THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 424/09

In the matter between:

ANDILE WILLIAM LIBAZI **FIRST APPELLANT**

MABHUTI MBAYIMBAYI **SECOND APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Libazi v The State* (424/2009) [2010] ZASCA 91 (1 June 2010).

Coram: Mthiyane, Mlambo and Shongwe JJA

Heard: **5 May 2010**

Delivered: **1 June 2010**

Summary: Criminal law – conspiracy to commit murder – what constitutes. Evidence – admissibility of hearsay evidence in terms of s 3(1)(c) of Law of Evidence Amendment Act 45 of 1988: right to challenge evidence – integral to constitutional guarantee of fair trial; cautionary rule towards evidence of accomplice – applicability of.

ORDER

On appeal from: Eastern Cape High Court, Mthatha (Petse DJP sitting as court of first instance).

The following order is made:

1. The first and second appellants' appeal against their conviction and sentence on count two is upheld and these are set aside.

2. The first appellant's appeal against his convictions on counts three, four and six is dismissed.

3. The second appellant's appeal against his convictions on counts three and four is dismissed.

4. The sentences imposed on the appellants on counts three, four and six respectively are set aside and replaced with the following:

   (i) Appellant number one is sentenced to 10 years' imprisonment on counts three, four and six respectively.
   (ii) Appellant number two is sentenced to 10 years' imprisonment on counts three and four respectively.

5. All the sentences are to run concurrently.

JUDGMENT

MLAMBO JA (Mthiyane and Shongwe JJA concurring):

Introduction

[1] The first and second appellants (Libazi and Mbayimbayi) and three others were arraigned before Petse DJP sitting in the Sterkspruit Circuit Court of the Mthatha High Court. They were all indicted on one count of murder arising out of the death of Mr Thokozile Anderson Thubela, one count of conspiracy to commit murder, five counts of attempted murder in which the complainants were Messrs Mawethu Malangabi, Gcobani Ngcakana, Simphiwe Ngqaza, Lunga Maqala and Linda Malangabi, one count of unlawful possession of two AK47 rifles, one count of unlawful possession of three 9 mm pistols, one count of unlawful possession of 9 mm, AK47, R4 and R5 ammunition and one count of theft of a firearm. At the conclusion of the trial only Herbert Shasha (Shasha), who was accused number three during the trial, was convicted on the murder and theft counts. The appellants were convicted on the conspiracy count as well as on three and two counts of attempted murder respectively[1] but were acquitted on all other counts. The remaining two accused were acquitted on all counts.

[2] The high court sentenced each of the appellants to 10 years' imprisonment on the conspiracy count as well as 10 years' imprisonment on each of the attempted murder counts they were convicted of. The court further ordered that nine years of each of the sentences imposed on account of the attempted murder counts were to run concurrently with the sentence imposed on the conspiracy count. This resulted in an effective term of imprisonment of 13 years for Libazi and 12 years for Mbayimbayi. The high court subsequently granted the appellants leave to appeal to this court against their conviction on the conspiracy

[1] Libazi was convicted of the attempted murder of Mawethu Malangabi, Gcobani Ngcakana and Lunga Maqala, and Mbayimbayi was convicted of the attempted murder of Mawethu Malangabi and Gcobani Ngcakana.

count but refused them leave to appeal against their other convictions and sentences. This court, however, granted the appellants leave to appeal to this court against their convictions for attempted murder and against all the sentences imposed by the high court. Shasha subsequently passed away and is not an appellant in the appeal before us.

