[14] The first ground is the infringement of the applicant's right to a fair trial in terms of section 35(3) of the Constitution. The second ground is that the matter raises an arguable point of law of general public importance which ought to be considered by this Court, namely, the High Court's misapplication of the test for putative private defence.

Right to a fair trial – conduct of the Presiding Officer

[15] The applicant submitted that, as a result of the trial Judge's intervention, the prosecutor did not cross-examine him regarding his intention. As a result of this irregularity, he was not informed about the State's case insofar as it related to his intention, namely—

> "whether the State's case was that he knew that the assailants were policemen (*dolus directus*), or that he foresaw that they could be policemen and acted regardless (*dolus eventualis*), or that he may not have known but should have foreseen that they were policemen (negligence)."

The applicant also submitted that the prosecutor had not "taken a clear position on this during his opening address". Therefore, the applicant was not cross-examined regarding his state of mind. The applicant relied on this Court's decision in *Molimi* in which it was held that "[t]he right of the accused at all important stages to know the ambit of the case [she or he] has to meet goes to the heart of a fair trial".[7] The applicant submitted that this irregularity undermined his right to a fair trial and raised

[7] *S v Molimi* [2008] ZACC 2; 2008 (3) SA 608 (CC); 2008 (5) BCLR 451 (CC) (*Molimi*) at para 54.

"a legal question of general public importance at the heart of our system of criminal justice".

[16] The applicant advanced an additional ground upon which he relied to appeal against his conviction. He submitted that the trial court rejected evidence that was not disputed by the State. The evidence referenced the conduct of the applicant after he had stabbed the police officers. This, the applicant argued, also constituted an irregularity. The applicant relied upon this Court's judgment in *Van der Walt*[8] and contended that in *Van der Walt* this Court upheld an appeal against conviction on the basis that the trial court relied on exhibits, belatedly, in its judgment, so that the accused did not know during his trial that the exhibits would be relied upon.[9] The applicant argued that the same principle applied to the evidence of an accused that was not disputed by the prosecution.

[17] The applicant's evidence regarding the measures he took to attempt to report the incident was not disputed by the respondent. However, it was rejected by the trial court.[10] This was despite Constable Makgafela testifying that he would not have been able to identify the applicant after the incident, and yet the applicant was nevertheless arrested at his place of residence. This, the applicant submitted, corroborated his version that he went to the police station and tried to report the matter.

Arguable point of law of general public importance

[18] The applicant relied upon a second ground upon which to found jurisdiction. He contended that this Court enjoys jurisdiction on the basis that the case raises an arguable point of law of general public importance which ought to be considered by

[8] *Van der Walt v S* [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC).

[9] Id at para 30.

[10] High Court judgment above n 1 at para 21.

this Court. The applicant, relying upon *Paulsen*,[11] submitted that there was an incorrect application of the test for putative private defence by the trial court.[12]

Applicant's oral submissions arguable point of law of general public importance

[19] Some confusion arose, in the course of oral argument, as to what test the trial court had adopted and applied in respect of the issue of putative private defence.

[20] First, the record filed by the parties with this Court did not correspond with the papers referred to by counsel during oral submissions. Second, the High Court judgment filed by the parties was not (or at least, did not appear to be) the judgment referred to by counsel during oral submissions. This has created some uncertainty. Therefore, I shall refer to the test for putative private defence referenced in (a) the judgment contained in the record filed with this Court, and (b) the judgment available on SAFLII (also referred to during oral submissions).

The judgment in the record filed with this Court

[21] This judgment (on conviction), dated 19 September 2019, is an unsigned *extempore* judgment. It states—

> "the accused defence firstly amounts to private defence, or more commonly known as self-defence. *A defence excluding unlawfulness, where the test is objective, and secondly, putative self-defence which relates to the accused state of mind and where the test is objective*. The test to be applied in respect of the accused, he generally held it mistakenly believed that he was acting in lawful self-defence, or whether his belief was also held on reasonable doubt." (Emphasis added.)

[11] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 30.

[12] An introductory summary of the applicant's written submissions. states that "the trial court *failed to apply the correct legal test* to determine whether the applicant's defence that he acted in putative private or self-defence was reasonably possibly true". However, the applicant's written submissions argue the case that the test was applied incorrectly, not that the incorrect test was applied. The latter was argued by the applicant during oral submissions.

The judgment available on SAFLII and found in the court file

[22] This judgment (on conviction), dated 19 September 2019, is signed by the Judge and states:

> "The accused's version, as mentioned above is that he acted in self-defence, and that he did not know that the people who attacked him were policemen executing their duties. As mentioned above, *his defence amounts to putative self-defence. The test is subjective, in other words, what the accused had in mind, objectively considered*."[13] (Emphasis added.)

The differences in the formulation of the test for putative private defence in these two versions of the judgment of the trial court are matters to which I shall return.

[23] During oral submissions, the applicant did not argue that the trial court misapplied the test for putative private defence. Instead, the applicant argued that the trial Judge misunderstood the test. The applicant's submissions relied primarily on the contention that the trial court failed to articulate the test for putative private defence correctly and that it conflated the requirements for fault and negligence when articulating the test. This incorrect understanding of the test for putative private defence, the applicant argued, constitutes a failure of justice.

Appeal on sentence

[24] In the event that the appeal against the applicant's conviction was unsuccessful, the applicant submitted that the imposition of a sentence under mandatory minimum sentencing legislation, and the determination by the trial Judge as to whether there are substantial and compelling circumstances warranting a departure from the mandatory minimum sentence, is not a true discretion insulated from interference on appeal. Rather, the determination is a value judgment that permits of appellate correction,

[13] High Court judgment above n 1 at para 8.

absent which, legislative mandatory minimum sentencing infringes the constitutional right to a fair trial.

Respondent's submissions

[25] The respondent submitted that it is not in the interests of justice for leave to be granted. The respondent relied on this Court's decision in *Paulsen* in which it held that "the interests of justice factor aims to ensure that the court does not entertain any and every application for leave to appeal brought to it".[14]

[26] The respondent also submitted that the applicant's legal counsel did not raise any complaints with the trial Judge, which counsel could have done. According to the respondent, the applicant's rights were not infringed and no irregularities occurred.

Arguable point of law of general public importance

[27] On the evidence, the respondent contended that the applicant was well aware that he was pursued by police officers. The police officers were wearing bullet proof vests with the SAPS insignia and it was not disputed that the streetlights were on when the applicant was spotted by the police. In addition, the police officers identified themselves to the applicant. Accordingly, the applicant did not act in putative private defence and the conviction is unassailable.

Appeal on sentence

[28] The respondent, with reference to *Malgas*,[15] submitted that the court's discretion in imposing the prescribed minimum sentence is limited. Furthermore, so it was contended, there is no rule preventing a court from sentencing a first time offender to direct imprisonment, especially in such severe cases. Thus, the sentence is justified.

[14] *Paulsen* above n 11 at para 30.

[15] *S v Malgas* [2001] ZASCA 30; 2001 (2) SA 1222 (SCA) (*Malgas*) at para 25.

Jurisdiction and leave to appeal

Fair trial

[29] The applicant contended that the curtailment of the prosecution's cross-examination of him by the trial Judge resulted in the applicant not knowing the prosecution's case as to his state of mind. Since the applicant's case rested upon putative private defence, it was essential for the applicant to have known what the prosecution alleged his state of mind to have been. Did the prosecution's case rest upon the allegation that the applicant knew that his assailants were police officers; or that he had foresight that they were police officers, and acted heedless of such foresight; or that the applicant acted when he ought reasonably to have recognised that his assailants were police officers? These states of mind constitute different species of fault, and the applicant was entitled to know, precisely, the case made against him. This, it was submitted on behalf of the applicant, was an irregularity of sufficient seriousness so as to undermine the applicant's right to a fair trial. Following *Van der Walt,*[16] an irregularity of this kind engages the jurisdiction of this Court.

[30] Not every allegation of an infringement of fair trial rights will engage the jurisdiction of this Court.[17] An irregularity must be "sufficiently serious as to undermine basic notions of trial fairness and justice".[18] I turn to consider whether the applicant's complaint that the trial court's curtailment of his cross-examination by the prosecution amounted to an irregularity is warranted; and if so, whether this Court's jurisdiction is indeed engaged.

[31] In the course of the trial, and towards the end of the prosecution's cross-examination of the applicant, the following intervention took place by the trial Judge:

[16] *Van der Walt* above n 8 at para 15.

[17] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*) at para 15.

[18] *Van der Walt* above n 8 at para 15.

> "MS ROOS [counsel on behalf of the respondent]: Constable [Makgafela] said that the first time he saw you he followed you on foot and he was wearing his reflector bullet proof vest.
> ACCUSED: As I testified that the first time we saw this red Polo it was at the T Junction at Riley Street and the people that I saw, none of them was wearing a bullet proof vest.
> COURT: Ms Roos, is there any sense in confronting the accused with the state's evidence at this point in time, you know what his version is.
> MS ROOS: Yes, M'Lord, as long as there. . . [intervenes]
> COURT: Now move on please.
> MS ROOS: . . . is not an inference drawn from the fact that the state did not put it, M'Lord, then I can leave that, M'Lord.
> COURT: Yes."

[32] This intervention was misplaced. The point of the cross-examination was not simply to permit the prosecution to ascertain and then test the applicant's version. At this stage of the trial, it was doubtless true that the prosecution did understand the applicant's version. The trial court lost sight of the elementary proposition that the cross-examination of the accused by the prosecution requires that the prosecution must put its case to the accused. The trial court's impatience was unwarranted and irregular because the prosecution was engaged upon an essential task – to put its case to the applicant. The question that arises is this: is the trial rendered unfair, upon the interruption by the trial Judge of the prosecution's efforts to put its case to the accused?

[33] The intervention of which the applicant complains was the curtailment of the prosecution's cross-examination of the applicant. This curtailment was, in the first place, a disability placed upon the prosecution. The prosecution sought to put its case to the applicant and was prevented further from doing so. That may have important entailments. The State must discharge its burden of proof. The prosecution must put its case to an accused. A failure to do so, or to do so sufficiently, will have a bearing upon the trial court's assessment of the evidence led at trial. In this case, as we shall

see, the cross-examination of the applicant, up to the point of the trial Judge's intervention, had already traversed some important aspects of the State's case. What remained to be done by the prosecution may have affected the trial court's assessment of the applicant's testimony and whether the State had discharged its burden of proof. But to determine this would require an assessment of all the evidence before the trial court. Such an assessment amounts to an appeal on a question of fact, a matter outside the jurisdiction of this Court.[19] It is also not a ground of appeal relied upon by the applicant.

