IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

NOT REPORTABLE
Case No: AR 182/2012

In the matter between:

BUSISIWE PRISCILLA MPILI	**First Appellant**
ZWELIJIKILE DALTON MPINGANA	**Second Appellant**
NKOSENYE MPHENDULI DLADLA	**Third Appellant**
STHEMBISO ANDRIES MHLONGO	**Fourth Appellant**

And

THE STATE	**Respondent**

JUDGMENT

Gorven J:

[1] In 2007 and 2008, the political temperature in a branch of the African National Congress (the ANC) based in Umlazi reached boiling point. This revolved largely around the election of delegates to the forthcoming national

meetings to be held in Polokwane. It was further fuelled by interpersonal rivalries and grudges. As a result, members of one camp of the branch conspired to kill members of the other camp. Two people were hired to do so and firearms were procured for that purpose. An unsuccessful attempt was made on the life of the chairperson of the branch after which the secretary was killed by multiple gunshot wounds.

[2] As a result of these crimes, the appellants appeared in the High Court before Kruger J, sitting with two assessors. The charges against all four were as follows:

Count 1: Conspiracy to commit the crime of murder;

Count 2: Attempted murder;

Count 3: Murder.

In addition, the second and third appellants were charged with the unlawful possession of a firearm as count 4. The first appellant and the second and fourth appellants were represented by a single legal practitioner whilst the third appellant was separately represented. The appellants all pleaded not guilty to all of the charges and elected not to disclose the basis of their defence.

[3] The first appellant was found guilty on count 1 and not guilty on the other two counts. The second appellant was acquitted on count 1 and found guilty on counts 2, 3 and 4. He was sentenced to 8 years' imprisonment on count 2, life imprisonment on count 3 and 3 years' imprisonment on count 4. The third appellant was convicted on count 2 but was acquitted on counts 1, 3 and 4, having been discharged at the end of the State case on counts 3 and 4 in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the Act). He was sentenced to 8 years' imprisonment. The fourth appellant was acquitted on count 1 but convicted on counts 2 and 3. On count 2 he was sentenced to 8 years'

imprisonment and on count 3 to 25 years' imprisonment and it was ordered that his sentences were to run concurrently.

[4] The second and fourth appellants were granted leave to appeal against their convictions and sentences. The third appellant was granted leave to appeal against his conviction only. The first appellant also appealed but subsequently withdrew her appeal. In all cases, leave to appeal was granted by the court *a quo*.

[5] The State relied heavily upon an accomplice witness by the name of Ngubane. He was warned in terms of s 204 of the Act.[1] His evidence was to the following effect. Strong rival camps and a jockeying for position developed within a branch of the ANC in Umlazi in 2007. In May or June 2007, Ngubane and one Nene were released from prison. They felt that Mshibe, the Chairperson of the branch at the time and the complainant in count 2, had failed to give them support while they were in prison. In addition, Mshibe had conducted disciplinary hearings against them and Ngubane was fined by the branch. He had also said in the presence of others that Ngubane was a killer, thus embarrassing him. A Branch General Conference was held in May or June 2008 in preparation for a national meeting of the ANC to be held in 2009 in Polokwane. The fuse which lit the conflict concerned the delegates who were to represent the branch at Polokwane. At the time, Mshibe and Mkhize, the deceased in count three, were in control of the branch. Mshibe was the chairperson and Mkhize was the secretary. The first appellant, who along with the second appellant was a member of the branch executive committee, harboured aspirations to attend the Polokwane conference. When Mshibe and Mkhize would not budge, the first, second and fourth appellants decided that Mshibe should be killed. To that end, Ngubane and the second appellant located

[1] See *S v Ndawonde* 2013 (2) SACR 192 (KZD) para 8..

the third appellant and Nkosi Dladla (Nkosi), who is since deceased. Ngubane said that Nkosi was the third appellant's brother. These two agreed to the second appellant and Ngubane's request to kill him for a fee of R8 000.