[3] The criminal proceedings sketched above arose from some shooting incidents which occurred in and around Sterkspruit on 27 May 1995. On that day a number of men allegedly allied to the Herschel United Taxi Association (HUTA) pursued and shot at members of the Herschel Long Distance Taxi Association (HLDTA). With the exception of Shasha, the appellants and the other accused persons who were acquitted were admittedly members of HUTA whilst Thubela, the deceased, and all the complainants in the attempted murder counts, were members of HLDTA. The first shooting incident occurred on the outskirts of Sterkspruit when occupants of a white Toyota Corolla fired shots at the occupants of an Opel Kadet whose passengers were members of HLDTA. Ngcakana, who was the driver of the Kadet, identified Libazi as one of the assailants. Mawethu Malangabi, who was a passenger in the Kadet, also identified Libazi as well as Mbayimbayi as two of the assailants. Further shooting incidents took place at the Buyafuthi taxi rank in Sterkspruit. On this occasion Lunga Maqala was shot at by occupants of a white Corolla and was wounded in his right thumb, index finger and thigh. He identified Libazi as one of the assailants. Linda Malangabi also witnessed the shooting incident at the taxi rank and saw the deceased, who had fallen to the ground whilst attempting to run away, being shot several times as he lay on the ground. This witness, however, was unable to identify any of the assailants.

[4] In convicting the appellants the high court relied predominantly on the evidence of Mr Mbulelo Albert Mbulawa (Mbulawa) and a number of eye witnesses including the complainants in the attempted murder counts, as well as on an extra curial statement signed by Shasha and given to a magistrate in

Sterkspruit on 24 December 1996. That statement which came to be known as exhibit D during the trial reads:

'We were fetched from Phola Park in Johannesburg by certain young men from Sterkspruit. There is a certain man whom I know as Dlomo. He is residing at [Dawn] Park. He arrived in the company of two young men. They were travelling in a white 12 valve Toyota Corolla. Dlomo introduced the two young men as Andile Libazi and Mbayimbayi. He then introduced me to the two young men. Dlomo said that the two young men were his homeboys in Sterkspruit. Their presence there was that they were assaulted by Zulus who are having taxis which transport passengers from Sterkspruit. One of their colleagues has passed away and that they needed assistance. I told Dlomo that there are certain young men to whom he can talk. Whilst we were standing, the two of them appeared. We then talked to them. We explained to them the presence of the two young men from Sterkspruit. The young [men] agreed to come and assist. The two young men from Phola Park requested me to accompany them. Andile and Mbayimbayi promised to offer some money after the job had been done. They asked us how much were we going to need. We told them that we never did this. They thanked us. Later on we told them that we wanted a sum of R6000-00. They agreed and told us that we should go to Sterkspruit immediately. They said that the people [they] were fighting against are armed with firearms. They agreed that they were having firearms after we asked them. At about 18h00pm they picked us after they had dropped Dlomo. We arrived at about 11h00pm in Sterkspruit. We attended a night vigil of Andile's colleague. Andile and his colleague talked with other taxi drivers. We remained in the M/V. We then left and they followed us. We went to fetch an R1 rifle from a certain homestead. We were told that it had no rounds of ammunition. Some of the taxi drivers went to ask for some fire-arms. They came back with one fire-arm. We told them that we cannot work with one fire-arm. We decided to go back and not fight if there were no fire-arms. We demanded the money they promised us. They did give us money. They then took us back. We said that if they found more fire-arms they could come and fetch us. They fetched us again on the following week saying that they will try to collect another fire-arm in Soweto. They collected the fire-arm. At about 8h00pm we left for Sterkspruit. We arrived there at about 12h00pm at Andile's place. We were then taken to Mvelase's place. In the morning some drivers arrived at Mvelase's place. It was alleged that their rivals were at the taxi rank busy loading passengers. The two young men from Phola

Park were taken to the taxi rank by a white motor vehicle carrying rifles. One of the men who were having another fire-arm arrived carrying two fire-arms. He then gave me a .38 rifle. We then proceeded to the taxi rank travelling with Mvelasi's van. Before we entered the taxi rank we heard gun shots next to the garage. We met Andile's M/V retreated. We met another gentlemen of Andile saying that they were fighting. His M/V had been shot. We also turned back when we [did] not see Andile's group. There were also policemen. On our arrival at Mvelase's place others also arrived. They said that they found a fire-arm from somebody who had been shot. They did not know as to whom the fire-arm belongs. We suggested that they took us back home. They told us to remain a while because there were soldiers. On the following day we left for Johannesburg travelling in a Mercedes Benz. On the second occasion we were offered a sum of R3000,00.
That is all.'