[34] Is the intervention by the trial Judge, apart from the disability placed upon the prosecution, then, also an irregularity that compromised the applicant's right to a fair trial? The applicant contended, as I have explained, that he did not know the State's case against him as to his state of mind. However, in the summary of substantial facts, the central issue in the trial was framed in the following way:

> "The officials pinned the accused down. The accused said that he was not aware that they were police officers. The complainant in count 2 produced his appointment certificate and demanded an explanation for the laptop. The accused did not answer."

[35] This passage made it plain that the State's case was that Constable Makgafela had identified himself as a police officer, and thus the applicant was aware that his pursuers were police officers. For this reason, according to the State's case, the applicant could not maintain that he was unaware that his assailants were police officers.

[36] The prosecution developed this case in the course of the evidence it led at trial. The State called Constable Makgafela. He testified that when he had given chase, he had shouted the words "stop police". When he and Constable Sithole caught up with the applicant, who fell to the ground, Constable Makgafela testified as follows:

[19] *Boesak* above n 17 at para 39.

> "My first question to him was 'do you think that you can outrun the police?'. . . His answer to the question I asked, he said 'I did not know that you were the police'. I then took out my wallet and I presented my appointment card to him".

[37] It is plain from the cross-examination of Constable Makgafela that the applicant's counsel was aware of the significance of Constable Makgafela's evidence, and, in particular, that, according to Constable Makgafela, he had identified himself to the applicant as a police officer. Counsel for the applicant explained that the applicant had asked his assailants, "what are you doing?". Constable Makgafela testified that he had answered, "we are the police". Counsel probed when it was that Constable Makgafela had taken off his bullet proof vest which identified him as a police officer. Counsel also put the applicant's version to Constable Makgafela. He put the matter this way: "You see the accused's version is that you were trying to put him into the car and then he feared that he was either kidnapped or hijacked, it does not matter". And later counsel framed his client's case thus: "[The] [a]ccused will say that he stabbed you and Sithole . . . he was acting in self-defence". To which Constable Makgafela responded, "No M'Lord he will be lying by so saying because he already knew by the time that we were police officers". Counsel then said: "The accused will deny that he knew at any stage that you were police officers".

[38] These exchanges leave no doubt that the applicant understood the State's case as to his state of mind at the time that he stabbed the police officers. That case was quite simply that the applicant knew that he was being arrested by police officers, and hence he could not maintain that he was acting in the belief that he was defending himself against an attack by violent assailants.

[39] After Constable Makgafela had testified, the State closed its case. The applicant elected to testify. Before doing so, the applicant did not complain that he was unclear as to the State's case against him. His counsel sought no further clarity from the State, and voiced no concern that his client's election to testify was in any way compromised. In his evidence-in-chief, the applicant's counsel dealt head-on

with the issue of his state of mind. The following evidence was led by the applicant's counsel:

> "Mr Engelbrecht: Okay, did you at any stage know that the two aggressors whom you stabbed were members of the SAPS?
> Accused: No, I did not know, I only learned when I was arrested by the police.
> Mr Engelbrecht: Now any of the two or both of them were they wearing police vests, bullet proof vests.
> Accused: No, they were both wearing civilian clothes.
> Mr Engelbrecht: And did any of them show you their appointment certificate as members of the SAPS?
> Accused: None of them did."

[40] This passage from the applicant's evidence-in-chief leaves no doubt that the applicant and his counsel understood the State's case to be that the applicant knew at the time that he stabbed his assailants that they were police officers.

[41] In the cross-examination of the applicant, and before the trial Judge's intervention, the prosecutor put the testimony of Constable Makgafela to the applicant. The following passage is salient:

> "Ms Roos: But you said then yourself you asked them what you have done wrong and the police officer told the Court there was this discussion about where did you get the laptop they informed you that they are police officers.
> Accused: That is not true what they said."

[42] The prosecutor, later in the cross-examination, raised with the applicant that Constable Makgafela had testified that he was wearing his bullet proof vest. The applicant answered that he had not seen this. It was then that the trial Judge intervened and required the prosecutor to move on, as he saw no point in confronting the applicant with the State's evidence.

[43] However, at this point in the cross-examination of the applicant, the essential features of the State's case as to the applicant's state of mind had already been put to the applicant. Given the evidence led at trial, up to the point of the trial Judge's intervention, taken together with the summary of substantial facts, the applicant knew well the case he was required to meet as to his state of mind. The State's case was that he knew that the men he stabbed were in fact police officers; and when he stabbed them he could not have believed he was acting in self-defence. Rather, he stabbed the police officers with intent to kill them.

[44] Once that is so, the intervention of the trial Judge did not undermine the applicant's right to a fair trial. The trial Judge should not have prevented the prosecution from its further efforts to put its case to the applicant. But the consequence of that intervention was to saddle the prosecution with an evidential impediment to the discharge of its onus and gave rise to no unfairness of the kind postulated by the applicant. At the point in the trial that the trial Judge's intervention took place, the applicant knew the case he had to meet. The applicant had elected to give evidence, and had given his evidence-in-chief. His cross-examination was well advanced. No unfairness of the kind relied upon by the applicant vitiated the proceedings.

[45] It follows that the applicant suffered no irregularity, as he has alleged, let alone an irregularity of sufficient seriousness. This Court therefore has no jurisdiction to entertain this ground of appeal. As to whether the disability under which the trial Judge placed the prosecution had any bearing upon the discharge by the State of its onus of proof, this is an issue the applicant did not rely upon as a ground of appeal. In any event, that was an impediment suffered by the State, not by the applicant. If anything, it enured to the benefit of the applicant. Consequently, the applicant's appeal on the basis that his right to a fair trial was infringed must be dismissed.

Putative private defence

[46] The applicant at trial relied upon putative private defence. In *De Oliveira*,[20] the Appellate Division set out the test for putative private defence. An accused who kills another, believing his or her life to be in danger, when, objectively, it is not, acts unlawfully. However, where such an accused kills another in the mistaken but genuine belief that his life is in danger, the accused lacks the intention to act unlawfully. The accused is accordingly not guilty of murder. The accused may be guilty of culpable homicide. That depends upon whether his belief that his life was in danger was reasonable or not. Putative private defence is thus concerned with culpability and not unlawfulness. Culpability on a charge of murder is judged according to what the accused believed. Culpability on a charge of culpable homicide is determined on the basis of the reasonableness of that belief.

[47] The applicant's case in relying on putative private defence was this: the two persons who subdued him and sought to place him in their vehicle turned out to be police officers. The applicant was not objectively acting in self-defence. However, the applicant genuinely believed that his life was in danger at the hands of two assailants. He stabbed these assailants to protect himself, not realising that they were police officers. His belief was both genuine and reasonable, and hence the applicant was guilty of neither murder nor culpable homicide.

[48] The trial court believed the testimony of Constable Makgafela and disbelieved the applicant. In particular, the trial court found that Constable Makgafela had informed the applicant, on apprehending him, that he and Constable Sithole were police officers. That finding excluded the applicant's reliance upon putative private defence. If the applicant was told that his two assailants were police officers, he could not have genuinely held the belief that his life was in danger. Hence, when he stabbed the police officers he intended to kill them.

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[20] *S v De Oliveira* [1993] ZASCA 62; 1993 (2) SACR 59 (A) (*De Oliveira*) at 63I–64B.

[49] The applicant's second ground of appeal is that the trial Judge failed to have regard to all the evidence led at trial from which the applicant's subjective state of mind might have been inferred. Had the trial Judge done so, he would have concluded that it was reasonably possibly true that the applicant did not realise that his assailants were police officers and genuinely believed that his life was in danger. The State would then not have discharged its burden of proof.

[50] This ground of appeal runs into a threshold difficulty. The incorrect application by the trial court of a well-established legal defence raises neither a constitutional issue, nor an arguable point of law.[21] If the trial court made no error of law in formulating the test for putative private defence, then the misapplication of the correct test to the evidence before the trial court is not a matter that engages our jurisdiction. The written submissions made on behalf of the applicant sought to persuade us that the trial court failed to consider all the evidence, and thus failed properly to draw warranted inferences as to the applicant's subjective state of mind. That may or may not be so, but the failure by a trial court properly to evaluate the evidence is an error of fact and not one of law. This Court's jurisdiction does not extend to such issues.

[51] Perhaps in contemplation of this difficulty, applicant's counsel, in oral submissions before us, extended the remit of the applicant's appeal. Counsel submitted that the trial court had, in addition, failed to formulate the correct test for putative private defence and then applied the wrong test to the evidence. That, of course, is an error of law. It carries the risk of an unsound conviction and an unfair trial, and does engage our jurisdiction.[22]

[21] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) (*Jiba*) at para 49.

[22] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at paras 43–50.

[52] This gives rise to further difficulty. Error of law was not advanced as a ground of appeal in the applicant's application to this Court. Jurisdiction, as a rule, is determined on the pleadings.[23] However, this Court has held that it may raise a point of law that falls within its jurisdiction, but was not raised by the parties. This may be done under the caveat that it is done exceptionally, that the point of law arises on the papers, and that the parties are given an opportunity to deal with the issue.[24] I cannot see any basis why this reasoning should not be extended to the situation where an error of law is raised for the first time in oral argument. If the error of law raises a constitutional issue or an arguable point of law of general public importance and the interests of justice require our intervention because of the risk of an unsound conviction, then if the issue can be determined on the papers as they stand and no prejudice arises, this Court should not be precluded from considering the matter.

[53] The error of law identified by the applicant's counsel in oral submissions before this Court is fundamental to the proper assessment of the defence advanced by the applicant at trial. An error of this kind, if left uncorrected, would render the applicant's trial unfair. It would also condemn the applicant to suffer a conviction and sentence of great consequence. The point of law arises on the record before us, and has been fully traversed in argument. No prejudice arises to the State if we entertain the matter, but great prejudice to the applicant would occur if the error of law is shown to have been made, and remains uncorrected. In these circumstances, a constitutional issue arises that engages our jurisdiction. It is also in the interests of justice that this late-arising ground of appeal be heard. Leave to appeal is consequently granted.

