e-MANTSHI

A KZNJETCOM Newsletter

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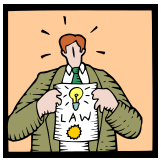
Welcome to the ninety fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Justice and Constitutional Development has determined under section 19(1) of the South African Judicial Education Institute Act, 2008 (Act 14 of 2008) 1 January 2012 as the date from which the South African Judicial Education Institute was deemed to have commenced with its training functions. The notice to this effect was published in Government Gazette no 37313 dated 10 February 2014.

Recent Court Cases

1. S v EA 2014 (1) SACR 184 (NCK)

If a matter against a juvenile had been diverted and s/he had completed the diversion programme it would be unfair to prosecute him/her again.

The accused, a juvenile at the time of the commission of the offences, was charged with a number of counts of assault with intent to do grievous bodily harm. He was convicted but, before sentence was imposed, it was discovered that the case had previously been diverted and the case subsequently withdrawn after he had completed the diversion programme successfully.

This was recorded by the magistrate as the apparent reason for the withdrawal of the case. The accused was 17 at the time of the commission of the offence. He completed the diversion programme successfully before he turned I8. The prosecution was instituted and reinstated when he was still a minor. The case was removed from the roll and it was later in 2010, when he had reached the age of majority, that it was continued. The proceedings were stopped and the matter submitted for review.

The court held that it could be safely inferred that the prosecutor informed the court accordingly when he withdrew the case. This suggested that an expectation was created that the accused would not be prosecuted again on the same facts. This had to be accepted in his favour. There was no evidence that the representation by the prosecutor was unqualified or that it was unreasonable. There was similarly no evidence that the prosecutor, who took the decision to divert the accused, had acted beyond his powers and/or his scope of authority. Diversion was and is a recognised practice that was often applied in respect of juvenile offenders. It was, in the circumstances of the case, unfair and not in accordance with the notions of basic fairness to prosecute the accused again. The court was therefore entitled to interfere in the matter, a decision it did not take lightly. The court remarked further that the NPA should be held to the expectation that the prosecutor had created. (Paragraphs [16]-[19] at *189h-190e.)*

2. S v OOSTHUIZEN 2014(1) SACR 192 (ECG)

Where the proceeds of a cheque was deposited into a business account as the purchase price for a business and the proceeds were withdrawn before the cancellation of the contract it does not amount to theft.

The appellant was convicted in a magistrate's court of theft. She appealed against her conviction. The charge against her arose out of her conduct after she had entered into an agreement with the complainant, whereby she sold her business (Anel's) to the complainant, the effective date of the sale being 1 August 2007. In terms of the agreement, the complainant was obliged to,

pay the purchase price in two instalments, the first one being payable at least seven days before the effective date. The complainant duly paid the amount of R350 000 by way of a cheque deposited into the account of the business on 23 August. After a number of meetings and visits to the business, the complainant came to the conclusion that the income of the business had been overstated and the expenses understated. She accordingly confronted the appellant and informed her that she had arranged to stop the cheque. Despite this, the appellant proceeded to make a number of withdrawals from the account by the effective date, almost equalling the amount of R350 000. It appeared that the complainant at no stage cancelled the contract for the purchase of the business. On appeal, the court proceeded to examine whether, in the circumstances, the appellant could have been convicted of theft.

Held, that the fact that the purchase price was paid by cheque was neither here nor there, unless the contract had been effectively cancelled before the money was withdrawn. (Paragraph [I5] at *196a.)*

Held, further, that in a matter such as the present, a cheque had to be taken to be accepted conditionally on it being honoured on its presentation. When honoured, the time of payment and discharge of the obligation to pay, related back to the time of delivery of the cheque (in this case to the business via the bank). The cheque was in fact honoured, notwithstanding the stop order, and that its date of deposit was the date of payment. Applying this to the present matter, it was clear that, when the money was withdrawn, the contract was still in existence, no cancellation having been effected, and the money paid by way of the cheque was due to and owned by the business. In the result, the appellant could not be held to have stolen the money and could not be guilty of theft. The conviction was set aside. (Paragraphs [23] at 197 *d-e* and [25] at *197f.)*

3. S v PHIRI 2014(1) SACR 211 (GNP)

When an HIV-positive accused has unprotected sex with a partner whom he knew was HIV-negative he could be convicted of attempted murder.