[5] Shasha, who was legally represented, did not contest the state's application for the admission of the statement into evidence and to it being used against him. Nor did he contest that the statement was given by him freely and voluntarily. The appellants, however, resisted the state's application to have the same admitted in evidence against them in terms of s 3(1)(c)[2] of the Law of Evidence Amendment Act 45 of 1988 (LEAA). The high court ruled that the statement was admissible hearsay evidence against the appellants and undertook to provide reasons at the conclusion of the trial. The court has, however, not provided its reasons for the ruling.

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[2] '3 Hearsay evidence
(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
(c) the court, having regard to-
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account,
is of the opinion that such evidence should be admitted in the interests of justice.'

[6] The appeal against all the convictions is primarily based on two legs. The first is that the high court erred in ruling that Shasha's statement was admissible not only against him but also against the appellants. The other basis specifically in relation to the convictions on the attempted murder counts is that the evidence of the state witnesses was unreliable due to the influence of the rivalry between the taxi associations and further due to inadequate opportunity for the witnesses for reliable identification during the shooting incidents.

[7] The ruling by the high court and the proper approach to s 3(1)(c) featured prominently in the argument before us. In this regard it was argued that the statement properly construed amounted to a confession and as such was inadmissible against anyone else other its maker in terms of the provisions of s 217[3] of the Criminal Procedure Act 51 of 1977 (the CPA). An alternative argument was that if it were found that the statement was not a confession but an admission, that it was similarly not admissible against the appellants in terms of s 219A[4] of the CPA. Pursuing this argument we were invited to revisit the reasoning and conclusion of this court in *S v Ndhlovu*[5] where statements by two

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[3] '217 Admissibility of confession by accused
(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided-
(a) . . .'

[4] This section provides: 'Admissibility of admission by accused
(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained-
(a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate.'

[5] 2002 (2) SACR 325 (SCA).

co-accused which, despite their disavowal by their alleged makers, were treated as hearsay evidence in terms of s 3(1)(c) and were ruled to be admissible against the co-accused in that matter. It was argued before us that that matter had been wrongly decided and that we should depart from it. It is appropriate at the outset, to focus on this issue in view of its prominence in the appeal.

[8] Before I consider *S v Ndhlovu*, it is opportune to state that, in my view, Shasha's statement was not a confession but one admitting a number of facts pointing to his complicity in the planning of criminal conduct aimed at members of a rival taxi organisation. In this regard a confession is generally described as 'an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law'.[6] On the other hand an admission is referred to as 'a statement or conduct adverse to the person from whom it emanates'.[7] These definitions were approved by the Constitutional Court in *S v Molimi*.[8]

S v Ndhlovu

[9] In *Ndhlovu* this court upheld a ruling by the trial court that, in terms of s 3(1)(c), verbal and written statements by certain accused which incriminated other accused, were admissible hearsay evidence against those accused who made them as well as against those accused they incriminated. The primary argument advanced in that case against the admissibility of the statements against the other accused, was that this deprived them of their right to challenge that evidence through cross-examination. After an exhaustive analysis of s 3[9] the court in *Ndhlovu* rejected the argument against admissibility on the basis that the Bill of Rights did not guarantee the right to challenge all evidence through cross-examination, stating:

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[6] *R v Becker* 1929 AD 167 at 171.
[7] Du Toit et al (see footnote 52 in *Molimi* (CC)).
[8] 2008 (2) SACR 76 (CC) para 28.
[9] In paras 11-15.

'Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to "challenge evidence" does not encompass the right to cross-examine the original declarant.'[10]

[10] The court further expanding on its view that the statements were admissible hearsay evidence where the interests of justice required it, stated at para 31:

'The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the central question is whether the interests of justice require that the prior statement should be admitted notwithstanding its later disavowal or non-affirmation. And though the witness's disavowal of or inability to affirm the prior statement may bear on the question of the statement's reliability at the time it was made, it does not change the nature of the essential inquiry, which is whether the interests of justice require its admission.'