[6] On the appointed day, the two hitmen were collected by the second appellant in the morning. They waited for Mshibe to leave for work but, because the motor vehicle was full of people, they did not carry out the hit. When Ngubane returned from work that afternoon at approximately 16h00, he and the second and fourth appellants agreed that the hitmen should kill Mshibe that evening, because he was expected to attend a meeting at around 17h00. The second appellant and Ngubane then fetched the hitmen in the second appellant's red Toyota Conquest. They took them to Mangosuthu Highway and dropped them off at the side of the road. They were able to see Mshibe approaching in his vehicle on the road below Mangosuthu Highway. The hitmen descended some stairs to that road. The second appellant and Ngubane drove slowly away to ensure that the hitmen made their escape and, as they did so, heard a number of gunshots and then saw the hitmen cross the main road and go up towards the men's hostel. When Ngubane and the second appellant telephoned the hitmen, they claimed to have killed Mshibe. It was later discovered that he did not die. Ngubane and the second appellant then went to the hitmen to find out what had happened. The third appellant told them that one of the firearms only fired one shot and thereafter malfunctioned. The other was fired until there were no more bullets. The hitmen agreed to make another attempt and to be paid only when successful.

[7] Sometime thereafter, Ngubane, and the first, second and fourth appellants decided that Mkhize, rather than Mshibe, should be killed. It was agreed that the second appellant and the two hitmen would go to find the home of Mkhize. The next day the fourth appellant phoned Ngubane to find out whether the second

appellant had fetched the two hitmen. Ngubane said that, because he was at work, he did not know and told him to phone the second appellant. The fourth appellant subsequently called back with a report. Later, while Ngubane was at the house of a councillor, one Xulu, the second appellant arrived and reported that he, the third appellant and Nkosi had seen Mkhize passing on the road. Ngubane then phoned the sister of Mkhize's wife and warned her that Mkhize must not go to work or should leave late for work, but gave no reason. The second appellant later phoned him and said that he and the hitmen had not seen Mkhize that day. Ngubane and the second and fourth appellants met a few days later and it was decided that the killing must take place immediately. The second appellant had procured a firearm from the fourth appellant to give to the hitmen. Ngubane saw the firearm in their presence and it was a black Z88. It was agreed that the second appellant should fetch the hitmen the following day so that they could kill Mkhize.

[8] The following day, Friday 10 October 2008, Ngubane left to work elsewhere. Whilst he was there, he was phoned by the second appellant, the third appellant, Nkosi and the fourth appellant, all of whom told him that Mkhize had been killed. The fourth appellant told him that he was going to the place to see for himself. On Ngubane's return the following day, the roads were teaming with comrades who were singing that Mkhize had been killed by councillor Xulu. Ngubane met the second appellant and the fourth appellant at the latter's residence. The fourth appellant requested the return of his firearm but the second appellant said that he had retained it. The fourth appellant gave R5 000 to Ngubane and the second appellant and the two of them took it to the third appellant at the men's hostel. They were to raise the balance of R3 000 later. Nkosi, who was bathing at the time, was not present when they handed it to the third appellant.

[9] Ngubane had pangs of conscience about the death of Mkhize because he regarded him as a friend. As a result, he spoke to a police officer he was working with who advised him to make a clean breast of things. On 16 October 2008, he phoned Mshibe in the morning, went to see him at his home and told him his story. Mshibe said he would revert to Ngubane and, that afternoon, arrived at the home of the latter in the company of a police officer. Things progressed and the police officers who had become involved said that the persons should be fetched while everything was fresh. Ngubane accompanied them and the four appellants and Nkosi were arrested. Ngubane was subsequently arrested as well.

[10] Mshibe gave evidence that, on 12 September 2008, shots were fired at his vehicle while he was driving to a meeting. He was travelling on a road below Mangosuthu Highway between 17h00 and 18h00 in the evening. He noticed two males coming down the steps leading from Mangosuthu Highway. When he came alongside, one of them was pointing a firearm at his vehicle from approximately 8 metres away. He tried to shield himself with his right hand and duck for cover whilst driving. His right hand was hit and, while he saw the gunman 'fiddling' with the firearm, he managed to escape and drove to St Augustine's Hospital using only his left hand. He was hospitalised for two or three weeks. On 10 October 2008, he received a phone call and went to a place where he found Mkhize lying dead on the ground. The following week he received a phone call from Ngubane who then came to see him at home and told him his story. He confirmed that he and Ngubane did not see eye to eye on political matters but that Ngubane had claimed that the death of Mkhize was bothering him. He did not see the assailants sufficiently clearly so as to be able to identify them.

[11] Inspector Ramana testified that he and the investigating officer at the time, Warrant Officer Malinga, who had since died, accompanied the second appellant to his house. They were taking the second appellant to court on the morning of 17 October 2008. They told him that they had information that he had a firearm there. The second appellant took them to a certain room and informed them that a firearm was under the mattress there. Warrant Officer Malinga lifted the mattress and recovered a firearm. It was a black Z88, which is the same firearm as is used by the police. The serial number of that firearm had been removed. The second appellant was arrested for unlawful possession of a firearm.