The appellant, a 32-year-old first offender, was convicted in a regional court of attempted murder and was sentenced to six years' imprisonment. He appealed against both his conviction and sentence. The conviction was based upon the fact that the appellant, who was employed as an HIV/Aids counsellor at a clinic run by the Department of Health and knew that he was HIV-positive, had unprotected sex with the complainant. He had

developed a relationship with her after she had come to the clinic to be tested and whom he knew had tested HIV-negative. He contended that he should not have been convicted of attempted murder, but of a lesser count, such as assault with intent to do grievous bodily harm. It was contended on his behalf that the sentence of six years' imprisonment was disturbingly inappropriate, in that the appellant was a first offender and HIV-positive.

Held, as regards the conviction, that there was no merit in the appellant's contentions. It was sufficient for a conviction on the count of attempted murder to establish that the appellant, knowing that he was HIV-positive, engaged in sexual intercourse with the complainant, whom he knew to be HIV-negative, without any preventative measures. This entailed the presence of mens rea in the form of dolus eventualis. In this regard it had to be accepted, and the court could take judicial notice of the fact, that at present HIV/Aids had no cure and infection with the virus was likely to lead to a reduced life span. (Paragraph [9] at *213i-214b.)*

Held, as regards the sentence, that the only aspect of the appellant's personal circumstances deserving of consideration was his HIV-positive status. In the present case the trial court found that the circumstances of the case rendered custodial sentence the only option, and no fault could be found with that finding. The appellant's HIV status was only but one factor among others to be considered and, having regard to all the circumstances, there had been no misdirection in the manner in which the magistrate had considered sentence. The appeal against both conviction and sentence was accordingly dismissed. (Paragraphs [16]-[18] at *215d-h.)*

From The Legal Journals

Mahlobogwane, F M

“Parenting plans in terms of the Children’s Act: serving the best interests of the parent or the child?”

Obiter 2013 218

Hoctor, S V

"The offence of being found in disguise in suspicious circumstances"

Obiter 2013 316

Van der Merwe, A

"A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 2008"

De Jure 2013 1022

Van Heerden, C

"Section 85 of the National Credit Act 34 of 2005: thoughts on its scope and nature"

De Jure 2013 968

Du Toit, P

"The role of remorse in sentencing"

Obiter 2013 558

Zaal, F N

"Fostering by caregivers with no common-law duty of support: at last, some clarity in the law. *SS v Presiding Officer, Children's Court, Krugersdorp* 2012 (6) SA 45 (GSJ)"

Obiter 2013 590

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

Common purpose reformulated?

Common purpose liability remains a controversial aspect of the principles of criminal liability in South African law, despite the doctrine passing constitutional muster in *S v Thebus and another* 2003 (2) SACR 319 (CC). In the case of *Thebus* (at para [18]), the Constitutional Court approved Burchell's definition of this doctrine, which states the following:

'Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design'.

This definition was most recently set out in Burchell's admirable *Principles of Criminal Law* 4ed (2013) 467. It is clear from the definition that the common purpose doctrine can apply in two scenarios: first, where there is a prior agreement between persons to commit a crime, and secondly, where there is an intentional active association with the commission of the crime (this is generally accepted in the case law: see *S v Mgedezi and others* 1989 (1) SA 687 (A) 705-6; *S v Mitchell and another* 1992 (1) SACR 17 (A) 21-23; *S v Mzwempi* 2011 (2) SACR 237 (ECM) at paras [76] and [124]). Where either of these situations can be established on the facts of the case, it is not necessary for the State to prove a causal contribution on the part of all of those involved in the criminal conduct, since the conduct of the individual who caused the consequence is imputed to all the others who are involved.

In the recently published fourth edition of *Principles of Criminal Law*, Burchell introduces an entirely new understanding of the operation of the common purpose doctrine, in explaining the judgment in the case of *Mzwempi*. Burchell's discussion is worthy of consideration. My interest is not merely personal - Burchell disagrees with my own interpretation of the judgment in *Mzwempi* (set out in (2012) *Journal of Commonwealth Criminal Law* 180ff) – but because adopting this understanding would change the way we view the common purpose doctrine.