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[23] See *Jiba* above n 21 at paras 38–9; *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC); and *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

[24] *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) at para 58; and *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd* [2021] ZACC 35; 2022 (5) BCLR 532 (CC) at para 38.

Merits

[54] I turn then to consider whether the trial Judge did indeed make an error of law in his formulation of the test for putative private defence. Ordinarily this would simply require a comparison of the test set out in the judgment of the trial court with the requirements of our law. However, we are hampered in undertaking this exercise by the record filed in this Court.

[55] As indicated, the record contains what is described as a transcript of the trial proceedings. That transcript contains an unsigned judgment. This appears to be the *extempore* judgment handed down by the trial Judge in Court on 19 September 2019 (the *extempore* judgment). The following passage appears in the *extempore* judgment:

> "[T]he accused defence firstly amounts to private defence, or more commonly known as self-defence. *A defence excluding unlawfulness, where the test is objective, and secondly, putative self-defence which relates to the accused state of mind and where the test is objective*. The test to be applied in respect of the accused, he generally held it mistakenly believed that he was acting in lawful self-defence, or whether his belief was also held on reasonable doubt. (Emphasis added.)
>
> . . .
>
> He was of the mind that he was entitled to react against the attack, not knowing that the men were policemen or assailants."

[56] The record also contains a judgment, signed by the trial Judge, dated 19 September 2019 (the signed judgment). The signed judgment is formatted in numbered paragraphs and contains the following passages:

> "The accused's version, as mentioned above is that he acted in self-defence, and that he did not know that the people who attacked him were policemen executing their duties. As mentioned above, *his defence amounts to putative self-defence. The test is*

> *subjective. in other words, what the accused had in mind, objectively considered.*[25] (Emphasis added.)
>
> . . .
>
> It follows that the accused's defence firstly amounts to private defence, or more commonly known as self-defence, a defence excluding unlawfulness, where the test is objective, and secondly putative self-defence, which relates to the accused's state of mind and where the test is subjective, in respect of whether the accused genuinely, albeit mistakenly, believed that he was acting in lawful self-defence, or whether his belief was also held on reasonable grounds."[26]

[57] We sought to obtain clarity from the parties as to which judgment this Court should reference. None was provided, save that we were told that a copy of the signed judgment was found in the court file. The signed judgment is also the version that was published on SAFLII. We can only infer that the trial Judge, having handed down the *extempore* judgment in court, then edited that judgment, and produced the signed judgment which was placed in the court file.

[58] The *extempore* judgment, as it was transcribed, contains a clear error of law. It states that "putative self-defence which relates to the accused state of mind and where the test is objective". That is not so. As *De Oliveira* authoritatively explained, when an accused on a charge of murder relies upon putative private defence, the issue for the trial court is whether the State has proved beyond reasonable doubt that the accused subjectively had the intent to commit murder, in other words, whether the accused held the honest but mistaken belief that he was entitled to act in private defence.

[59] What is not clear is whether the reference to an objective test in the *extempore* judgment was simply a transcription error that is not attributable to the trial Judge. The signed judgment reflects a correction. The test of what is described

[25] High Court judgment above n 1 at para 8.

[26] Id at para 5.

as "putative self-defence" in the signed judgment is formulated on the basis that "the test is subjective, in other words, what the accused had in mind, objectively considered".

[60] In *Wells*,[27] the Appellate Division faced a similar difficulty. Two documents were placed before the Appellate Division: an *extempore* judgment and a revised judgment. The parties to the appeal were at odds as to which was the lawful judgment. The Appellate Division considered the conflicting authorities at common law. One line of authority held that a judicial official, having pronounced his or her judgment, is *functus officio* and the judgment is incapable of alteration, correction, amendment or addition. The other approach, following *Voet*, permits the judge, on the same day that judgment is given in court, to "explain (*explicare)* what has been obscurely stated in his judgment and thus correct (*emendare)* the wording of the record provided that the tenor of the judgment is preserved."[28] The Appellate Division favoured the more permissive approach of *Voet.*

[61] The pronouncements in *Wells* must now be considered under the constitutional discipline of the accused's right to a fair trial. An accused is entitled to know the reasons upon which a court relies to exercise its very great and coercive powers of punishment, following upon a conviction. Those reasons must be clearly and precisely formulated. An accused convicted of a crime must be able to understand the basis of the court's decision, not least so as to exercise the right to seek leave to appeal. That is properly done when the accused stands before the court and the judgment is handed down. An accused convicted and sentenced by a court must be able to rely upon the reasons a court provides when its judgment is given. That is the curial pronouncement that reflects the authority of the court. A person convicted of a crime should not be required to suffer the *ex post* reformulations and explanations that a trial Judge considers, on reflection, to best express the reasons for the judgment.

[27] *S v Wells* [1989] ZASCA 154; [1990] 2 All SA 1 (A) (*Wells*).

[28] Id at 820E-F.

[62] In busy criminal courts, the *extempore* judgment is often a necessary part of judicial practice. No discouragement of this useful practice is warranted. Infelicities of style, grammar, spelling and word choice may require revision; and they should be permitted. A patent error or omission may be corrected. However, the substantive reasons for the judgment, handed down in court, must stand. That is the authoritative pronouncement of the court, conveyed to the accused. Importantly, it is through this judgment that the accused is convicted and it also through it that the reasons for the conviction are reflected. If an *extempore* judgment is given, its reasons are authoritative, and they may not be altered or embellished to give further expression to what the court meant to convey. The time for that is when the judgment is handed down by the court. This is a somewhat less permissive holding as to the competence of a trial court to vary its judgment in a criminal case than was allowed in *Wells*, a pre-constitutional era decision. However, in my view, it better accords with the constitutionally entrenched rights of an accused to a fair trial and the duties of a court to pronounce with finality upon the case before it.

[63] Ordinarily, a legal text is interpreted according to the now well-established triad of text, context and purpose.[29] That is an exercise by recourse to which a court arrives at a singular, authoritative interpretation that brings finality to a legal dispute. If the text is ambiguous, the court's task is nevertheless to provide the authoritative meaning of the text. However, where the issue on appeal, as here, is how to treat an ambiguity in a judgment, rendered at the conclusion of a criminal trial, a different principle is of application. The question is not simply what did the trial court mean by the ambiguous text? Rather, if the ambiguity is not resolved because it reflects a patent error, the ambiguity must be acknowledged and, if it is material, the ambiguity must redound to the benefit of the accused. That is so because the presumption of innocence requires that we may not permit an accused to suffer a conviction which

[29] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

may have resulted from legal error. If, then, it is unclear whether the trial Judge was in error as to the law, because the judgment is ambiguous and not the result of a patent error, an appeal court should not seek to arrive at an interpretation that provides its best sense of what the trial court meant to say. Rather, if there is a real risk that the trial court fell into legal error, the accused, now on appeal, cannot be required to run that risk. If the legal error is material, the conviction is rendered unsafe, and should be set aside. In this way, an accused person's fair trial rights in section 35(3) of the Constitution are also protected.

[64] It follows that the *extempore* judgment of the trial Judge must be taken to state the legal test relied upon by him to assess the case of putative private defence. The signed judgment may be of some assistance though, to the extent that it does not exceed the bounds of permissible judicial correction.

[65] A comparison of paragraph 5 of the signed judgment and the corresponding passage of the *extempore* judgment, fairly read, indicates an editorial correction that does not change the contents of the *extempore* judgment, save in one important respect. As appears from the relevant passage of the *extempore* judgment, the trial Judge cast the test for putative private defence as objective, whereas in the signed judgment the trial Judge framed the test as subjective. This, the applicant submits, is a manifest error of law.

[66] This Court must, unavoidably, interpret the relevant passage of the *extempore* judgment. The passage posits that the test relates to the accused's state of mind, but that the test is nevertheless objective. One way to interpret this is that there was a transcription error or that the word "objective" was said in error and the trial Judge meant to say "subjective". Some confirmation of this latter interpretation is to be found in the logic of the passage itself. The trial Judge was contrasting private defence, a defence excluding unlawfulness, where the test is objective, and putative private defence, which relates to the accused's state of mind. It would make logical sense then to cast putative private defence as a defence tested on a subjective basis,

and hence the trial Judge may simply have misspoken. The *extempore* judgment later contains the following passage: "I have already mentioned that the accused (sic) defence amounts to putative self-defence. He was of the mind that he was entitled to react against the attack, not knowing whether the men were policemen or assailants." This may also be read as supportive of the trial Judge's adherence to a subjective test.

[67] There is a danger, in an exercise of this kind, to interpret the judgment so as to repair an error, and treat the word "objective" in the *extempore* judgment as either a transcription error or a word said in error. However, in paragraph 8 of the signed judgment, the following sentences appear: "As mentioned above, his defence amounts to putative self-defence. The test is subjective, in other words, what the accused had in mind, *objectively considered*" (emphasis added). The second sentence, here cited, has no analogue in the *extempore* judgment, but it is a clear indication of what the trial Judge considered the test to be for putative private defence to which he had sought to give expression in his *extempore* judgment.

[68] What then did the trial court understand by this gloss upon the test that the accused's state of mind must be ascertained, "objectively considered". Was this simply a reference to the commonplace recognition that a finding by the trial court as to the accused's state of mind rests upon inferences drawn from the evidence led at trial? Or was the reference to "objectively considered" the invocation of a regulating consideration of reasonableness in determining the accused's state of mind? In other words, even if the accused acted in the genuine but mistaken belief that his life was in danger, putative private defence requires that his mistake must be reasonable.

[69] If that is the test for putative private defence that the trial court relied upon, then it would, as I have sought to explain, confuse how the defence negatives fault in respect of the crimes of murder and culpable homicide. An accused who holds the genuine but mistaken belief that his life is endangered lacks the intention to act unlawfully, and is not guilty of murder. The issue is simply what belief did the accused hold at the relevant time. Whether the accused's mistaken belief, though

genuinely held, was reasonable or not, determines whether the accused is guilty of culpable homicide.

[70] The trial Judge, in formulating the test for putative private defence, was unquestionably passing judgment on the charges of murder and attempted murder. He was not considering the separate question as to whether the applicant, if not guilty of murder, was nevertheless guilty of culpable homicide. That enquiry would have followed only *after* it was established that the applicant had held a particular belief – the question would then have been, was that belief reasonable? If not, he could have been convicted of culpable homicide, a competent verdict on a charge of murder. It follows that there is an appreciable risk that the trial Judge, in formulating the test for putative private defence in the signed judgment, imported objective considerations of reasonableness into the test, and thereby confused how the defence negatives fault in respect of the crime of murder. Although the gloss of objective consideration may have been intended to have a more benign evidential import, given the gravity of the charges with which the applicant was charged, any ambiguity on this score must be resolved in favour of the applicant.