[12] Formal admissions were made by the appellants in terms of s 220 of the Act. The effect of these was that Mkhize had been killed on 10 October 2008 at the place his body was recovered. His death was caused by multiple gunshot wounds fired at him there. He had three gunshot wounds to the head and five to the chest. Two bullets were recovered from his body, one from the left frontal bone and one from the right frontal brain, as were cartridge cases at the scene. The cartridge cases so recovered had been fired from the firearm found at the second appellant's home. It was not possible to determine whether the bullets in question had been fired from that firearm. The firearm in question was a firearm as defined in the Firearms Control Act 60 of 2000 and the serial number had been removed and could not be determined. There is no issue that the State proved the chain of evidence concerning the murder and the linking of the firearm to the murder.

[13] The appellants all gave evidence in their defence. Their evidence amounted to a bare denial of that of Ngubane. The trial court gave a lengthy, comprehensive summary of all the evidence led at the trial. It evaluated the evidence of each witness and demonstrated a detailed, full grasp.

[14] It must be borne in mind that, not only was Ngubane a single witness to many of the events, but he was an accomplice as well. Holmes JA warned of the difficulty accomplice witnesses present when, in *S v Hlapezula*,[2] he said:

'It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he 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. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring *(a)* recognition by the trial Court of the foregoing dangers, and *(b)* the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him'.

It has been said of single witnesses that their evidence must be 'clear and satisfactory in every material respect'.[3] This is not the test, however, as appears from *S v Sauls & others*:[4]

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of RUMPFF JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean

"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"

[2] *S v Hlapezula & others* 1965 (4) SA 439 (A) at 440D-G.
[3] *R v Mokoena* 1932 OPD 79 at 80.
[4] *S v Sauls & others* 1981 (3) SA 172 (A) at 180E-G.

(*Per* SCHREINER JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[15] The trial court was alive to the caution necessary when evaluating the evidence of Ngubane. It listed various aspects of his evidence which were not challenged by the second appellant. These included that the second appellant did not challenge the evidence of Ngubane, that the second appellant had located the hitmen, that his red Toyota Conquest vehicle was used to transport them, that Ngubane was with him and the hitmen when the latter were dropped off on the Mangosuthu Highway shortly before shots were fired, that he drove away slowly so as to make sure that the hitmen escaped, that the fourth appellant had provided him with the firearm which he handed to the hitmen, that the fourth appellant requested its return after the murder of Mkhize, that he had phoned Ngubane to tell him that the murder was successful, that he was present when the fourth appellant handed over the R5 000 to pay the hitmen and that he and Ngubane went to the hostel and handed this money to the third appellant. The trial court was also alive to the contradictions and improbabilities in the version of the second appellant as well as evidence which corroborated that of Ngubane. Possibly the main aspect was the evidence of Inspector Ramana that the firearm linked to the offence was found in the possession of the second appellant and was a Z88 as Ngubane testified. The second appellant's evidence about the firearm was contradictory and entirely improbable. Not only that, but he failed to put his version to Inspector Ramana. His evidence that a tuck shop run from his house would be clear to anyone who entered was contradicted by his own evidence that the tuck shop was inside the house and accessed by a separate door.

[16] The third appellant did not challenge the evidence of Ngubane that Nkosi was his brother but first asserted this in his evidence. In addition, the versions of Ngubane and Mshibe as to the attempted murder coincide, even to the aspect of the malfunctioning firearm. Mshibe said that he noticed this and that one of the assailants was 'fiddling' with it, thus enabling him to escape. Ngubane said that the third appellant gave this as the reason for the failure to kill Mshibe and that, when it was time to kill Mkhize, asked for a functioning firearm because one of theirs was not working. The evidence of the third appellant was utterly unbelievable. A good example is that it was put on his behalf that the police got lost trying to find his home and that this demonstrated that Ngubane did not know him. When he testified, however, he simply said that the police had arrived at his home and arrested him.