Let us remind ourselves what was held in *Mzwempi*. The court was confronted with a case of faction fighting, and held that although the appellant was a member of the armed force from the Manduzini clan which attacked the members of the Makhwaleni clan, the evidence before it was insufficient to establish beyond reasonable doubt: (i) that the appellant could be linked to any of the crimes flowing from the attack – murder, attempted murder and arson – in his individual capacity; or (ii) that the crimes had not already been committed before the point at which the appellant was positively identified as being present; or (iii) that the appellant was a party to a prior agreement to commit any of these crimes. The court's decision on the facts is not in dispute. However the court's discussion of the legal position is somewhat more controversial, at least in one respect.

In discussing the law relating to the common purpose doctrine, Alkema J sets out the leading cases of *S v Safatsa and others* 1988 (1) SA 868 (A), and *S v Mgedezi supra* and *S v Thebus supra*, in which active association common purpose, which was in issue in each of these cases, was refined and authoritatively approved. However, the case of *S v Nzo and another* 1990 (3) SA 1 (A), which was not mentioned in the *Thebus* case, is singled out as unjustifiably extending the ambit of

the common purpose doctrine, and on this basis, it is contended, it ought to be disregarded in favour of the *Safatsa*/*Mgedezi* line approved in *Thebus*. It was held by the trial court in *Nzo* that members of an undercover African National Congress group, who were engaged in acts of sabotage in Port Elizabeth, could be held liable for the murder of the victim, who had been killed by another member of the group after she threatened to inform the police about the activities of the group. Whilst there was no evidence that the accused were aware of the murder, or that they knew that it was going to be committed, nevertheless both their foresight of the possibility that the murder could occur, and their continued association with the common purpose of the group, had been established, and these factors were held to be determinative. On appeal, it was argued on behalf of the appellants that liability could not be imputed to every ANC member for every foreseen crime committed by another ANC member in the context of 'a criminal campaign involving the commission of a series of crimes', and that liability should only extend to 'crimes with which the accused specifically associates himself' (at 7E-F).

The majority of the court rejected this argument however, stating that it was not concerned with the 'liability of the members of the ANC for crimes committed by other members', and nor was it concerned with the 'appellants' liability merely as members of the organisation' (at 7G-H). Instead, the majority held (at 7H-J), the focus of the court was on the actions of three individuals who formed the 'active core' of the ANC cell in Port Elizabeth, and who functioned as 'a cohesive unit in which each performed his own allotted task':

'Their design was to wage a localized campaign of terror and destruction; and it was in the furtherance of this design and for the preservation of the unit and the protection of each of its members that the murder was committed.'

The reasoning of the trial court was therefore approved by the Appellate Division (although the first appellant was acquitted on the basis of dissociation). This decision has been criticised by Burchell ((1990) *SACJ* 345) for its apparent extension of the ambit of common purpose beyond acceptable limits, and the court in *Mzwempi* takes the same approach, holding that *Nzo* does not accord with the *Safatsa*/*Mgedezi* line approved in *Thebus*, and that it therefore need not still bind new cases in precedent. Alkema J stated (at para [111]) that the consequence of applying the approach in *Nzo* would result in every ANC member at the time being guilty of murder, or indeed, every member of the Manduzini clan being guilty of all the crimes: 'a consequence not worthy of serious thought'.

Whilst the court's conclusion makes for compelling rhetoric, it is my submission that it is rather less compelling in law, as it is clear that the basis for founding the murder conviction on common purpose in *Nzo* was not related to active association common purpose (as in *Safatsa*, *Mgedezi* and *Thebus*), but rather to common purpose founded on prior agreement: the 'terrorist campaign' participated in, in the execution of a 'common design' (at 7C of *Nzo*). According to the majority judgment of the court, both such 'common design' to commit acts of sabotage, as well as the foresight of the possibility that informers who posed a threat would have to be executed, had been established beyond reasonable doubt.