[71] How then does the importation of reasonableness into the test of putative private defence in the signed judgment affect our interpretation of what is said in the *extempore* judgment, given that the formulation of the test in the *extempore* judgment is indicative of the trial Judge's reasoning? In my view, it casts doubt upon the interpretation of the *extempore* judgment, offered above, that the reference to an objective test was either a transcription error or slip of the tongue. That is so because the signed judgment indicates that the trial Judge did consider putative private defence, on a charge of murder, to require some conformity with objective considerations of reasonableness. At the very least, the contents of the signed judgment support the conclusion that the trial Judge was confused as to the test for putative private defence.

[72] The *extempore* judgment, it will be recalled, formulated the test for putative private defence as "objective". We would only read that as a reference to "subjective", if the error was clear, and beyond doubt. On a matter as important as the formulation of the test upon which the applicant's defence rests, our interpretative task is not to ask what the trial Judge could have meant to convey, but rather, whether what he said must be taken to mean its opposite, and that this must manifestly be so. If the error is not obvious, we run the risk of overlooking an error of law that has significant consequences for the safety of the applicant's conviction.

[73] In my view, the formulation of the test for putative private defence in the *extempore* judgment does not meet the test of manifest or obvious error. The relevant passage in the *extempore* judgment certainly makes more sense if the reference to the word "objective" is taken to mean "subjective". However, my analysis of the signed judgment indicates that the trial Judge was not clear as to the distinction between these concepts in his appreciation of the requirements for putative private defence. That being so, we cannot discount the possibility that, in characterising the test as objective in the *extempore* judgment, the trial Judge meant to import some considerations of reasonableness into his appreciation of the test. In consequence, we cannot say that the *extempore* judgment gives expression to an obvious error. The relevant passage of the *extempore* judgment must thus be read as it appears from the transcript.

[74] On this reading of the *extempore* judgment, the trial Judge made a conspicuous error of law. On a charge of murder, putative private defence is not determined on the basis of a test that is objective. Following *De Oliveira*, the authorities are clear.[30] The central issue at the trial of the applicant should have been whether the State had proved beyond reasonable doubt that the applicant subjectively had the intent to commit murder. If it was reasonably possibly true that the applicant entertained the honest, but mistaken belief that his life was threatened, and that he was entitled to act

[30] See, amongst others, *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; 2016 (2) SA 317 (SCA) at paras 52-3.

in private defence, then the State would not have proved its case. The reasonableness or otherwise of the applicant's belief is not relevant to this enquiry. It is relevant to the question as to whether the applicant was guilty of culpable homicide. The trial Judge's invocation of an objective test for putative private defence was an error of law, one that is fundamental to the soundness of his findings as to the guilt of the applicant on the charges of murder and attempted murder.

[75] I am fortified in my conclusion that the trial Judge made an error of law when regard is had to the trial court's assessment of the applicant's evidence at trial. I engage this enquiry, not to determine whether the trial Judge failed to apply the law, a matter, standardly, outside of our jurisdiction, but rather to consider whether the trial Judge sought to make findings as to the applicant's state of mind, free of considerations of reasonableness.

[76] As I have sketched above, the trial Judge approached the case on the basis that if he believed Constable Makgafela's evidence, the applicant must be disbelieved, more particularly as to whether Constable Makgafela had informed the applicant that his pursuers were police officers. This binary approach failed to consider whether the applicant in fact appreciated what had been said to him. The applicant's evidence was that he was sworn at by his pursuers in a language he did not fully understand. Whether the applicant's version was reasonably possibly true required a careful assessment of what occurred after the applicant stabbed the police officers.

[77] The applicant's evidence was that, after the stabbing, he told the security guards in the vicinity that he was being pursued and sought help. He then went to his residence and reported the matter to the security guards there; he telephoned his sister, and told her what had happened. He explained that he stabbed two men who tried to rob and abduct him. The next day, the applicant and his sister went to the police station to report the matter. The police declined to open a case because the applicant could not identify his attackers. Later, the applicant was arrested at his residence. Since Constable Makgafela testified that he did not know the applicant the

overwhelming likelihood is that the police only knew of the applicant's place of residence, as a result of the applicant's report to the police.

[78] This evidence of what occurred after the stabbing was not challenged by the prosecution. Yet the trial Judge rejected it as inconsistent and improbable, and did so absent any explanation as to how the police came to learn of the applicant's identity and place of residence, save for the report that the applicant had made to the police. The applicant's account of what he did after the stabbing is consistent with his version that he thought he was being attacked by assailants, that his life was in danger, and that he had stabbed the deceased and Constable Makgafela in the belief that he needed to protect himself. Had the trial Judge focused his assessment on the applicant's state of mind, he could not have simply rejected the post-stabbing conduct of the applicant as improbable. It was, after all, uncontradicted and borne out by the arrest of the applicant. It was evidence supportive of the applicant's account of his state of mind.

[79] What this illustrates is that the trial Judge did not have the applicant's state of mind at the forefront of his assessment. Rather, his assessment of the applicant's defence was marked by what he reasoned to be objective considerations and probabilities. This is the very ambiguity that lies at the heart of the trial Judge's formulation of the test for putative private defence. The state of mind of an accused is to be judged, the trial Judge stated, on the basis of "what the accused had in mind, objectively considered", and hence on the basis of reasonableness. That is not the correct test. But it appears to have been the operative test used by the trial Judge. This too, then, supports the interpretation of the test for putative private defence enunciated by the trial Judge in the *extempore* judgment, as being a test that references objective considerations.

[80] I find therefore, that the trial Judge made an error of law going to the heart of the applicant's defence. The conviction and sentence of the applicant by the trial Judge cannot survive this error. The applicant's appeal on this ground succeeds, and his conviction and sentence for murder and attempted murder must be set aside.

Conclusion

[81] For these reasons, this Court issued the order on 13 May 2022 in which it upheld the applicant's appeal, set aside the order of the High Court, acquitted the applicant and ordered his immediate release.

KOLLAPEN J (Mlambo AJ concurring):

Introduction

[82] I have had the benefit of reading and considering the comprehensive and clearly articulated judgment of my brother, Unterhalter AJ (the first judgment). There is little doubt that the challenges to conviction and sentence, both on the papers as well as in argument, relate to a number of constitutional rights, yet none of them, either individually or collectively, raise a constitutional matter or an arguable point of law of general public importance. As a result, the jurisdiction of this Court is not engaged and the application for leave to appeal stands to be dismissed. In particular, I am not in agreement with the conclusion reached in the first judgment that the High Court incorrectly formulated the test for putative private defence. In respect of sentence, no constitutional matter or arguable point of law of general public importance is raised; nor can it be said that any alleged error by the High Court in applying the settled test for substantial and compelling circumstances engages the jurisdiction of this Court.

Background

[83] The applicant was convicted of murder and attempted murder by the High Court and sentenced to life imprisonment and 15 years' imprisonment, respectively. The conviction arose out of an incident which occurred on the night of 2 March 2018 in Sunnyside, Pretoria. The incident led to the stabbing of two policemen, one fatally and the other was left with a serious and permanent disability.

[84] Two mutually destructive versions of what occurred on that night were placed before the High Court and the detail of these versions is set out fully in the first judgment. The applicant says that he and his friend were followed through the streets of Sunnyside by two persons driving an unmarked vehicle and that, fearing for their lives, they sought to get away from them but he was unsuccessful.

[85] The applicant and his friend ran off in different directions but the applicant was caught. He says that he feared for his life and resisted attempts by those who had followed him to force him into the vehicle. In doing so, the applicant used a flick knife he had in his possession to stab the two men. His evidence was that at no stage was he made aware that the two men were police officers.

[86] The version of the State was that the two victims of the stabbing were police officers in plain clothes and on duty that night; they followed the applicant and his friend as they suspected that the applicant may have been in possession of a stolen laptop. At some stage they had to give chase on foot and, in doing so, called out to the applicant to stop and shouted out that they were police officers. The applicant was apprehended and shown a police identification card and in the process of attempting an arrest of the applicant, he stabbed both of them.

[87] A central dispute before the High Court was whether the applicant, as he says, was unaware that the men were police officers or whether, as the State contended, he was made aware that they were police officers before the stabbing occurred. The High Court accepted the evidence of the State, rejected that of the applicant and proceeded to convict the applicant of the charges he faced and thereafter he was sentenced as set out above.

[88] The litigation history before the High Court and the Supreme Court of Appeal is fully dealt with in the first judgment, as are the submissions of the parties before this Court, and they do not warrant repeating as they are sufficiently comprehensive.

Challenge to the conviction

[89] This challenge was advanced on two legs. The first one related to the intervention of the trial Judge during the cross examination of the applicant. I agree with the conclusion reached in the first judgment that the intervention of the trial Judge did not result in any serious irregularity that impacted on the fairness of the trial. I agree that this leg of the challenge is not sustainable and stands to be dismissed for the reasons given in the first judgment.

[90] The second challenge to the conviction was based on how the High Court dealt with the defence of putative private defence. The argument changed tack substantially during the course of the hearing from one, initially and on the written submissions, located on the incorrect application of the test for putative private defence, to one, in oral argument, asserting that the trial court incorrectly formulated the test. Notwithstanding its late introduction and that the error of law contended for was not pleaded, I agree with the conclusion reached in the first judgment that the issue was fully ventilated before this Court and that the interests of justice coupled with the risk of an unsound conviction must mean that this Court should consider the argument, notwithstanding its lateness.

Jurisdiction and leave to appeal

[91] Section 167(3)(b)(i) of the Constitution provides that "[t]he Constitutional Court . . . may decide (i) constitutional matters". In *Boesak*,[31] this Court set out the approach and what it described as the threshold requirement in applications for leave to appeal when it said:

> "A threshold requirement in applications for leave relates to the issue of jurisdiction. The issues to be decided must be constitutional matters or issues connected with decisions on constitutional matters. This is dealt with more fully below.

[31] *Boesak* above n 17.