[17] As regards the fourth appellant, he did not challenge significant parts of the evidence of Ngubane. First, that he was present at the meetings where the killing of Mshibe and Mkhize was discussed. In particular, that he was at the meeting in the afternoon when it was said that Mshibe might be attending a meeting at around 17h00 and that the hitmen should be fetched to carry out their task. Secondly, that he was present when the hitmen explained why they had failed. Thirdly, that he thereafter provided the second appellant with his firearm, requested its return and gave the second appellant the R5 000 to be paid to the hitmen. When these failures were pointed out, he claimed that he had wanted to instruct his counsel to challenge it but did not have the opportunity to do so. This was rejected by the trial court as false because, after Ngubane's evidence in chief, the matter was adjourned for the specific purpose of obtaining instructions on his evidence. In addition, the fourth appellant interrupted proceedings on a number of occasions to instruct his legal representative and the evidence of Ngubane endured over a couple of days with long and short adjournments where instructions could be given.

[18] Suffice it to say, I can find no misdirections committed by the court *a quo* in its factual findings and its evaluation of the evidence. As a result, we are bound by those findings. In *S v Hadebe & others*,[5] the approach was summarised as follows:

'[T]he credibility findings and findings of fact of the trial Court cannot be disturbed unless the recorded evidence shows them to be clearly wrong.'

This was approved in *S v Monyane & others*:[6]

'In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong'.

The trial court correctly rejected as not being reasonably possibly true the evidence of the three appellants. It correctly accepted as true beyond reasonable doubt that of Ngubane and the other State witnesses.

[19] The State alleged that the three appellants acted in pursuance of a common purpose to commit the offences in question. It is clear that this common purpose between Ngubane, the second appellant and the fourth appellant was proved as regards the conspiracy to murder Mshibe which led to the attempted murder with which they were charged. It is also clear that it was proved in respect of the same people as regards the conspiracy to murder Mkhize.

[20] There is direct evidence that the second and fourth appellants actively assisted in the attempted murder of Mshibe during September 2008. The second appellant drove the third appellant and Nkosi to the scene. Ngubane said that they had descended by the steps to the road below and he heard gunshots shortly thereafter. Mshibe's evidence corroborates that of Ngubane as to how it happened and that two assailants, standing near the bottom of steps, were

[5] *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645*e-f*.
[6] *S v Monyane & others* 2008 (1) SACR 543 (SCA) para 14.

involved. He experienced only one firearm attack on the day in question. Ngubane and he were clearly talking of the same event. The evidence of Ngubane was that the third appellant admitted that he and Nkosi had attempted to kill Mshibe and explained their failure to do so by saying that a firearm had malfunctioned. There was thus sufficient evidence of the involvement of the second and third appellants in the offence. The involvement of the fourth appellant was limited to the planning leading up to the attempt. There is no evidence that he was present or participated in the events at the scene. As such, the conviction can only stand if the State proved that he was implicated by way of common purpose. This aspect was not addressed in the judgment of the court *a quo*. Neither was it addressed by any of the counsel on appeal. He simply submitted that there was no evidence of his involvement, apart from criticizing the evidence Ngubane.

[21] Common purpose involves joint criminal activity. The Supreme Court of Appeal has distinguished between common purpose arising from a prior agreement and that arising where there is no such agreement.[7] The present matter concerns the first of these. In matters of common purpose, 'the action of the accused need not contribute to the criminal result in the sense that but for it the result would not have ensued.'[8] An accused need not be on the scene of the crime. Once it has been proved that an agreement has been reached and steps taken to implement it which involved an accused, that accused must show that she or he has dissociated from the criminal conduct in order to escape the reach of the common purpose. In *S v Ndluli & others*,[9] Nienaber JA said:

'Dissociation consists of some or other form of conduct by a collaborator to an offence with the intention of discontinuing his collaboration. It is a good defence to a charge of complicity in the eventual commission of the offence by his erstwhile associate or associates . . . The

[7] *S v Mgedezi & others* 1989 (1) SA 687 (A) at 705I-706C.
[8] *S v Thebus & another* 2003 (6) SA 505 (CC) para 33.
[9] *S v Ndluli & others* 1993 (2) SACR 501 (A) at 504*d-f*.

more advanced an accused person's participation in the commission of the crime, the more pertinent and pronounced his conduct will have to be to convince a court, after the event, that he genuinely meant to dissociate himself from it at the time.'

[22] In the present matter, therefore, what was proved was that the fourth appellant participated in the planning of the attempted murder. He was part of the group that decided what to do when the attempt failed. Along with the second appellant and Ngubane, he agreed that Mkhize should be murdered instead. The night before Mkhize was murdered, the fourth appellant was present when the second appellant showed Ngubane the firearm, said that he had procured it from the fourth appellant and it was agreed between the three of them that the murder should take place the next day. In addition, the fourth appellant phoned Ngubane to report that Mkhize had been murdered and indicated that he was going to visit the scene to see for himself. He met thereafter with Ngubane and the second appellant and produced R5 000 to pay the third appellant and Nkosi for having murdered Mkhize. What is abundantly clear is that there is no evidence that he dissociated from the attempted murder or from the murder.