In a new argument which he introduces into the fourth edition of *Principles of Criminal Law*, Burchell defends the correctness of the judgment in *Mzwempi* however, in the following terms. First, he states that the two forms of common purpose (which he refers to as 'the two extremes') may overlap in practice:

'For instance, there may be a prior agreement to commit crime A, and crime B is also committed by members of the group. Provided crime B was foreseen as a possible consequence of committing crime A then the South African courts have indicated that liability of members of the group for committing crime B may result in terms of the common purpose rule, provided that crime B is a so-called consequence crime. So, for instance, an accused who agreed, as a member of a criminal syndicate, to commit (or participate in the commission of) housebreaking with intent to commit a crime or robbery would be liable for murder if the resultant death was foreseen as a possibility of engaging in the agreed crime.' (at 467-8)

The idea of 'overlap' between forms of common purpose may be somewhat misleading. After all, a crucial aspect of liability on the basis of the common purpose doctrine is that the relevant intent must extend to that particular crime. Even if a number of crimes flow from the same course of criminal conduct, it is essential that the *common purpose* relate to each individual crime in order for liability to follow. Intent is evaluated separately for each crime, and is not based on other criminal conduct.

Burchell continues (at 468) that 'there must [be] a *specific agreement* to commit *crime A* and, it is submitted, some *similarity in nature between crime A and crime B*' (original emphasis). As it stands, this statement is entirely novel, and does not seem to be backed up by any authority. Once again it bears iteration that the key consideration in this regard would simply be whether the accused had the necessary intention to commit the relevant crime, along with the necessary act of association with the conduct of the others. To add this particular requirement, as Burchell does, would appear to be without justification, and would only serve to limit the operation of the common purpose doctrine, an outcome which was not sought by the Constitutional Court in *Thebus*.

The key concern of Burchell, as also of Alkema J in *Mzwempi*, was to exclude the perceived impact of *Nzo*. Thus Burchell (at 468-9) praises the approach adopted in *Mzwempi* as 'surely correct' in holding that

'foresight of the possibility of the commission of crime B cannot, simply in conjunction with membership of a group that may, in itself, be unlawful or where the group sanctions or engages in some nefarious activities, be sufficient to hold a member liable for *all* of the foreseen crimes ultimately committed by other members of the group.'

In this regard it may simply be pointed out that the majority of court in *Nzo* was at pains to point out that the effect of the common purpose doctrine extended to the appellants in this case, and did not seek to draw a broader interpretation extending to the liability of other ANC members engaged in the armed struggle. As mentioned earlier, this extended application was the substance of the contentions of behalf of the appellants, and this proposition was indeed accepted by Steyn JA in his minority

judgment in *Nzo*. However, as Alkema J points out in *Mzwempi* (at para [96]), the 'extended liability' approach which it is argued *Nzo* champions has simply not been applied in any subsequent case. The reason for this is self-evident, it is submitted. Just as the majority stated, the dictum in the case was never meant to be of general application, but rather to apply to the particular factual scenario in the case of *Nzo*.

Does this mean that the common purpose doctrine could never apply in an analogous future situation involving membership of an organisation or group which has the specific aim of carrying out violent or destructive acts? It is submitted that it certainly could – this is after all the nature of the common purpose doctrine, particularly in the form of a prior agreement – but all the elements of the common purpose would have to be established beyond reasonable doubt for this conclusion to be reached.

In conclusion, it is Burchell's contention that the *Mzwempi* case has made an important contribution to the law relating to common purpose in ridding the law of the pernicious effects of *Nzo* (at 469, see also 478-9):

'The only way to make sense of the practical extension of common-purpose liability to this hybrid of prior agreement *and* active association is to recognise that specific agreement to commit crime A *and* active association in crime B is required for criminal liability for crime B and so the courts would have to apply the most restrictive common-purpose rule, viz the *Mgedezi* active-association limits to this hybrid situation. This is what Alekema [sic] J did in *Mzwempi*.'