Self evidently, in that matter this court essentially narrowed the ambit of the right to challenge hearsay evidence tendered in terms of s 3 if the requirements for admission in that section were satisfied, and as the court emphasized, if the interests of justice required it. Were this to be the rule in all instances, I have my reservations regarding the justifiability thereof especially taking account of the particular facts of the matter in casu. Furthermore, this court in *S v Molimi* was, for different reasons, of the view that what was crafted in *Ndhlovu* was not meant to be an 'inflexible rule'. [11]

[11] Our Constitution requires rights to be construed generously to ensure the widest protection possible. Rights ought not be cut down by reading implicit

[10] Para 24.
[11] 2006 (2) SACR (SCA) para 13.

restrictions into them. In-roads into the protection that the right affords should in all instances be justified.[12] The right to challenge adverse evidence is a foundational component of the fair trial rights regime decreed by our Constitution in s 35(3).[13] Cross-examination is integral in the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him. As Schwikkard[14] puts it in her analysis of *Ndhlovu*:

'The right to challenge evidence, in so far as it is an essential characteristic of an adversarial trial and primarily directed at the truth-seeking, goes beyond merely establishing the reliability of the hearsay evidence in question. Its most important component – cross-examination – is also an important tool in eliciting favourable information . . . It also has certain features that arguably cannot be replicated by substituted indicae of reliability. For example, contradictions between witnesses or apparent inconsistency in a witness's statement are better explored though cross-examination than the logic of inferences. It is further the best vehicle for ascertaining the

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[12] *S v Zuma* 1995 (2) SA 642 (CC) at para 14; *S v Mhlungu* 1995 (3) SA 391 (CC) at para 9.

[13] '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;
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.'

[14] P J Schwikkard 'The Challenge to Hearsay' 2003 *SALJ* 63 p 71.

credibility of the witness and extracting information that might have been under-emphasized or left out in the-evidence-in-chief.'

[12] Failure to respect an accused person's fair trial rights has rightly been viewed as having the potential to undermine the 'fundamental adversarial nature of judicial proceedings' which also imperils their legitimacy. The Constitutional Court in *S v Molimi,*[15] stated:

'This court has said that the right to a fair trial requires a substantive rather than a formal or textual approach and that "it has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime". It is not open to question that a ruling on the admissibility of evidence after the accused has testified is likely to have an adverse effect on the accused's right to a fair trial. It may also have a chilling effect on the public discourse in respect of critical issues regarding criminal proceedings. More importantly, proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy.'

[13] The Constitutional Court expressed the statement referred to above in a matter where *Ndhlovu* had been brought under scrutiny. Whilst acknowledging that *Ndhlovu* was indeed to be understood as narrowing an accused's right to challenge hearsay evidence tendered in terms of s 3, that court preferred to express no view on the correctness of the *Ndhlovu* rationale based on its view that this was not challenged in the appeal to this court in that matter (*Molimi*).[16]

Cautionary rules

[14] An even more compelling consideration militating against the wholesale application of the rule in *Ndhlovu* is rooted in the injunction to courts to treat co-accused or accomplice evidence with caution. While the prejudice to the accused of admitting the co-accused statement is very high and limits constitutional rights

[15] 2008 (2) SACR 76 (CC) para 42.
[16] Para 47.

to challenge evidence and remain silent, various cautionary rules operate to make the probative value of the co-accused statement very low. In this regard, it is a widely acknowledged rule that the evidence of an accomplice should be treated with extreme caution since, as Holmes JA put it:

'First, [the accomplice] is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit.'[17]

[15] Also apposite in this regard are the remarks of this court in *Balkwell & another v S*[18] in which it was pointed out that:

'. . . *Ndhlovu* (*supra*) too readily dismissed concerns expressed in *S v Ramavhale* 1996 (1) SACR 639 (A), which cautioned (at 649C–D) that a court should hesitate long in admitting hearsay evidence that plays a decisive or even a significant part in convicting an accused person. *Ndhlovu* (*supra*) makes no attempt to reconcile the incongruity between the bar created by section 219 of the Criminal Procedure Act 51 of 1977 and its application of section 3 of the Law of Evidence Amendment Act 45 of 1988. Moreover, in dealing with the constituent parts of section 3, *Ndhlovu* offers no guidance as to how the receipt of the extra-curial admissions which it allows under that section, should be approached given the rationale at common law for their exclusion or what role, if any, the various common-law safeguards should play.'