> A finding that a matter is a constitutional issue is not decisive. Leave may be refused if it is not in the interests of justice that the Court should hear the appeal. The decision to grant or refuse leave is a matter for the discretion of the Court and, in deciding whether or not to grant leave, the interests of justice remain fundamental."[32]

[92] In *Jiba,*[33] this Court affirmed the two requirements that must be met for leave to appeal to be granted. It said:

> "For leave to appeal to be granted in this Court, the applicant must meet two requirements. These are that the matter must fall within the jurisdiction of this Court and that the interests of justice warrant the granting of leave. For this Court's jurisdiction to be engaged the matter must either raise a constitutional issue or an arguable point of law of general public importance that ought to be heard by this Court."[34]

[93] More recently in *Tembisa,*[35] this Court, in considering what a constitutional matter or an arguable point of law of general public importance meant in the context of section 167(3)(b) of the Constitution, said:

> "In order for a case to be a 'constitutional matter' within the meaning of section 167(3)(b)(i), the resolution of a constitutional issue must be reasonably necessary in order to determine the case's outcome. Similarly, a case only 'raises an arguable point of law' within the meaning of section 167(3)(b)(ii) if the answer to that question is reasonably necessary to determine the case's outcome."[36]

[94] This of course raises the sharp question whether, in these proceedings, there is any constitutional matter or arguable point of law of general public importance whose

[32] Id at paras 11-2.

[33] *Jiba* above n 21.

[34] Id at para 35.

[35] *NVM obo VKM v Tembisa Hospital* [2022] ZACC 11; 2022 (6) BCLR 707 (CC) (*Tembisa*).

[36] Id at para 88.

resolution is necessary to determine the outcome of this appeal. There does not appear to be one.

[95] Given that the applicant's challenge has vacillated between the incorrect application of a settled test to the incorrect formulation of a settled test, it may be useful to set out how those different components of the challenge impact on the jurisdiction of this Court.

[96] In *University of Johannesburg*,[37] this Court distinguished between the two and said that a wrong decision in the application of the law raises neither a constitutional issue nor an arguable point of law of general public importance.[38] It went on, however, to say that where a court departs from settled law, such a departure would establish the arguability of the point of law provided that there was merit to it and it had prospects of success.[39]

[97] The first judgment relies on *University of Johannesburg* for the proposition that if the trial court incorrectly formulated the test then that would constitute an error of law, carrying with it the risk of an unsound conviction and would engage our jurisdiction.

[98] Accordingly, and arising out of *University of Johannesburg*, if the applicant is able to show that the High Court formulated the test for putative private defence incorrectly and in conflict with settled law, that may well constitute an arguable point of law of general public importance. But equally, if no such case can be advanced, then the result must be that this Court's jurisdiction is not engaged and any complaint as to how the test may have been applied will not engage our jurisdiction.

[37] *University of Johannesburg* above n 22.

[38] Id at para 49.

[39] Id at para 50.

[99] Therefore, the question whether the High Court formulated the test for putative private defence correctly and in accordance with settled law, determines the fate of this appeal.

Test for putative private defence

[100] Given the centrality of whether the test was correctly formulated by the High Court, a useful and necessary starting point would be to recall the test for putative private defence.

[101] In *De Oliveira*,[40] the Appellate Division framed the test in the following terms as it sought to distinguish private defence from putative private defence:

> "From a juristic point of view the difference between these two defences is significant. A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way. In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus in which case liability for the person's death based on* intention will also be excluded; at worst for him he can then be convicted of culpable homicide."[41]

[102] The test for private defence is objective while that for putative private defence is subjective, the latter is concerned with culpability and is an enquiry into the state of mind of the accused. The applicant's defence was firstly that of private defence and secondly that of putative private defence, but the High Court correctly characterised it

[40] *De Oliveira* above n 20.

[41] Id at 63H-64B.

as putative private defence – one where the applicant says that he genuinely but mistakenly believed that his life was in danger.

[103] Given that putative private defence is concerned with the culpability of the accused person and the test for putative private defence is characterised as subjective, its application, depending on the charge an accused faces, may require considerations of reasonableness.

[104] As Burchell[42] explains:

> "Provided a foundation is laid for 'putative' private defence, then the court proceeds to examine whether the accused genuinely, albeit mistakenly, believed that he or she was acting in lawful private defence (where the charge requires intention to be proved) or whether this belief was also held on reasonable grounds (where negligence is sufficient for liability)."[43]

[105] The reference to "reasonable grounds", may carry the risk that the accused's belief must be reasonable and may suggest that the test is not purely subjective or nuanced. This is not so. Where the crime requires intention, a genuinely held mistaken belief will negate intention. However, where the crime merely requires negligence, the belief should also be held on reasonable grounds. The test remains subjective, though, in both enquiries.

[106] The risk alluded to, however, is not academic but real as a court may properly, in appropriate instances, have regard to considerations of reasonableness in assessing a defence based on putative private defence. It must be that if it does so in the context of a charge requiring intention it would misconstrue the test, but doing so where the charge requires negligence would be permissible.

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[42] Burchell *South African Criminal Law and Procedure* 4 ed (Juta & Co Ltd, Cape Town 2011) vol 1 (Burchell).

[43] Id at 132.

[107] Indeed, in *De Oliveira* the accused did not testify and the Court in dealing with an appeal against a conviction of murder resorted to considerations of reasonableness in assessing the question of culpability.

[108] The Court said in relation to the murder charge the accused was facing:

> "In those circumstances it is inconceivable that a reasonable man could have believed that he was entitled to fire at or in the direction of the persons outside in defence of his life or property (and that without even a warning shot).[44]
>
> . . .
>
> In the circumstances there was *prima facie* proof that the appellant could not have entertained an honest belief that he was entitled to act in private defence."[45]

[109] Botha[46] comments on the approach of the Court in *De Oliveira* and contends that it applied a partially objective test when she says:

> "In *S v De Oliveira* 1993 2 SASV 59 (A), however, the then Appellate Division in a rather drastic turnabout insisted on a purely subjective 'erroneous belief' as the only requirement to eliminate *dolus* (intent). At the same time, though, in deciding whether the accused in *De Oliveira* could successfully raise putative self-defence against a murder charge, the court unfortunately and unnecessarily clouded the issue by applying a partially objective test, stating that the 'reasonable person' in the circumstances of the accused would not have believed that he was entitled to shoot."

[110] However, the better view on the matter and one that preserves the necessary conceptual distinction between the tests for private defence and that of putative private defence is that advanced by Snyman.[47] When commenting on the approach of

[44] *De Oliveira* above n 20 at 64G-H.

[45] Id at 65A-B.

[46] Botha "Putative self-defence as a defence in South African criminal law: A critical overview of the uncertain path to Pistorius and beyond" *Litnet Academics* (26 July 2017), available at https://www.litnet.co.za/putative-self-defence-defence-south-african-criminal-law-critical-overview-uncertain-path-pistorius-beyond/.

[47] Snyman *Criminal Law Casebook* 5 ed (Juta & Co Ltd, Cape Town 2013) (Snyman).

the Court in *De Oliveira*, he says that while the Court may have had recourse (in the absence of the accused testifying) to what the reasonable person would have done, such an enquiry would not be dispositive of the question of culpability. In those circumstances, the Court would be required to go beyond what the reasonable person would have done and consider whether there were other factors that could lead it to a conclusion different from the reasonable person test.[48]

[111] What all of this demonstrates is that even while conceptual clarity may exist in respect of the test for putative private defence, the subjective enquiry to be followed may properly, and in appropriate circumstances, consider elements of reasonableness. It would certainly do so when the charge is one requiring negligence, and it would do so in the process of inferential reasoning courts undertake to determine what the state of mind of the accused may have been in a particular situation. That, however, does not change the nature of the test from being a subjective test, as Snyman correctly asserts in his comment on *De Oliveira*:

> "This judgment illustrates the difference between real and putative private defence. Because these two defences belong to two quite distinct elements of liability, namely unlawfulness and culpability (*mens rea*), the judgment also illustrates the important distinction between the inquiry into unlawfulness and that into culpability. The appellant did not take the court into its confidence by telling the court what he thought or what went on in his mind at the crucial moment when he fired the shots. The Court accordingly had to decide his subjective state of mind by means of inferential reasoning. One of the aids in determining by inferential reasoning what the appellant's state of mind was, is to have recourse to what the reasonable person would have known or foreseen. However, the reasonable person test is the test to determine negligence, and not intent or foresight, and therefore a court which investigates an accused's state of mind at the crucial moment cannot confine its investigation to what the reasonable person thought or foresaw. The court must go beyond the reasonable person test and further inquire whether there were possibly

[48] Id at 170.

> other circumstances which could lead the court to come to a conclusion which differs from the conclusion reached by an application of the reasonable person test."[49]

[112] That said, I proceed to deal with the conclusions reached in the first judgment in support of the setting aside of the conviction.

[113] In finding that the appeal against conviction must succeed, the first judgment concludes that the trial court committed an error of law in formulating the test for putative private defence and that the application of an incorrectly formulated test brought about a conviction that was unsound and one that this Court would be justified in interfering with.

[114] In coming to its conclusion, the first judgment laid the foundation for its conclusion on a number of arguments which I now deal with.

Status of an extempore judgment

[115] *Extempore* judgments form part of the necessary tools of trade of our courts. Judicial officers who have carefully given thought to the deliberations before them and the decision to be brought out often resort to the delivery of an *extempore* judgment to state the court's findings. The complexity of the matter, both legally and factually, will often determine whether resort is to be had to the use of an *extempore* judgment. It is this judgment that a person affected by it, be it in civil or criminal proceedings, will hear in open court and it is this judgment that must ultimately reflect the court's articulation of the law and the manner in which it dealt with the evidence and the reasons for its conclusion. I agree with the conclusion of the first judgment with regard to the symbolic and legal importance of an *extempore* judgment in an open public court.

[49] Id at 170-1.

[116] In practice, an *extempore* judgment is read into the record. Its source may be carefully prepared notes, a prepared summary of the law and the evidence, or, at times, a Judge's recollection and framing together of the law and the facts without any detailed or particular recourse to a script or a text. It is often a matter of judicial style and determined by a consideration of the particular matter at hand and its complexity.