It is my contention that there is no need to resort to such convoluted reasoning. In fact the *Mzwempi* case greatly overstates the effect and influence of *Nzo*, and mistakes the form of common purpose liability which applies. No doubt the *Nzo* judgment will always leave some with a sense of disquiet, but if one simply focuses on the operation of the legal principles involved, it is submitted that one cannot find fault with it. It was held that liability for murder could follow where saboteurs (in this case) were engaged, by virtue of a pre-existing plan, in waging operations to overthrow the government, and such saboteurs foresaw the possibility of such activities necessitating the killing of anyone who stood in the way of them achieving their objectives. This finding involves a simple application of the doctrines of common purpose and *dolus eventualis*. If the boot was on the other foot, as it were, and the government were ANC and the saboteurs were radical right-wingers, on the same facts the same result should obtain. Nothing in the *Thebus* judgment would suggest otherwise.

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Matters of Interest to Magistrates

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Moshomo Levin Kubyana v Standard Bank of South Africa Ltd

Case CCT65/13 [2014] ZACC 1

Hearing Date : 07 November 2013
Judgement Date: 20 February 2014

Media Summary

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter regarding a credit provider's obligations under the National Credit Act (Act) to notify a consumer of his or her default before approaching a court to enforce a credit agreement.

In 2007 Mr Kubyana and Standard Bank entered into an instalment sale agreement for the purchase of a motor vehicle. Mr Kubyana failed to make regular payments and fell into arrears. In 2010 Standard Bank sent a notice in terms of section 129 of the Act to him, indicating that he was in arrears and that it intended to approach a court for debt enforcement. The notice was sent by registered post to the branch of the Post Office which Mr Kubyana had chosen. Although two notifications were sent to his home requesting that he collect his registered mail, he never did so. Five weeks later the notice was returned to Standard Bank uncollected.

The High Court found that Standard Bank had fulfilled its obligation to bring the section 129 notice to Mr Kubyana's attention. Standard Bank was therefore entitled to enforce its debt against Mr Kubyana, who was ordered to settle the amount outstanding under the instalment sale agreement and to return the motor vehicle.

The Constitutional Court upheld the decision of the High Court and found in favour of Standard Bank. Mhlantla AJ found that, under section 129 of the Act, a credit provider wishing to enforce a credit agreement must deliver a notice to a consumer setting out the consumer's default and drawing the consumer's attention to his or her rights. This is an essential component of the Act's efforts to achieve non-litigious

resolution of disputes. In order to effect delivery, the credit provider must take those steps that would bring the notice to the attention of a reasonable consumer. When a consumer has elected to receive notices by way of post, a credit provider must prove (i) dispatch of the notice by way of registered mail; (ii) that the notice reached the correct branch of the Post Office; and (iii) that the notification from the Post Office requesting that the consumer collect the section 129 notice was sent to the chosen address. If a credit provider has taken these steps it will generally have discharged its obligations unless, in the circumstances, the section 129 notice would still not have come to the attention of a reasonable consumer.

Jafta J wrote separately on the interpretation of section 129(1) of the Act and in order to clarify what was previously said about that provision by the Constitutional Court in its earlier case of Sebola v Standard Bank [2012] ZACC 11.

Both Mhlantla AJ and Jafta J concluded that the Act does not allow consumers to frustrate the delivery of section 129 notices by ignoring notifications from the Post Office. Standard Bank had done all that was required of it by the Act. Despite having gone through a full trial process, Mr Kubyana failed to provide an explanation for why he did not respond to the notifications from the Post Office. There was therefore no evidence before the Court showing why it was reasonable for Mr Kubyana not to have taken receipt of the section 129 notice.

Moseneke ACJ, Cameron J, Dambuza AJ, Madlanga J and Van der Westhuizen J concurred in the judgments of both Mhlantla AJ and Jafta J; Froneman J and Skweyiya J concurred in the judgment of Mhlantla AJ; and Nkabinde J and Zondo J concurred in the judgment of Jafta J.

The Constitutional Court granted leave to appeal but unanimously dismissed the appeal with no order as to costs.

A Last Thought

Minister of Safety and Security v Van Duivenboden **[2002] 3 All SA 741** ***SCA***, *Nugent JA* stated as follows at paragraph 12:
“Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as

making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm … … … … where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court, namely, whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it."