[16] For all the aforegoing it is apparent that I do not regard the *Ndhlovu* approach as all encompassing. The matter at hand is a case of the classical 'absent witness' as opposed to *Ndhlovu* and *Molimi* where the makers of the statements testified disavowing the statements attributed to them. In our case,

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[17] *S v Hlapezula & others* 1965 (4) SA 439 (A) at 440D-E. See also *S v Gentle* 2005 (1) SACR 420 (SCA); *S v Scott-Crossley* 2008 (1) SACR 223 (SCA); *S v Makeba and another* 2003 (2) SACR 128 (SCA); D T Zeffertt, A P Paizes, A St Q Skeen *The South African Law of Evidence* 2003 pp 801-804.

[18] [2007] 3 All SA 465 (SCA) paras 34-35.

Shasha was clearly an accomplice and did not testify. This effectively emasculated the court from evaluating the evidence in the statement and applying the necessary cautionary rules. This, in my view, clearly militated against the admission of the statement as hearsay evidence against the appellants. I also am not persuaded by the state's argument that the failure by Shasha to testify was mitigated by the evidence of Mbulawa who, the state asserted, could have been cross-examined on the statement as his evidence, so the submission went, was similar to that contained in the statement. Strictly speaking this is not factually correct. Fundamentally, however, Mbulawa was not the author of the statement and he could conceivably never be cross-examined on its contents.

[17] It is opportune at this juncture to determine whether the appellants' convictions are sustainable having expunged any role played by Shasha's statement therein. It is trite that a trial court must consider the totality of the evidence to determine if the guilt of any accused person has been proven beyond reasonable doubt. I focus on the conspiracy conviction first. The high court's judgment is silent regarding its reasons for convicting the appellants on this count specifically. Whilst the high court alluded to this count and the evidence the state relied on to secure a conviction, nothing further was said by the high court regarding this count save for the statement that the witness Mbulawa had been an impressive witness. The court simply went on to analyse the eyewitness account of the shooting incidents themselves. One is therefore deprived of the benefit of the high court's reasons for convicting the appellants on the conspiracy count.

[18] The offence of conspiracy is punishable in terms of section 18(2)(a) of the Riotous Assemblies Act 17 of 1956. The section provides:

'Any person who . . . conspires with any other person to aid or procure the commission of or to commit . . . any offence, whether at common law or against a statue or statutory

regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

Although conspiracy is punishable in terms of an old statute dealing with riotous assemblies, the crime of conspiracy as define in the act is not limited to acts relating to riotous assemblies. The definition is wide enough to cover conspiracy to commit a crime. According to Burchell[19] the crime of conspiracy is committed 'if what the parties agree to do is a crime. There can be a conspiracy only if there is a definite agreement between at least two persons to commit a crime . . .'

Furthermore, Snyman[20] has the following to say about the offence:

'To constitute a crime there must be an act or an omission; a mere subjective contemplation of future criminal conduct which does not find outward expression in deed or omission is not criminally punishable. If a person agrees with another to commit a crime, the subjective contemplation advances to the stage of objective expression, and the agreement is an act which amounts to a conspiracy.'