[117] Transcribed *extempore* judgments form part of the record of proceedings and the parties to litigation place reliance on them, in either advancing a case on appeal or for other purposes such as to prove the correctness of the contents and the findings of the judgment. Ordinarily, that does not and should not pose a problem, but in the realm of human fallibility and imperfection, errors do occur. They do so when the presiding officer makes an error in the use of language or in properly articulating some proposition or conclusion; they may also do so when the transcriber does not accurately transcribe what has been correctly expressed by the presiding officer or where the recording is inaudible. In these scenarios, the transcription may not always be a correct reflection of what was intended to be articulated, alternatively, of what was indeed properly articulated.

[118] The law recognises the possibility of error at this level and the concomitant need to address and remedy it while preserving the substance of the *extempore* judgment.

[119] In *Wells*,[50] the Appellate Division considered the then conflicting views relating to the power of a judicial officer to revisit the contents of an *extempore* judgment and in doing so, eschewed the strict approach that held that once pronounced, a judgment was incapable of being altered, corrected or amended. The Appellate Division also did not find favour with a variant of the strict approach that would permit a judicial officer to make linguistic or other corrections without changing the substance of the judgment.

[50] *Wells* above n 27.

[120] The Court then went on to consider the approach espoused by *Voet*. This approach would permit a Judge, on the same day after judgment is given in court, to add to it remaining matters which relate to the consequences of what has already been decided. And, to further "explain (*explicare*) what has been obscurely stated in his judgment and thus correct (*emendare*) the wording of the record provided that the tenor of the judgment is preserved".[51]

[121] Describing this as the more enlightened approach, the Court accepted that approach as the correct statement of our law and, in doing so, observed that it accorded with South African practice.

[122] The first judgment, however, suggests a departure from the approach taken in *Wells*[52] and for the adoption of a less permissive holding, arguing that it accords better with the rights of an accused to a fair trial and the duty of a court to pronounce with finality upon the case before it.

[123] While fair trial imperatives and finality in criminal proceedings are important in our constitutional dispensation, I am not sure how the enlightened approach taken in *Wells* is inconsistent with these objectives. What *Wells* does is strike the appropriate balance between certainty and accuracy. It ensures that what an accused is informed of in open court when the court's decision and the reasons for it are delivered is not altered in substance by any subsequent revision of the judgment. However, errors, grammatical or otherwise, patent errors and obscure formulations are capable of being revised, all of course subject to the important rider that the substance of the judgment may not be changed.

[51] Id at 820 D-F.

[52] Id at 820F.

[124] It is therefore difficult to see how any changes or amendments to an *extempore* judgment that do not change its substance, imperil the fair trial guarantees of an accused, in particular, when the substance of the judgment remains constant. *Wells* is clear on that – the substance of the judgment may not be changed and, on that basis, the adoption of a less permissive approach as advocated in the first judgment, may neither be necessary nor justified.

[125] In this regard, it must be accepted that an error that reflects the presiding officer's incorrect understanding of the law is a serious one and should not be capable of revision, as to allow that would be to allow a change in the substance and the tenor of the judgment.

[126] A departure from *Wells*, while not being necessary to protect the fair trial rights of an accused, may also have a chilling effect on the administration of justice. This may create a reluctance on the part of judicial officers to resort to the delivery of an *extempore* judgment which will largely be cast in stone, and in respect of which only grammatical, spelling and word choice errors may be revised.

[127] The right to a fair trial is a right that not only has consequences for an accused person, but also extends to others who have an interest in the criminal justice system. In *Thebus*,[53] this Court held:

> "Although a principal and important consideration in relation to a fair trial is that the trial must be fair in relation to the accused, the concept of a fair trial is not limited to ensuring fairness for the accused. It is much broader. A court must also ensure that the trial is fair overall, and in that process, balance the interests of the accused with that of society at large and the administration of justice."[54]

[53] *Thebus v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC).

[54] Id at para 107.

[128] The approach in *Wells* represents the appropriate wide consideration of fairness that *Thebus* proclaims. Even in the specific context of the fair trial rights of an accused person, such an approach is not invasive of those carefully crafted rights.

[129] However, and in the context of these proceedings, it matters not whether an enlightened approach or a variant of the strict approach, which the first judgment advocates for, is used, as on either approach the end result will be the same. Even on a less permissive approach, the revisions reflected in the signed judgment all fall squarely within the revisionary remit of the court.

Did the High Court err in formulating the test for putative private defence?

[130] The first judgment suggests that a revision would be permissible to effect matters of style, grammar, spelling and word choice as well as to correct a patent error or omission. The first judgment would, as I understand it, allow for the passage in question to be read as follows:

> "It follows that the accused's defence firstly amounts to private defence, or more commonly known as self-defence, a defence excluding unlawfulness, where the test is objective, and secondly putative self-defence, which relates to the accused's state of mind and where the test is *objective*, in respect of whether the accused genuinely, albeit mistakenly, believed that he was acting in lawful self-defence, or whether his belief was also held on reasonable grounds."[55] (Emphasis added.)

[131] The first judgment reminds us that it is the *extempore* judgment that would be the authoritative judgment in the sense that it is this judgment that the accused would hear and understand to reflect the reasoning and the conclusions of the Court.

[132] Clearly, the only difference then in this passage, and that which appears in the first judgment as revised, would be the use of the word "objective" and it is the use of that word that the first judgment would contend constitutes the error of law. For that

[55] See the first judgment at [54].

argument to succeed, the use of the word "objective" must not reflect a matter of style, grammar or word choice or be a patent error or omission.

[133] It is this passage that the first judgment says contains a manifest error of law and that error, it says, lies in it casting the test for putative private defence as objective.[56] I have some difficulties with this proposition.

[134] The test for putative private defence is formulated in the passage as a whole and not only in the phrase where the word "objective" is used in relation to the test. If there is anything to be gleaned from judgments such as *Endumeni*[57] and *Capitec*[58] (even though they dealt with the interpretation of contracts) it is that in the use of language, context and the purpose form part of a unitary exercise, and that these are not to be considered in a mechanical fashion. Importantly, *Endumeni* tells us that a sensible meaning is to be preferred to one that is not sensible.[59]

[135] If regard is had to the passage in its entirety, the Court was setting out and distinguishing the tests for private defence and putative private defence. It correctly described the test for private defence as relating to unlawfulness and said that the test was objective. It then correctly characterised putative private defence as relating to the accused's state of mind, but then also labelled the test as objective.

[136] The first judgment observes that the High Court was contrasting the two tests and that it would make logical sense to cast putative private defence as a defence tested on a subjective basis. Indeed, the use of the word "objective" does not fit into the flow of the ideas conveyed, nor of the substantive content of the test that the court went on to describe. In addition, the insistence that the word "objective" be insulated

[56] Id at [65].

[57] *Endumeni* above n 29.

[58] *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) (*Capitec*).

[59] *Endumeni* above n 29 at para 18.

from revision, would mean that the Court contrasts two different tests, the one relating to unlawfulness and the other to fault, but then ends up labelling both tests as being objective. This is in stark contrast to the exercise of distinguishing the tests. This is not only illogical but does not lead to a sensible interpretation of the passage.

[137] It must follow that the word "objective", if it was used by the trial Judge at all, was a patent error as everything else in the passage militates against the use of the word "objective" in that context. However, if there is any doubt that the word "objective" constitutes a patent error, it is dispelled by the phrase that immediately follows where the court describes the test as whether the accused "*genuinely, albeit mistakenly, believed he was acting in lawful self-defence, or whether his belief was also held on reasonable grounds*".[60]

[138] This is the part of the passage that reflects the description and the formulation of the test as it relates to culpability – a subjective test that goes to the mind of the accused and, in respect of crimes involving negligence, one that would also consider the reasonableness of the belief. The language used does not conflate a subjective approach with objective considerations and is not reflective of any confusion or misunderstanding on the part of the High Court.

[139] The test, as formulated by the High Court, when it says whether the accused "*genuinely, albeit mistakenly, believed he was acting in lawful self-defence, or whether his belief was also held on reasonable grounds*"[61] is one that is almost identical to that which Burchell refers to and to which reference has already been made.[62]

[60] High Court judgment above n 1 at para 5.

[61] Id.

[62] Burchell above n 42 at 132.

[140] Viewed in its totality, everything in the passage points to a subjective formulation except for the use of the term "objective". If there is any disjuncture between how the test is labelled in contrast as to how it is substantively formulated, then surely the labelling of a test is different from its formulation and its labelling cannot be dispositive of the question. Its formulation lies in how the High Court saw and gave expression to the components of the test and, on that score, there is simply no error or ambiguity in the formulation. To suggest that the incorrect use of the word "objective" under those circumstances constitutes an error of law is not sustainable. The first judgment impermissibly narrows the focus of the enquiry to a single word as opposed to considering the passage as a whole. It elevates form (the label of the test) above substance (the formulation of the test) and ultimately leads to a conclusion that is not sensible in context. All of this is rested on an assumption that it was the Judge in the High Court that used the word "objective", even in the absence of any evidence that this was so.

[141] Of course, if there was an error in the use of the term "objective" by the Judge, then it would constitute a patent error in the light of everything else the passage correctly expresses and in this regard the first judgment holds that a patent error or omission may be corrected.[63] It must therefore follow that the passage which contains the proper exposition of the test must then mean that the word "objective" (if used by the judge at all) was a patent error which, even on the variant of the strict approach, should be capable of revision.

[142] I would therefore conclude that, purely on the basis of the *extempore* judgment, one cannot say that the High Court erred in formulating the test for putative private defence. The full exposition of the test accords in every respect with the current established test for putative private defence.

[63] See the first judgment at [62].

[143] If the word "subjective" was used, then there could be no complaint that the test was incorrectly formulated in the *extempore* judgment. Essentially, it comes down to the use of a single word. If we are to approach interpretation as a unitary exercise and not mechanically, and if we are to give a sensible meaning to the language used, then everything militates against the conclusion that the word "objective" must outweigh all other considerations and lead to the conclusion that an error of law occurred in how the High Court formulated the test. At best, an error would have occurred in the labelling of the test and not in its formulation and in context. That error cannot constitute an error of law.

[144] If the incorrect word was purely an error of transcription, then the case for error of law becomes even more tenuous. The passage in question where the test is formulated is replete with grammatical and other errors. A cursory comparison of the transcribed and the revised passage, which the first judgment accepts as permissible revisions, reveal no more than three errors in transcription in a single sentence dealing with the formulation of the test.

[145] The unrevised passage reads as follows:

> "The test to be applied in respect of the accused, he generally held it mistakenly believed that he was acting in lawful self-defence, or whether his belief was also held on reasonable doubts."