[23] It should be noted that there was no eyewitness to the murder of Mkhize. This aspect was also not dealt with by the trial court or any of the counsel who appeared before us. What is clear, however, is that the firearm found in the possession of the second appellant was the one which fired the shots which caused the death of Mkhize. In addition, the second appellant and Ngubane paid part of the agreed fee for the killing to the third appellant who acknowledged having been party to the murder. The firearm was supplied by the fourth appellant. All three of the appellants were in telephonic contact with Ngubane at the time of the murder. When the fourth appellant requested the return of the firearm loaned to the hitmen by the second appellant, the second appellant told

him that he was keeping it. In the circumstances, the three appellants were all linked to the murder beyond any reasonable doubt. The third appellant can count himself fortunate to have escaped a conviction on the count of murder. The fourth appellant can count himself fortunate to have not been charged with the unlawful possession of a firearm. In the result, there is no basis on which to uphold the appeals against the convictions.

[24] As mentioned, only the second and fourth appellants were given leave to appeal against their sentences. The appeals on sentence were only argued faintly. As regards the second appellant, it was submitted that the court *a quo* should have found that there were substantial and compelling circumstances warranting a downward deviation from the prescribed sentence of life imprisonment. The fact that he was a first offender, was forty years old and thus susceptible to be influenced and had participated in the community by way of his membership of the Branch Executive Committee of the ANC and his company which constructed low cost housing, amounted to substantial and compelling circumstances. The difficulty with this submission is that the exercise is not a one-sided one. In *S v Malgas*,[10] the following was said:

'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

[25] In this matter, it involved a cold-blooded, hired killing. The second appellant was intimately involved over an extended period. He drove the hitmen, he procured the murder weapon, conveyed the money and, in general,

[10] *S v Malgas* 2001 (1) SACR 469 (SCA) para 25.

was the lynchpin of the operation. Society has expressed itself strongly against such killings. In *S v Ferreira and Others*,[11] Marais JA said:

'But after all is said and done, a contract killing for reward is involved. That is, I believe, in the eyes of most reasonable people, an abomination which is corrosive of the very foundations of justice and its administration. … If no greater sanction for that than a non-custodial sentence is said by this Court to be an appropriate response to a contract killing, I believe it will undermine public confidence in the courts, encourage a belief that those who instigate contract killings will not necessarily be visited with incarceration, foster a perception that, provided one's motives are subjectively pure and no matter how unreasonable and culpable one's failure to explore or make use of other or less drastic options may be, society will not be greatly offended by one's engagement of killers to do away with another human being.'

[26] The motivation arose from his preferred candidate being overlooked as a delegate of a branch of the ANC. It was purely political in nature and did not arise from any conduct aimed against him personally. In these circumstances, it is not possible as an appeal court to hold that the trial court misdirected itself when it did not find substantial and compelling circumstances in favour of the second appellant. Imposing the prescribed sentence is not unjust in that it would be disproportionate in the circumstances of the matter as a whole. No submissions were made in support of the appeal against the other sentences imposed on him.

[27] Turning to the fourth appellant, there were no submissions that the trial court had misdirected itself or that his sentences were startlingly inappropriate. There would, in any event, have been no basis for any such submission. As such, an appeal court is not entitled to interfere with the sentences.

[11] *S v Ferreira and Others* 2004 (2) SACR 454 (SCA) para 70.

[28] In the result, the appeals against the convictions of the second, third and fourth appellants are dismissed and the appeals against the sentences imposed on the second and fourth appellants are dismissed.

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GORVEN J

I agree.

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MADONDO J

I agree

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STEYN J

DATE OF HEARING:	30 October 2015
DATE OF JUDGMENT:	5 November 2015
FOR THE 2nd APPELLANT:	LD Halam, instructed by Pangwa Attorneys, Johannesburg
FOR THE 3rd APPELLANT:	SB Mngadi, instructed by the Durban Justice Centre
FOR THE 4th APPELLANT:	M Nkomo, instructed by the Durban Justice Centre
FOR THE RESPONDENT:	J Du Toit, instructed by the Director of Public Prosecutions, Pietermaritzburg, KwaZulu-Natal.