[19] It appears that for a conviction on a charge of conspiracy to be achieved the commission of an offence must be the focal point of the agreement between the perpetrators.[21] It is, however, not a requisite for a conviction on a charge of conspiracy for the actual offence to have been committed. Once the planned offence is committed it appears that it is preferable to rather convict of that offence than the conspiracy or both.[22]

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[19] J Burchell *Principles of Criminal Law* 3 ed (2005) p 652.
[20] C R Snyman *Criminal Law* 5 ed (2008) p 294-295.
[21] *Rex v Milne and Erleigh (7)* 1951 (1) SA 791 (A) at 823; *S v Sibuyi* 1993 (1) SACR 235 (A) at 249E.
[22] *S v Fraser* 2005 (1) SACR 455 (SCA) para 7, where the following is stated: 'Normally, where a person conspires with another to commit a crime and the crime in question is committed, then the conspirator is liable for the crime itself and should be so charged: See Burchell *South African Criminal Law and Procedure* vol 1 General Principles of Criminal Law 3rd ed at 367 and cf *R v Milne and Erleigh (7)* 1951 (1) SA 791 (A) at 823G.'

[20] The only witness who gave evidence regarding the conspiracy count is Mbulawa. His evidence was that he had known the appellants for quite some time, that he grew up in Hlomendlini, the same area as Mbayimbayi. He testified that the appellants used to visit him in his Gauteng residence and that some time during 1995 they visited him and alluded to a feud between their taxi association and a rival one. They allegedly solicited his assistance to fight back against the members of that association. His evidence was further that as he could not render the assistance they required, he led them to Shasha whom he knew as Maya, as a person who could assist them. He never took part in the discussions they had with the latter but had, however, heard part of the discussion to the effect that the assistance required by the appellants was the procurement of firearms and for people to fight the rival taxi association.

[21] Both appellants, whilst acknowledging that they knew Mbulawa, disputed his version that they had solicited his assistance. They asserted that he was either mistaken or deliberately incriminating them as he owed Mbayimbayi an amount of R10 000 and further that Libazi had refused to loan him money.

[22] Perusal of Mbulawa's evidence and his performance under cross-examination shows that the high court was justified in regarding him as an impressive witness. He came across as forthright and no contradiction or inconsistency is apparent in his evidence. Furthermore, he was not involved in the feud between the taxi associations. He also knew the appellants very well and simply relayed the discussions he had with them.

[23] Having said that it must be so, however, that Mbulawa's evidence on its own falls short of establishing the offence of conspiracy to commit murder. The appellants sought assistance to 'fight back' against another association. Reduced to its bare essentials, Mbulawa's evidence evinced an intention by the appellants' to source assistance to 'fight back'. No specific crime was mentioned by Mbulawa regarding the objective of the assistance sought save that what was

planned was unlawful conduct. The high-water mark of his evidence is that the appellants shared a common purpose to engage in violent conflict with a rival association. It has not been shown that murder was specifically within the contemplation of the appellants at that time. The offence of conspiracy to commit murder was clearly not established and that conviction cannot stand.

[24] In relation to the convictions of the appellants on the attempted murder counts, the primary submission was that the evidence tendered by the state was unreliable on two bases as mentioned earlier. The first was that the eyewitnesses did not have a conducive opportunity to make any reliable identification during a life and death situation as a result of the shooting that was going on at the time. The second basis was that the evidence of the state witnesses should never have been accepted as they were driven by the rivalry of their associations which had prompted them to falsely incriminate them.

[25] Ngcakana, the driver of the Kadet identified Libazi as one of their assailants in the shooting incident outside Sterkspruit. He stated that Libazi was closest to him and he actually heard him say ‘kill the dog’ or words to that effect. Mawethu Malangabi, a passenger in the Kadet and who also attested to having heard the words uttered by Libazi, also identified the latter as well as the passenger on the extreme left hand rear in the Corolla as Mbayimbayi. He stated that this appellant had, in the course of the shooting, removed his balaclava and had alighted from the Corolla which enabled him to recognise him. He stated, however, that he did not see if this appellant had anything nor did he see him do anything. This was the only evidence regarding the shooting incident outside Sterkspruit town. Maqala is the only witness who identified Libazi during the shooting incident at the taxi rank.

[26] The appellants gave evidence in their defence and denied complicity in the shooting incidents. Their version was that they were at the rank in Libazi’s taxi having a meal when they heard shooting in their vicinity. In view of the fact

that Libazi had allegedly been the target of past shooting incidents, they ran away. Both appellants stated that the witnesses who allege to having identified them were actuated by the rivalry between their associations. They also stated that they were mistakenly identified as the situation during the shooting incidents was not conducive for reliable identification.