[146] It clearly does not make much sense in its transcribed from but in its revised form, it reads as follows:

> "[W]hether the accused genuinely, albeit mistakenly, believed that he was acting in lawful self-defence, or whether his belief was also held on reasonable grounds."

This is also the formulation that Burchell uses.

[147] It is quite easy to understand how these errors may have crept in: "generally held" is transcribed instead of "genuinely held", "it mistakenly" instead of "albeit mistakenly" and "reasonable doubts" is transcribed instead of "reasonable grounds". All these errors appear in the same sentence and the transcribed words are phonetically similar to the revised words. All of this is offered simply in support of the argument that transcription errors crept into the *extempore* judgment and the possibility that the use of the word "objective" may also have been an error in transcription is a strong one. The transcribed *extempore* judgment was never placed before Bam J; the word "objective" is totally out of kilter, regard being had to the full passage and the logic and flow of the test formulated. One must be careful in reaching a conclusion of judicial error under these circumstances where so much points compellingly away from it.

[148] The first judgment then invokes the revised judgment to suggest that the Court regarded objective considerations as being part of the test for putative private defence. In particular, reference is made to paragraph 8 of the revised judgment where the Court says that—

> "his defence amounts to putative self-defence. The test is subjective, in other words, what the accused had in mind, objectively considered."[64]

[149] The first judgment would hold that this sentence would not constitute a permissible revision of the *extempore* judgment, as it does not even appear in the *extempore* judgment and would constitute an addition, which it holds, should not be possible. It is therefore not clear on what basis reference can be made to this part of the revised judgment on the narrow test for revision postulated in the first judgment, while closing the door to the revision of the word "objective".

[64] High Court judgment above n 1 at para 8.

[150] However, and assuming that resort can also be had to the revised judgment as well as the transcribed judgment, the first judgment then posits the question whether the words "objectively considered" were simply a reference to the recognition by the trial court that the enquiry into the accused's state of mind rests upon inferential reasoning, or whether it was the invocation of a regulating consideration of reasonableness in determining the accused's state of mind.

[151] The first judgment, having posited two possible explanations for the words "objectively considered", then concludes the argument by stating that even though the words may have been intended to have a more benign evidential import, the gravity of the charges must mean that any ambiguity must be resolved in favour of the applicant.

[152] I am not sure if that conclusion is sustainable.

[153] Firstly, there simply cannot be any ambiguity. In the *extempore* judgment, the test is correctly formulated as subjective. There is the labelling of the test as being "objective" which I have sought to demonstrate could only have been a patent error if indeed it was a term used by the Judge. This, coupled with the recognition in the first judgment that the words "objectively considered" may have been benignly intended, must reduce the scope for any ambiguity. Again, the phrase "objectively considered" cannot be viewed in isolation.

[154] While I agree with the stance taken in the first judgment that our task is to ascertain what the trial Judge conveyed, as opposed to what he meant to convey, it is clear from the transcription that firstly we cannot be sure that the trial Judge did convey the term "objective" but, even if he did, the error is so obvious that it must be capable of revision on the basis of it being a patent error.

[155] The first judgment also deals with how the trial court dealt with the evidence before it, in rejecting the version of the applicant that he held a mistaken but genuine belief that he was warding off an unlawful attack on him, and suggests that objective

considerations constituted part of his consideration which, in turn, would suggest that he formulated the test incorrectly. One must be cautious at the level of principle of an approach that considers how the test was applied (which does not engage our jurisdiction) in order to support an argument that since the test was incorrectly applied, it must support the conclusion that the test was incorrectly formulated.

[156] However, and even if such an approach was permissible, it does not advance the conclusion of an error of law. The *extempore* judgment undertook an evaluation of all the evidence before the Court and in doing so, the Court made credibility findings and accepted the evidence of Constable Makgafela, describing his evidence as clear and without contradiction and stating that he made a good impression. In this regard, that acceptance would have included his evidence regarding the warning to the accused to stop running as his pursuers were police officers and the evidence relating to the production of his police identification card.

[157] In dealing with the version of the accused, the Court correctly accepted as a starting point that the State bore the onus of establishing the guilt of the applicant beyond reasonable doubt, and that if the applicant's version was reasonably possibly true, he would be entitled to his acquittal. However, it went on to find, after assessing his evidence and the probabilities thereof, that his version could not be reasonably possibly true.

[158] There is nothing in the *extempore* judgment to suggest that the Court had regard to considerations of reasonableness in rejecting the version of the applicant as not being reasonably possibly true. That key aspect of the case revolved substantially around the events that led up to the apprehension of the applicant and the events that led to the stabbing of the two policemen. The conclusion of the Court was based on the evidence of the State and that of the applicant. Even if there may be criticism of how the trial Judge dealt with the post stabbing evidence relating to the attempts by the applicant to get assistance and report the matter, they do not simply provide evidence of a resort to objective considerations being taken into account in rejecting

the version of the applicant. It is for these reasons that I would also say that the assessment of the evidence and the reasons for conviction do not support the conclusion that either the incorrect test was used, or that considerations of reasonableness were used by the Court in determining what the state of mind of the accused was at the time of the stabbing.

[159] Even if we may differ with the conclusion that was reached, it does not suggest that an incorrect test was formulated or indeed applied.

[160] Finally, and accepting that judicial officers do err and often in serious ways with far-reaching consequences, we must exercise some measure of caution in reaching that conclusion. This is so, in particular, where the substantial and possibly only evidence in support of it is a transcription of a judgment, which transcription was never placed before the Judge and in respect of which the Judge never associated himself with the correctness or otherwise of its contents. It is simply not possible in these circumstances to close the door to the real possibility that the Judge did not use the term "objective" but that the error was one of transcription. In those circumstances it would be manifestly unfair to the Judge, to the prosecution and indeed to the broader interests of the administration of justice, to impute the error to the Judge. To do so would run counter to the proper assessment of the *extempore* judgment, which points diametrically in the opposite direction. There is nothing to support the conclusion that there is an appreciable risk that the trial court incorrectly formulated the test resulting in an unsound conviction.

[161] In sum, neither the *extempore* judgment nor the revised judgment provide evidence of an error of law being committed by the trial Judge in how the test for putative private defence was formulated. There is also no constitutional matter or arguable point of law of general public importance that requires determination in order to deal with the appeal. The result is that our jurisdiction is not engaged and leave to appeal against conviction must accordingly be refused.

Sentence

[162] The application for leave to appeal is also directed against the sentence imposed by the trial court. On this aspect, the applicant contends that our jurisdiction is engaged as the imposition of a mandatory minimum sentence impacts on his constitutional rights set out in sections 12 and 35 of the Constitution. When regard is had to sections 12 and 35, then it appears that the relevant portions thereof are sections 12(1)[65] and 35(3)[66] of the Constitution.

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[65] Section 12(1) of the Constitution provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

[66] Section 35(3) of the Constitution provides:

> "(3) Every accused person has a right to a fair trial, which includes the right—
>
> (a) to be informed of the charge with sufficient detail to answer it;
>
> (b) to have adequate time and facilities to prepare a defence;
>
> (c) to a public trial before an ordinary court;
>
> (d) to have their trial begin and conclude without unreasonable delay;
>
> (e) to be present when being tried;
>
> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
>
> (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
>
> (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
>
> (i) to adduce and challenge evidence;
>
> (j) not to be compelled to give self-incriminating evidence;
>
> (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
>
> (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

[163] The High Court approached the sentencing on count 1 (the murder charge) mindful that the provisions of the Criminal Law Amendment Act[67] (Act) provides for the imposition of a minimum sentence of life to be imposed, unless the Court was satisfied that substantial and compelling circumstances existed to warrant a departure from the statutorily ordained minimum sentence.

[164] It then proceeded to consider the personal circumstances of the applicant including that he was relatively young, a first offender and that the crimes he was convicted of were not committed with any pre-meditation. At the same time, it gave due consideration to the fact that the crimes committed were very serious, they were directed at police officers and that there was an expectation generally that courts were required to deal with such crimes with the requisite level of seriousness.

[165] The Court concluded that the aggravating circumstances concerning the crimes were overwhelming, and that there were no substantial and compelling circumstances that justified a departure from the minimum sentence that the Legislature had determined. It then proceeded to sentence the applicant to the minimum as provided for in the Act – a sentence of life imprisonment on the count of murder. In respect of the count of attempted murder a sentence of 15 years' imprisonment was imposed.

The issuing of directions

[166] On 28 January 2022, the Acting Chief Justice directed the parties to file written submissions to address the following issue:

> (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
>
> (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
>
> (o) of appeal to, or review by, a higher court."

[67] 105 of 1977.

> "[W]hether the finding of the trial court that there were no substantial and compelling circumstances so as to deviate from the minimum sentence is a matter of sentencing discretion or a value judgment. If the finding is a value judgment, under what standard is an appellate court permitted to substitute its own evaluation of substantial and compelling circumstances for that of the trial court, and impose an appropriate sentence?"

[167] The parties responded to the directions issued and largely took the view that the determination of the existence of substantial and compelling circumstances involved a value judgment and not the exercise of a true discretion, and that an appeal court was at large to intervene if it was of the view that an error had occurred in the determination of whether substantial and compelling circumstances were found to exist. The respondent, however, even while accepting that in the main the authorities pointed in the direction that the court was exercising a value judgment, suggested that there was also some reference to the court exercising a discretion and that to this extent argued that the issue required some clarity. I am not convinced about the cogency of the argument that any uncertainty exists on this issue as the law appears to be well settled distinguishing, as it does, between a true discretion and a value judgment in the approach to sentencing generally – it is an issue I will return to.

Leave to appeal

[168] While in general terms it must be so that sentences imposed by a court, in particular custodial sentences, impact on a number of constitutional rights such as those found in sections 12 and 35 as the applicant points out, it does not necessarily follow that every act of sentencing raises a constitutional issue nor can it also be said that all such matters raise an arguable point of law of general public importance.