[27] In my view, the evidence of some state witnesses, especially Majodima, was correctly discounted for being unreliable. The fact remains that even with that evidence being discounted, the direct identification evidence by the three witnesses mentioned above has not been shown to be unreliable. Furthermore, the high court meticulously analysed all the evidence led clearly alive to the need for reliability of the state's evidence especially in relation to identification. In this regard the high court found that the evidence of the state witnesses was reliable and branded the appellants as liars who deliberately 'fudged' their responses under cross-examination. It can also not be disputed, as the high court found, that the witnesses were well acquainted with the two appellants, after all, they operated in the same industry and had known each other very well for a considerable period of time. They were therefore not strangers to each other. In my view, the high court's observations of the witnesses whom it had the opportunity to observe, throughout the trial, were justified.

[28] Some issue was taken with the fact that even if Mbayimbayi was identified by Mawethu Malangabi as one of the passengers during the shooting incident involving the Kadet, he was stated to have done nothing other than that he was a passenger in the Corolla. Indeed, that may be correct, but the fact of the matter is that Mbayimbayi was present at a scene where a fellow association member was there actively shooting at the occupants of the Kadet. His presence at the scene does not require him to have actively participated as we have reliable evidence from Mbulawa that he was one of the co-conspirators that led to the violence on the day in question. Clearly, he is inextricably bound to the commission of offences by other members of his association in his presence in execution of the

prior plan. He did not advance a defence of disassociation nor did he tender evidence to that effect. The high court made its finding of guilt against him with reference to authoritative pronouncements by our courts in this regard based on the doctrine of common purpose. The principles of this doctrine are very clearly set out in *S v Mgedezi*[23] and approved by the Constitutional Court in *S v Thebus*.[24]

[29] I have no hesitation therefore in concluding that the acceptance of the evidence of the witnesses Ngcakana, Maqala and Mawethu Malangabi is justified and that their evidence is reliable. I conclude therefore that the convictions of the appellants for attempted murder were justified.

Sentence

[30] The appeal against sentence is premised largely on the submission that the conspiracy conviction be set aside which would naturally influence the issue of sentence. This was on the basis that the other sentences were ordered to run concurrently with the sentence imposed on account of the conspiracy conviction. The conspiracy conviction has now fallen by the wayside and the sentence imposed on that score must consequently also fall away. This, as submitted, has an effect on all the sentences as they were ordered to run concurrently with that imposed for the conspiracy conviction. In so far as the sentences imposed for the attempted murder convictions per se, it has not been argued that any misdirection was committed by the high court in imposing them. Indeed such an argument would be misconceived as those sentences are clearly appropriate and induce no sense of shock.

[31] I am of the view that a sentence of 10 years' imprisonment on each count of attempted murder is justified but each of these sentences should run

[23] 1989 (1) SA 687 (A).
[24] 2003 (2) SACR 319 (CC).

concurrently resulting in an effective sentence in the case of each appellant of 10 years' imprisonment.

[32] In the result:

1. The first and second appellants' appeal against their conviction and sentence on count two is upheld and these are set aside.

2. The first appellant's appeal against his convictions on counts three, four and six is dismissed.

3. The second appellant's appeal against his convictions on counts three and four is dismissed.

4. The sentences imposed on the appellants on counts three, four and six respectively are set aside and replaced with the following:

   (i) Appellant number one is sentenced to 10 years' imprisonment on counts three, four and six respectively.
   (ii) Appellant number two is sentenced to 10 years' imprisonment on counts three and four respectively.

5. All the sentences are to run concurrently.

D MLAMBO
JUDGE OF APPEAL

APPEARANCES

APPELLANTS:	M R Hellens SC Instructed by S S H Mehlomakulu & CO, Sterkspruit Matsepes Attorneys, Bloemfontein
RESPONDENT:	S Mbewu Instructed by Director of Public Prosecutions, Umtata

Director of Public Prosecutions, Bloemfontein