[169] In *Tembisa*, this Court remarked as follows on the matter:

> "To a greater or lesser extent, the rights guaranteed in the Bill of Rights cover the whole field of human existence. Almost any case could be framed as touching on one

> or other fundamental right. This is not enough to make the case a constitutional matter. This is shown by *Boesak*. A sentence of imprisonment, following upon a conviction that was not justified by the evidence, might be said to implicate the convicted person's right not to be deprived of freedom without just cause (section 12(1)(a)) and his right to a fair trial (section 35(3)), yet a contention that the conviction was not justified on the evidence is not a constitutional matter but a factual one."[68]

[170] In *Bogaards*,[69] the majority of this Court said:

> "The state is correct that, absent any other constitutional issue, the question of sentence will generally not be a constitutional matter. It follows that this Court will not ordinarily entertain an appeal on sentence merely because there was an irregularity; there must also be a failure of justice. Furthermore, this Court does not ordinarily hear appeals against sentence based on a trial court's alleged incorrect evaluation of facts. For instance, this Court will not, in the ordinary course, hear matters in relation to sentence merely because the sentence was disproportionate in the circumstances. Something more is required."[70]

Does a constitutional issue arise and is the "something more" that Bogaards alludes to present in these proceedings?

[171] In his written submissions, the applicant contended that, while sentencing ordinarily involves the exercise of a true discretion by a court, in the context of the provisions of the Act, the existence or otherwise of substantial and compelling circumstances involves a value judgment as opposed to the exercise of a discretion.[71]

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[68] *Tembisa* above n 35 at para 92. See also *Boesak* above n 17 at para 15(a) and *S v Ramabele* [2020] ZACC 22; 2020 (2) SACR 604 (CC); 2020 (11) BCLR 1312 (CC) at para 33.

[69] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC) (*Bogaards*).

[70] Id at para 42.

[71] For an explanation of a what a value judgment is, see for example *Media Workers Association of South Africa v Press Corporation of South Africa Ltd ('Perskor')* [1992] ZASCA 149; 1992 (4) SA 791 (A) (*Media Workers Association*) at 800C-G.

[172] This issue is not a novel one and has come before the Courts on numerous occasions. In approaching the matter, one must be careful to distinguish between what is regarded as the general sentencing discretion of a court as opposed to the determination of substantial and compelling circumstances.

[173] In *Salzwedel*,[72] the Supreme Court of Appeal held that—

> "the determination of a proper sentence for an accused person fell primarily within the discretion of the trial Judge and that this Court should not interfere with the exercise of such a discretion merely because it would have exercised that discretion differently if it had been sitting as the Court of first instance. This submission is undoubtedly correct, but it is clear that:
>
> > '[t]he Court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence.'"[73]
>
> Similar sentiments were expressed by this Court in *Bogaards* when it said that "[o]rdinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed".[74]

[174] In these circumstances where the sentencing court exercises a sentencing discretion in the true sense, the scope for appellate interference is circumscribed.

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[72] *S v Salzwedel* [1999] ZASCA 93; 2000 (1) SA 786 (SCA) (*Salzwedel*).

[73] Id at para 10 quoting from *S v Anderson* 1964 (3) SA 494 (A) at 495G-H.

[74] *Bogaards* above n 69 at para 41.

[175] In *Wijker*,[75] the Supreme Court of Appeal after referring to *Media Workers Association* described a true discretion and the limitations on appellate interference therewith as follows:

> "However, as I stated above, the word discretion is used here in a wide sense. Henning 'Diskresie-uitoefening' in 1968 *THRHR* 155 at 158 quotes the following observation concerning discretionary powers:
>
> > '[A] truly discretionary power is characterised by the fact that a number of courses are available to the repository of the power (Rubinstein *Jurisdiction and Illegality* (1956) at 16).'
>
> The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him. I do not think the power to determine that certain facts constitute an unfair labour practice is discretionary in that sense. Such a determination is a judgment made by a Court in the light of all relevant considerations. It does not involve a choice between permissible alternatives. In respect of such a judgment a Court of appeal may, in principle, well come to a different conclusion from that reached by the Court *a quo* on the merits of the matter."[76]

[176] While those views correctly express the law in so far as it relates to the general exercise of a discretion by a court and the limited scope of appellate interference. The more limited issue that arises in these proceedings, and one that the directions issued sought to engage with, was confined to the nature of the decision of a court in the context of minimum sentences and, in particular, the character of that decision as it relates to the existence of substantial and compelling circumstances.

[75] *Wijker v Wijker* [1993] ZASCA 101; 1993 (4) SA 720 (A).

[76] Id at 727F-J quoting from *Media Workers Association* above n 71 at 800C-G.

[177] In *Homareda*,[77] the Court, after considering the divergent approaches to the question of substantial and compelling circumstances, ranging from the existence of exceptional circumstances on the one hand to a proper consideration of the aggravating and mitigating circumstances present on the other, was clear that the decision on substantial and compelling circumstances involved a value judgment when it said:

> "The correct approach to the exercise of the discretion conferred on a court in section 51 of the Act, as I see it, may be summarised as follows:
>
> . . .
>
> (5) The decision whether or not substantial and compelling circumstances are present involves the exercise of a value judgment; but a Court on appeal is entitled to substitute its own judgment on this issue if it is of the view that the lower court erred in its conclusion: cf *Wijker v Wijker* 1993 (4) SA 720 (A) at 727E-728B."[78]

[178] While the Court made reference to the exercise of a discretion, it did so in recognition that generally courts exercise a discretion in their sentencing role which is distinct and different from the value judgment it is required to make, in coming to a decision on whether substantial and compelling circumstances are present. The value judgment is exercised within the sentencing process and the holding in *Homareda* does not suggest that the court exercises a discretion in deciding on the existence of substantial and compelling circumstances.

[179] Also in *GK*,[79] the Court expressed similar views and explained how the exercise of a sentencing discretion and that of a value judgment were different, but existed within the same sentencing framework that governs minimum sentences when it said:

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[77] *S v Homareda* 1999 (2) SACR 319 (W) (*Homareda*).

[78] Id at 325G-326D.

[79] *S v GK* 2013 (2) SACR 505 (WCC) (*GK*).

> "It is appropriate first to say something concerning the approach of an appellate court to a trial court's finding as to the presence or absence of substantial and compelling circumstances. I do not think a trial court's finding on this question is a matter with which an appellate court can interfere only if there has been a material misdirection or if the sentence is 'disturbingly' inappropriate or induces a sense of 'shock'. That is the approach when an appellate court considers a sentence imposed in the exercise of the trial court's ordinary sentencing discretion. In terms of section 51 of the Criminal Law Amendment Act 105 of 1997 certain minimum sentences are prescribed and the court is deprived of its ordinary sentencing discretion, unless substantial and compelling circumstances are present. The presence or absence of such circumstances is thus the jurisdictional fact (to borrow an expression from administrative law) on which the presence or absence of the ordinary sentencing discretion depends. A determination that there are or are not substantial and compelling circumstances is not itself a matter of sentencing discretion.
>
> The question whether such circumstances are present or absent involves a value judgment, but unless there are clear indications in the Act that this value judgment has been entrusted solely to the discretion of the trial court, an appellate court may form its own view as to whether such circumstances are or are not present. The fact that a judicial power involves a value judgment does not in itself mean that it is a discretionary power in the sense that an appellate court's power to interfere is circumscribed (see *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* 1992 (4) SA 791 (A) at 800C-G)."[80]

[180] The Supreme Court of Appeal in *Bailey*[81] echoed similar sentiments with regard to a value judgment being exercised and went on to also explain why the approach by an appeal court was necessarily different when sentencing takes place within the framework of the minimum sentencing regime, as opposed to what it called sentencing under the ordinary sentencing regime. It said:

> "The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary

[80] Id at paras 3 and 4.

[81] *S v PB* [2012] ZASCA 154; 2013 (2) SACR 533 (SCA) (*Bailey*).

sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.

The most difficult question to answer is always: what are substantial and compelling circumstances? The term is so elastic that it can accommodate even the ordinary mitigating circumstances. All I am prepared to say is that it involves a value judgment on the part the sentencing court. I have, however, found the following definition in *S v Malgas* (above) para 22 to be both illuminating and helpful:

> 'The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration of circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.'"[82]

[181] The reference to *Malgas*[83] where the Court set the basis for the determination of substantial and compelling circumstances as to whether an injustice would occur, accords with the approach that the court is ultimately exercising a value judgment when it decides on the existence or not of substantial or compelling circumstances. This would in turn permit a widened scope for appellate interference as opposed to where the sentencing court exercises a discretion in the true sense.

[182] Finally in *Mudau*,[84] the Supreme Court of Appeal also spoke of an appropriate sentence in the context of minimum sentences as one that would not be unjustly

[82] Id at paras 20-1.

[83] *Malgas* above n 15 at para 22.

[84] *S v SSM* [2013] ZASCA 56; 2013 (2) SACR 292 (SCA) (*Mudau*).

disproportionate if regard was had to the offence, the offender and the interests of society. It held:

> "Life imprisonment is the most severe sentence which a court can impose. It endures for the length of the natural life of the offender, although release is nonetheless provided for in the Correctional Services Act 111 of 1998. Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. A minimum sentence prescribed by law which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, the offender and the interests of society, would justify the imposition of a lesser sentence than the one prescribed by law. As I will presently show, the instant case falls into this category. This is evident from the approach adopted by this Court to sentencing in cases of this kind."[85]

[183] The existence of what may be described as two different sentencing approaches that the Court in *Bailey* made reference to is clearly justified and warranted by the far-reaching nature that the Act has introduced into our law. While it has not removed the sentencing discretion, it has fettered it to some extent and with that comes the likelihood of a sentencing framework that may pose a significantly higher risk to the freedom of the individual and considerations of a fair trial. In those circumstances an error in a finding of substantial or compelling circumstances is inherently more damaging to the constitutional values of freedom and liberty, justifying at the level of principle a wider scope for appellate interference.

[184] Reverting to the question posed in *Bogaards* whether the appeal raises a constitutional issue as the applicant says it does, the answer must be no. The law is settled that a court brings out a value judgment when it makes a determination on the existence of substantial and compelling circumstances. An appellate court is entitled to interfere with that decision if an error has occurred and *Malgas* sets the threshold for such interference as being a sense of injustice with the sentence imposed. No

[85] Id at para 19.

constitutional issue arises nor do any arguable points of law of general public importance that engage our jurisdiction.

[185] The issue advanced by the applicant that the High Court erred in finding that there were no substantial and compelling circumstances does not raise a constitutional issue. No other basis for interference with the sentence was advanced other than simply the contention that the sentence is disproportionate. *Bogaards* reminds us that this is not a basis for intervention.

[186] It is for those reasons that the application for leave to appeal against sentence must fail.

[187] I would therefore have refused leave to appeal against conviction and sentence.

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